

IN THE SUPREME COURT OF THE STATE OF NEVADA

VILLAGE LEAGUE TO SAVE INCLINE
ASSETS, INC., a Nevada non-profit
corporation, on behalf of its members
and other similarly situated;
MARYANNE INGEMANSON, Trustee of
the Larry D. and Maryanne Ingemanson
Trust; DEAN R. INGEMANSON,
individually and as trustee of the Dear
R. Ingemanson Trust; J. ROBERT
ANDERSON; and LES BARTA; on
behalf of themselves and others
similarly situated,

Appellants,

vs.

STATE OF NEVADA, on relation of the
STATE BOARD OF EQUALIZATION;
WASHOE COUNTY; BILL BERRUM,
Washoe County Treasurer,

Respondents.

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**NOTICE OF SUPPLEMENTAL AUTHORITIES TO RESPONDENT
STATE BOARD OF EQUALIZATION'S ANSWERING BRIEF TO
APPELLANTS' (INTERVENORS') OPENING BRIEF**

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**NOTICE OF SUPPLEMENTAL AUTHORITIES TO RESPONDENT
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Respondent State of Nevada ex rel. State Board of Equalization (State Board) by and through its counsel Catherine Cortez Masto, Attorney General, by Dawn Buoncristiani, Deputy Attorney General, files a Notice of Supplemental Authorities to Respondent State Board's Answering Brief to Appellants' (Intervenors') Opening Brief (Supplement) pursuant to N.R.A.P. 31(e). The Supplement is made pursuant to the applicable statutes and case law as more fully set out in the following points and authorities.

DATED this 19th day of August, 2014.

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POINTS AND AUTHORITIES

The State Board supplements its Answering Brief at page nineteen (19) through page twenty-three (23) that discuss collateral estoppel, and pages twelve (12) through nineteen (19) that discuss the nature of the cause of action or claim when the State Board equalizes a class of property pursuant to NRS 361.395.

Appellant Intervenor (Intervenor) argue that collateral estoppel bars the State Board from equalizing the taxable value of Intervenor's property. See Opening Brief, pp. 10-14. Pursuant to *Five Star Capital Corporation*, the State Board disagrees. In *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 710 (2008), this Court adopted the terms "claim preclusion and issue preclusion as the proper terminology in referring to these doctrines."¹ This Court, also, clarified "the tests for determining when claim preclusion or issue preclusion applies."² *Id.* at 1049.

"[T]he following factors are necessary for application of issue preclusion: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; . . . (3) the party against whom

¹ "As a result of this lack of clarity in our case law regarding the factors relevant to determining whether claim or issue preclusion apply, we take this opportunity to establish clear tests for making such determinations. We now specifically adopt the terms of claim preclusion and issue preclusion as the proper terminology in referring to these doctrines." *Five Star Capital Corp.* at 1054.

² "The meaning of the term 'res judicata' has evolved over time in the judicial system and confusion continues among courts as to what 'res judicata' encompasses. In some jurisdictions the term includes both claim and issue preclusion, while in other jurisdictions claim and issue preclusion are separated, with 'res judicata' referring to 'claim preclusion' and 'collateral estoppel' referring to issue preclusion." *Id.* at 1051.

the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated.” *Id.* at 1055 (citations and internal quotation marks omitted). Pursuant to the *Five Star Capital Corp* requirements, the first and fourth elements cannot be met. Since all elements must be met for issue preclusion to apply and two elements cannot be met, issue preclusion does not bar the State Board from equalizing any properties for which there is a final judgment in an appeal of a contested case.

Here, issue preclusion (collateral estoppel) does not apply. See Answering Brief, pp. 19-23. First, the issue in the *Bakst* case is not identical to the issue before this Court. The *Bakst* case related to appeals of individual taxable values to the State Board. *State ex rel. State Bd. of Equalization v. Bakst*, 122 Nev. 1403, 1406, 148 P.3d 717, 720 (2006). State Board’s Answering Brief discussed the differences between the assessor setting individual taxable values and the State Board equalizing such taxable values.³ See Answering Brief, pp. 19-23. If the issues in the *Bakst* case had been identical to the issues in the matter before this Court there would have been no need for this Court to remand this matter to the District Court for the State Board to perform its duty to equalize State-wide. See, Respondent’s Appendix (RA), pp. 37-38, Nevada Supreme Court Order, Case No. 56030; Answering Brief, pp. 19-23.

Second, the fourth element is the issue of taxable values that are the

³ NRS 361.043 defines taxable value as the value of property of an interstate or intercounty nature determined in the manner provided in NRS 361.320 or 361.323” or “[t]he value of all other property determined in the manner provided in NRS 361.227.” The assessor develops taxable value pursuant to NRS 361.227 while the State Board equalizes taxable value pursuant to NRS 361.395.

result of state-wide equalization. This issue was never actually and necessarily litigated in *Bakst* or *Barta*. *Bakst* at 1406; *State ex rel. State Bd. of Equalization v. Barta*, 124 Nev. 612, 618-619, 188 P.3d 1092, 1096-1097 (2008). Since none of the property taxable values in *Bakst* or *Barta* had been subject to equalization as a class by the State Board; such taxable values could not have been the subject of litigation. See Answering Brief, p. 22; RA Vol. I, pp. 37-39. Accordingly, pursuant to *Five Star Capital Corp.*, the State Board is not barred by collateral estoppel from equalizing the taxable values of property which are the result of a judgment for an appeal of a contested case.

The following is the “three-part test for determining whether claim preclusion should apply in this matter: (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case.” *Id.* at 1054 (citations omitted). “This test maintains the well-established principle that claim preclusion applies to all grounds of recovery that were or could have been brought in the first case.” *Id.* at 1054-55.

Pursuant to the *Five Star Capital Corp.* requirements for claim preclusion, the third element cannot be met. Since all elements must be met, claim preclusion does not bar the State Board from equalizing any properties for which there is a final judgment in a contested case appeal. See Answering Brief, pp. 12-19. The third element, the matter before the Court, is not based on the same claims as the *Bakst* or *Barta* cases because the matter before this Court relates to equalization of classes of property by the State Board. *Bakst* at 1406; *Barta*, at 618-619. See Answering Brief, pp. 12-19. A claim against state-wide equalization could

not have been made by Intervenors prior to the State Board's state-wide equalization hearings. Until the State Board met pursuant to the Writ of Mandamus to hear property owners' grievances regarding equalization, the State Board had only equalized pursuant to hearing contested cases.⁴ RA Vol. Vol. I, pp. 37-39; Joint Appendix, Vol. IV, pp. 660-669. Contested case hearings are adjudicative, not legislative hearings. See Answering Brief, pp. 12-19.

Hence, hearing appeals of individual taxable values and equalizing taxable values are different actions or functions of the State Board. See Answering Brief, p. 22. The assessor develops taxable value which is subject to an adjudicatory action by appealing through a contested case to the State Board. The State Board equalizes taxable values developed by the assessor within a class, a legislative action, not subject to appeal by a contested case unless taxable value increases. See Answering Brief, pp. 12-19. Accordingly, such functions are subject to different claims. Intervenors' res judicata (claim preclusion) claim does not bar the State Board from equalizing property values that are the result of a contested case such as those of Intervenors.

Finally, Intervenors allege the State Board did not oppose Intervenors' res judicata claim; however, as discussed above the State Board did provide analysis in its Answering Brief regarding the different types of action: a contested case appealing an individual value, an adjudicatory action, and state-wide equalization of classes of property, a

⁴ The State Board held such public hearings on September 18, 2012, November 5, 2012, and December 3, 2012. JA, Vol. IV, pp. 660-666. See Answering Brief, p. 2.

legislative action. See Reply Brief, pp. 7-8; Answering Brief, pp. 12-19. Hence, this case may be distinguished from the *Polk* case where the State attorneys did not address or provide analysis on the constitutional claim which was a key issue of the opposing side's argument. *Polk v. State*, 126 Nev. Adv. Op. 19, 233 P.3d 357, 358, 360 (2010).⁵

Here, not only are there other key arguments upon which this Court may decide this matter, but the State Board provided the analysis supporting the denial of a claim preclusion, res judicata, claim when the State Board discussed the difference between its adjudicatory and legislative functions. See Answering Brief, pp. 12-19. The State Board provided the analysis for a response to the res judicata argument but did not provide a direct conclusion as it has above using the analysis provided in State Board's Answering Brief and the elements required by *Five Star Capital Corp. Polk* at 360. The analysis in State Board's Answering Brief and this Supplement distinguish this matter from the cases cited by Intervenor's relating to a confession of error. In such cases the Court found a confession of error was warranted where the party's "brief effectively failed to address a significant issue raised by the appeal", or "the answering brief was silent as to the issue in question" or "failed to supply any analysis, legal or otherwise, to support its position" *Polk* at 360. See Reply Brief, pp. 7-8.

The holding in *Polk* should not be followed. A confession of error is

⁵ The State Board responded directly to Section "C" of Intervenor's Opening Brief titled: "The STATE BOARD and COUNTY are collaterally estopped from reappraising and reassessing the Bakst Appellant Intervenor's residential properties." See Answering Brief, pp. 19-23. Such section included the res judicata argument.

not warranted because, unlike the *Polk* respondents, State Board was not silent on the issue, but addressed the issue by providing the analysis in its Answering Brief and Supplement. *Id.* at 359, 360. Unlike the *Polk* respondents, the State Board has filed a Supplement to its Answering Brief upon becoming aware of Intervenor's request for a confession of error. *Id.* at 360. State Board has now directly responded to Intervenor's res judicata claim with a conclusion that claim preclusion does not apply to this matter which is supported by the argument in its Answering Brief. See Intervenor's Reply Brief, pp. 7-8. *Polk* at 360. Intervenor will suffer no surprise at oral argument. *Id.* Therefore, the State Board respectfully requests this Court find a NRAP 31(d) confession of error is not warranted.

In the alternative, should the Court determine res judicata is warranted based on a confession of error, the State Board respectfully requests this decision be limited to these Intervenor's. The issue of barring the State Board from equalizing an assessment that is the result of a final judgment in an appeal of a contested case is a matter of first impression. Setting precedent based on a confession of error could result in the lack of a "uniform and equal rate of assessment and taxation." NEV. CONST. art. 10, § 1.

DATED this 19th day of August, 2014.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Arial, 14-pt;

☐ This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ Proportionately spaced, has a typeface of 14 points or more, and contains 2,354 words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains words or _____ lines of text; or

☐ Does not exceed _____ pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of August, 2014.

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CERTIFICATE OF SERVICE

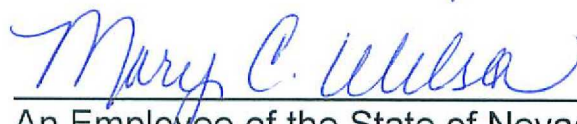
I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and on August 19, 2014, I served a copy of the foregoing, **NOTICE OF SUPPLEMENTAL AUTHORITIES TO RESPONDENT STATE BOARD OF EQUALIZATION'S ANSWERING BRIEF TO APPELLANTS' (INTERVENORS') OPENING BRIEF**, by mailing a copy thereof, postage-prepaid, addressed to:

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Dated: August 19, 2014.



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