

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERNEST A. BECKER, IV, individually;
ERNEST A. BECKER, IV and
KATHLEEN BECKER as Trustees of
the ERNEST A. BECKER IV and
KATHLEEN C. BECKER FAMILY
TRUST; EB FAMILY HOLDINGS,
LLC; KIMBERLY RIGGS; SALLIE
BECKER; BRIAN BECKER; and
WILLIAM A. LEONARD, Trustee,

Appellants,

vs.

ERNEST AUGUST BECKER, V,

Respondent.

No. 65335

On Certification from United States
Bankruptcy Court for the District of
Nevada
Case No. BK-S-13-14992-BTB
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APPELLANTS' OPENING BRIEF

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APPELLANTS' NRAP 26.1 DISCLOSURE

The undersigned counsel of record for Appellants certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

ERNEST A. BECKER, IV, individually; ERNEST A. BECKER, IV and KATHLEEN BECKER as Trustees of the ERNEST A. BECKER IV and KATHLEEN C. BECKER FAMILY TRUST; EB FAMILY HOLDINGS, LLC; KIMBERLY RIGGS; SALLIE BECKER; BRIAN BECKER; and WILLIAM A. LEONARD, Trustee. No publicly held companies own any interest in the Appellants. Appellants have been represented in this matter by the following attorneys and law firms:

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JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal pursuant to NRAP 5(c)(1), which states:

The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States or of the District of Columbia, a United States District Court, or a United States Bankruptcy Court when requested by the certifying court, if there are involved in any proceeding before those courts questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellants Ernest A. Becker, IV, individually, Ernest A. Becker, IV and Kathleen Becker as Trustees of the Ernest A. Becker, IV and Kathleen C. Becker Trust; EB Family Holdings, LLC; Kimberly Riggs; Sallie Becker; and Brian Becker; William A. Leonard, Trustee hereby submit to the Court their Statement of Issues Presented for Review:

I.

Whether a debtor in bankruptcy may properly claim an exemption in his entire stock interest pursuant to NRS 21.090(1)(bb) and the incorporated provisions of NRS 78.746, or whether the debtor's exemption is limited to his non-economic rights in the stock.

STATEMENT OF THE CASE

This case arose in the United States Bankruptcy Court for the District of Nevada, in the Chapter 7 Bankruptcy proceeding of Ernest August Becker, V (the “Debtor”). The issues were initially raised in the bankruptcy case on October 31, 2013 when certain creditors and interested parties filed an “Objection to Claimed Exemptions” (JA, 20-28)¹, objecting to the Debtor’s claimed exemption of his interest in the stock of Ensworth Apts., Inc. (“Ensworth”) and Eagle Rock Gaming, Inc. (“Eagle Rock Gaming”) as listed on the Debtor’s Amended Schedule C (JA, 18). On November 1, 2013, the Chapter 7 Bankruptcy Trustee also challenged the claimed exemptions when he filed the “Trustee’s Joinder to Objection to Claimed Exemptions” (JA, 32-34). On December 4, 2013, the Debtor filed the “Debtor’s Response to Objection to Claimed Exemptions and to Trustee’s Joinder to Objection to Claimed Exemptions” (JA, 35-41) and on December 11, 2013, the “Reply in Support of Objection to Claimed Exemptions” (JA, 42-51) and the “Trustee’s Joinder to Reply in Support of Objection to Claimed Exemptions” were filed (JA, 52-53). A hearing was held on February 19, 2014, and on April 2, 2014, the Bankruptcy Court entered its “Order Certifying Question of Law to the Nevada Supreme Court” (JA, 54-60). On July 31, 2014, the Nevada Supreme Court entered its “Order Accepting Certified Question of Law” (JA, 61-62).

STATEMENT OF FACTS

Debtor is a 25% stockholder in two Nevada corporations named Ensworth Apts., Inc. and Eagle Rock Gaming, Inc. (JA, 18).

On June 5, 2013, the Debtor filed a voluntary Chapter 7 petition (JA, 55).

¹ The Joint Appendix shall be referenced as “JA”, followed by the page number(s).

Debtor owes large sums of money to his father, his siblings, his parents' family trust, and to Appellant EB Family Holdings, LLC, who filed Proofs of Claim in the bankruptcy proceeding, which are summarized in the Bankruptcy Court's Claims Register (JA, 96-101).

In the bankruptcy proceedings, on his Amended Schedule "B" – Personal Property, the Debtor lists "Ensworth Corporate Stock" with a value of \$1,362,000 ("Ensworth Stock"), and also lists a stock or other interest in "Eagle Rock Gaming, Inc." with a value of \$219,000 ("Eagle Rock Gaming Stock")(JA, 2).

On his Amended Schedule "C" – Property Claimed as Exempt, the Debtor claimed these stock holdings to be exempt property under 11 U.S.C. 522(b)(3) by claiming a \$1,362,000 exemption for the full value of his interest in the Ensworth Stock and a \$219,000² exemption for the full value of his interest in the Eagle Rock Gaming Stock pursuant to NRS 21.090(1)(bb) thereby attempting to put his financial interest in these companies outside of the reach of his creditors and outside the reach of the Bankruptcy trustee (JA, 18).

On October 31, 2013, creditors and interested parties Ernest A. Becker, IV, individually, Ernest A. Becker, IV and Kathleen C. Becker, as Trustees of the Ernest A. Becker IV and Kathleen C. Becker Family Trust, EB Family Holdings, LLC, Kimberly Riggs, Sallie Becker and Brian Becker (collectively, the "Objecting Creditors") filed an Objection to Claimed Exemptions, thereby

² On Amended Schedule C, the Debtor listed the current value of the Ensworth Stock to be \$5,448,000 and the current value of the Eagle Rock Gaming Stock to be \$876,000. Note that this would put the value of the Debtor's 25% interest in these companies to be \$1,362,000 for the Ensworth Stock and \$219,000 for the Eagle Rock Gaming Stock.

disputing Debtor's claimed exemptions in both the Ensworth Stock and the Eagle Rock Gaming Stock (JA, 20-28).

On November 1, 2013, William A. Leonard, the Chapter 7 Bankruptcy Trustee (the "Trustee", who together with the Objecting Creditors shall be referenced as the "Objecting Parties"), filed his Joinder to Objection to Claimed Exemptions (JA, 32-34).

Debtor has claimed an exemption for the entire stock interest he holds in the Ensworth Stock and the Eagle Rock Gaming Stock. In challenging these claimed exemptions, the Objecting Parties believe that the Debtor is only entitled to exempt his non-economic interest (such as his votings rights, management rights, and power of appointment), and that Debtor's economic interests, including all profits and distributions related to Debtor's interests, are property of the bankruptcy estate which must be paid to the Trustee for the benefit of the estate and its creditors (JA, 18, 20-28 and 32-34).

A hearing on the Objection to Claimed Exemptions was held in the Bankruptcy Court on February 19, 2014 (JA, 54), and on April 2, 2014, the Bankruptcy Court entered its "Order Certifying Question of Law to the Nevada Supreme Court", thereby asking the Nevada Supreme Court to give guidance on the exemption issue (JA, 54-60).

SUMMARY OF THE ARGUMENT

The Objecting Parties first reference the history of the charging order remedy in Nevada, noting that such a remedy in Nevada was first given to judgment creditors of partners in 1931, of limited partners in 1985, of members of limited liability companies in 1991, and then to judgment creditors of stockholders

in closely held corporations in 2007. The history of the statute demonstrates that the legislature wanted to provide judgment creditors of small corporations with the same type of charging order remedy upon a judgment debtor's economic interest that was available for other types of entities.

The Objecting Parties next argue that the Nevada statutes do not exempt a debtor's economic interest in stock, pointing out that the exemption provided in NRS 21.090(1)(bb) is expressly limited by the words "except as set forth in that section", referring to Section 746 of NRS Chapter 78. This limiting language means except for the stockholder's economic interest in the corporation. The creditor is given the "rights of an assignee" which is defined to mean the rights to receive distributions or dividends and excludes the right to participate in management. *Weddell v. H2O, Inc.*, 128 Nev. Adv. Op. 9, 127 P.3d 743 (2012) supports the argument that the Debtor's claimed exemption of his entire interest (both economic and non-economic) in the Ensworth Stock and the Eagle Rock Gaming Stock is an overly-broad attempt to protect the Debtor's entire interest in the stock, rather than only the non-economic interest that the Nevada charging order statute protects from creditors.

The Objecting Parties next argue that the Debtor's interpretation of NRS 78.746(2) is flawed. NRS 78.746 does not provide the Debtor with an exemption that was not otherwise provided in NRS 21.090(1)(bb). The Debtor's mistaken interpretation completely ignores the last seven words of NRS 21.090(1)(bb): "except as set forth in that section" and renders such language meaningless or superfluous, contrary to Nevada Supreme Court precedent which requires that all language in a statute be given meaning. *In re Steven Daniel P.*, 129 Nev. Adv. Op.

73, 309 P.3d 1041, 1043-44 (2013), *quoting George J. v. State (In re George J.)*, 128 Nev. Adv. Op. 32, 279 P.3d 187 (2012). *See also, Tomlinson v. State*, 110 Nev. 757, 761, 878 P.2d 311, 313 (1994).

Finally, the Objecting Parties argue that NRS 78.746 does not prohibit charging orders on stock in closely held corporation. This argument is supported by the case of *In re Foos*, 405 B.R. 604 (Bankr. N.D. Ohio 2009), in which a Chapter 7 bankruptcy trustee objected to a debtor's claimed exemption of a partnership interest under a statute that allowed a judgment creditor to obtain a charging order against a partnership interest. The court held that the Debtor's economic interest was not exempt under a statutory scheme similar to Nevada's, which has a provision nearly identical to NRS 78.746(2)(b). The same rationale applies in the instant case.

The Objecting Parties are not, however, asking this Court to determine the right of the Trustee to sell the economic and non-economic interests of the shareholder under bankruptcy law.

ARGUMENT

I. STANDARD OF REVIEW

Certified questions are questions of law which must be decided by adopting "... the rule of law that is most persuasive in light of precedent, reason and policy." *CP, ex rel. M.L. v. Allstate Ins. Co.*, 996 P.2d 1216, 1222 (Alaska 2000). Another court has stated: "A de novo standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate court." *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E. 2d 64 (1998).

II. A BRIEF HISTORY OF THE CORPORATE CHARGING ORDER REMEDY IN NEVADA

The charging order remedy in Nevada was first given to judgment creditors of partners in a partnership in 1931 in NCL Section 5028.27 (Addendum, 4-5).³ The remedy was then extended to interests of limited partners in 1985,⁴ and then to membership interests in limited liability companies in 1991.⁵ Finally, in 2007, the remedy was further extended to judgment creditors of stockholders in closely held corporations.⁶ In the 2007 Legislature, the corporate charging order provisions, and the related exemption from execution were first contained in Senate Bill 317 (First Reprint) as Sections 1 and 5.⁷ Ultimately, those provisions were combined into Senate Bill 242 (Second Reprint) as Sections 43.5 and 171.4.⁸ The purpose for the provisions was explained in on Page 7 of the April 12, 2007 Senate Judiciary Committee Minutes⁹ as follows:

It provided the charging order protection amendment. If there is a judgment against a shareholder of a small corporation, you could get a charging order which would allow you to garnish or attach the stream of income to that shareholder but not execute and take away other shares and force your way into a closely held corporation and create disharmony. Small corporations are 75 shareholders or less which is the threshold under Internal Revenue Service rules. This is something that is already available to other business entities, such as partnerships, so it is not something unique. It is just currently not available to corporations. Many small corporations are more like partnerships so that is the reason for this.

³ In accordance with NRAP 28(f), an Addendum is being filed with this brief, and it shall be referenced as “Addendum”, followed by the page number(s).

⁴ See, NRS 88.535 (Addendum, 15).

⁵ See, NRS 86.401 (Addendum, 11).

⁶ See, NRS 78.746 and NRS 21.090(1)(bb) (Addendum, 9 and 7).

⁷ See Addendum, 85_and_91-94).

⁸ See Addendum, 111-112_and_118-121).

⁹ See Addendum, 128.

Similarly, Pages 21 and 22 of the May 7, 2007 Assembly Judiciary Committee Minutes¹⁰ state as follows:

First, and most important, it provides a simple mechanism for enforcing judgments against small, closely held corporations - i.e., to create a charging order that currently exists for partnerships in the State of Nevada - and would now allow that charging order for small corporations with 75 shareholders or less not publicly traded, which is the threshold for subchapter S corporations. The reason for this is there is not a ready public market for small, closely held corporations, so if the shares were to be seized - if there was a judgment against someone who happened to own shares in a small corporation - it is difficult to recognize the value out of those shares. Moreover, most of those closely held corporations are family-owned and they would then be disrupted. This mechanism currently existed for partnerships in the State, and this would simply apply it to small corporations as well. There would be a charging order, so that any dividends or income from that corporation to which the shareholder was entitled would go to pay the judgment creditor. It would be similar to writ of garnishment, but instead of garnishing wages, it would attach to their stream of income from that corporation. It is an appropriate balance for those small companies. It would not apply to someone who owns all of the shares; in that case, the entire company could be taken and sold.

The idea of having a corporate charging order was first introduced to the Nevada Legislature in 2005 as part of Senate Bill 453 (Second Reprint)¹¹ which was sponsored by the Nevada Resident Agent Association, and on Page 20 of the Assembly Judiciary Committee Minutes¹² on May 5, 2005, a white paper entitled "Charging Order Protection for Nevada Corporations" (the "Charging Order White

¹⁰ See Addendum, 132-133.

¹¹ See Addendum, 42-53.

¹² See Addendum, 66.

Paper”) was presented as Exhibit F to the Committee Minutes.¹³ Pertinent parts of the Charging Order White Paper state as follows:

This paper discusses the use of the charging order in support of legislative change which would standardize the remedies of creditors under Nevada law. Additionally, the changes proposed in this paper would create a significant advantage for the State of Nevada in attracting additional commercial recordings and associated revenues, particularly in the area of promoting new corporate filings. (Addendum, 74).

The purpose and theory behind the charging order limitation is to protect innocent partners (in the case of an LP) or members (in the case of an LLC) from being forced to inherit potentially hostile parties as partners/members in a partnership-type arrangement as the result of creditor foreclosure or forced sale. (Addendum, 75).

Charging order protection for corporations is not currently available in any jurisdiction that we can identify. (Addendum, 76).

Stock of a publically traded Nevada corporation would not be eligible for charging order protection under the NRAA proposal, due to the fact the corporation’s status as a public entity removes the partnership/owner relationship that the charging order is designed to protect. (Addendum, 78).

While the charging order on corporate stock may delay the creditor’s ability to collect on the judgment, the likelihood may be much greater that the creditor is able to collect on the full amount, either through the attachment of future dividend distributions or at some future point of sale or transfer of corporate stock. (Addendum, 81).

This proposal represents an attempt to provide equal treatment among the available business entity types regarding the protection of the economic interests of innocent partner/stockholders of Nevada Corporations. However, the charging order also provides important protection to ensure that creditors will receive full value remedies, and thus protects their economic interests as well. Further, the proposal

¹³ See Addendum, 72-83.

seeks to provide long-term protection and reinforcement of Nevada's commercial filing staple: the corporation. As Nevada competes with many other states for market share in the corporation filing world, it will be poised to attract a large number of filings that currently go elsewhere. (Addendum, 83).

Thus, it is seen that the statute's intended purpose is to protect other shareholders of small corporations from having to accept potentially hostile new shareholders, such as shareholders that are not family, friends or employees, and to give shareholders of corporations equal treatment with owners of other types of entities with respect to the protection of the economic interests of creditors and other shareholders.

The corporate charging order provisions in NRS 78.746 were amended in 2009 to raise the number of applicable stockholders from 75 to 100 and to define the "rights of an assignee", and in 2011 to make the provisions also applicable to single-shareholder corporations, but none of these revisions changed the inter-relationship between NRS 78.746 with NRS 21.090.¹⁴ It is in light of this historical background that this case must be decided.

III. NEVADA STATUTES DO NOT EXEMPT THE DEBTOR'S ECONOMIC INTEREST IN THE STOCK.

Federal bankruptcy law permits a bankruptcy debtor to claim exemptions from the bankruptcy estate for property that is exempt from execution under the law of the state where the debtor resides. *See*, 11 U.S.C. 522(b)(3)¹⁵. Pursuant to this section, the Debtor made a claim to a large number of exemptions in Amended Schedule C in his bankruptcy case (JA, 18). In Nevada, exemptions from execution are listed in NRS 21.090, and contain such items as private libraries, works of art,

¹⁴ A copy of the relevant changes in the Statutes of Nevada from 2009 and 2011 is attached as Addendum, 22 and 23.

¹⁵ (Addendum, 1-2)

musical instruments and jewelry not exceeding \$5,000 in value, necessary household goods not exceeding \$12,000 in value, equity in a vehicle not exceeding \$15,000 in value, equity in a home not exceeding \$550,000 in value, and any personal property (including stock) not otherwise exempt, not to exceed \$1,000 in total value. There is also an exemption for stock in a corporation, but the exemption for stock is limited as set forth in NRS 21.090(1)(bb), which states as follows:

The following property is exempt from execution, except as otherwise specifically provided in this section or required by federal law:

(bb) Stock of a corporation described in subsection 2 of NRS 78.746 except as set forth in that section. (emphasis added)

Thus, to understand the Nevada stock exemption, it is necessary to look at NRS 78.746, which provides:

1. On application to a court of competent jurisdiction by any judgment creditor^[16] of a stockholder, the court may charge the stockholder's stock with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the stockholder's stock.

2. Subject to the provisions of NRS 78.747,^[17] this section:

(a) Provides the exclusive remedy by which a judgment creditor of a stockholder or an assignee of a stockholder may satisfy a judgment out of the stock of the judgment debtor. No other remedy, including, without limitation, foreclosure on the

¹⁶ Note that in the instant case, the Trustee has the rights of and stands in the shoes of a judgment creditor per 11 U.S.C 544(a) (Addendum, 3).

¹⁷ NRS 78.747 has no application here, because it deals with the liability of alter egos, and there is no issue of alter ego in this case.

stockholder's stock or a court order for directions, accounts and inquiries that the debtor or stockholder might have made, is available to the judgment creditor attempting to satisfy the judgment out of the judgment debtor's interest in the corporation, and no other remedy may be ordered by a court.

(b) Does not deprive any stockholder of the benefit of any exemption applicable to the stockholder's stock.

(c) **Applies only to a corporation that:**

(1) Has fewer than 100 stockholders of record at any time.

(2) Is not a publicly traded corporation or a subsidiary of a publicly traded corporation, either in whole or in part.

(3) Is not a professional corporation as defined in NRS 89.020.

(d) Does not apply to any liability of a stockholder that exists as the result of an action filed before July 1, 2007.

(e) Does not supersede any written agreement between a stockholder and a creditor if the written agreement does not conflict with the corporation's articles of incorporation, bylaws or any shareholder agreement to which the stockholder is a party.

3. As used in this section, **"rights of an assignee" means the rights to receive the share of the distributions or dividends paid by the corporation to which the judgment debtor would otherwise be entitled. The term does not include the rights to participate in the management of the business or affairs of the corporation or to become a director of the corporation.** (emphasis added)

From NRS 78.746, we learn a number of things. First, if a judgment creditor of a stockholder in a small corporation wants to satisfy the judgment out of the stock of the judgment debtor, the creditor's only remedy is to get a charging order on the debtor's economic interest in the company, thereby allowing the creditor to receive the benefit of the debtor's financial interest such as distributions and dividends. Second, the creditor only has the rights of an assignee of the shares;

i.e., the rights to receive distributions and dividends, and the creditor does not become the owner of the stock with rights to participate in management. Third, the exclusive remedy of obtaining a charging order as provided in NRS 78.746(1) does not apply to publicly traded or professional corporations or to corporations with 100 stockholders or more.¹⁸ Fourth, a debtor's non-economic interest is still exempt from execution, notwithstanding the rights of a creditor to charge the economic interest. Fifth, the use of the word "section" (instead of the word "subsection") in subsection 2 of NRS 78.746 makes it clear that the provisions of NRS 78.746(2) apply to all of Section 746 including NRS 78.746(1).

In sum, the Nevada statute providing for creditors to obtain charging orders against a debtor's closely held corporate stock does not allow exemption of the economic interest in the stock. The Debtor's claimed exemptions are an overly-broad attempt to protect the Debtor's entire interest in the stock, rather than only the non-economic interest that the Nevada charging order statute protects from creditors.

Although the Nevada Supreme Court has not previously published an opinion specifically determining the rights and remedies of a judgment creditor under the corporate charging order statute (NRS 78.746), the Court did so with respect to the similar charging order statute applicable to limited liability companies (NRS 86.401)¹⁹ in *Weddell v. H2O, Inc.*, 128 Nev. Adv. Op. 9, 127 P.3d

¹⁸ See, NRS 78.746(2)(c). Here, there is no question that Ensworth and Eagle Rock Gaming are closely held entities which meet the criteria of NRS 78.746(2)(c). This was admitted by the Debtor at the Bankruptcy Court hearing (JA, 82-84).

¹⁹ Note that NRS 78.746 is nearly identical to NRS 86.401 as set forth on the comparison table attached as Exhibit A to the Reply in Support of Objection to Claimed Exemption (JA, 50-51). Note also that similar provisions exist relating to

743 (2012). In that case, the Court recognized the ability of creditors to reach an LLC member's economic interest in a limited liability company and receive profit and distributions, stating that after entry of a charging order: "[T]he debtor member no longer has the right to future LLC distributions..." 271 P.3d at 750 (emphasis added). The court explained that creditors are entitled to collect the debtors' profits and distributions, even though debtors retain the non-economic interest in the entity, that is, whatever management rights they may have:

[T]he judgment creditor does not unequivocally step into the shoes of a limited-liability member. [citation omitted] The limited access of a judgment creditor includes "only the rights of an assignee of the member's interest." NRS 86.401(1).... A judgment creditor, or assignee, is only entitled to the judgment debtor's share of the profit and distributions, takes no interest in the LLC's assets, and is not entitled to participate in the management or administration of the business.

Weddell, 271 P.3d at 750 (emphasis added).

The Debtor's purported exemption of his entire stock interest in Ensworth and in Eagle Rock Gaming is improper. Like Nevada's limited liability charging order statute, Nevada's charging order statute that applies to stock in closely held corporations does not permit a debtor to keep his or her entire interest from the reach of creditors. A debtor may only exempt and retain his or her non-economic interest, i.e., the right of management or administration, not the right to dividends or distributions. A judgment creditor, or, in this case, the Trustee, is entitled to reach and realize on the economic rights attributable to the stock interest. *See Renteria v. Canepa*, 2013 WL 3155348, 2013 U.S. Dist. LEXIS 86181 (D. Nev.

partnerships (NRS 87.280 and NRS 87.4342) and limited partnerships (NRS 87A.480 and NRS 88.535).

2013) (approving charging order in favor of judgment creditor against judgment debtor's stock in closely held corporation).

In the proceedings before the Bankruptcy Court, the Debtor made a number of erroneous arguments, including that (a) NRS 78.746(2)(b) means that the Debtor's economic interest in the two corporations is exempt from execution, (b) the reference to NRS 78.746 in NRS 21.090(1)(bb) does not include a reference to NRS 78.746(1), and that NRS 78.746 prohibits charging orders on small corporations (JA, 36-37 and 83-86). These arguments will be shown below to be without merit.

IV. THE DEBTOR'S INTERPRETATION OF NRS 78.746(2) IS FLAWED.

As stated above, NRS 21.090(1)(bb) provides an exemption for:

(bb) Stock of a corporation described in **subsection 2** of NRS 78.746 except as set forth in that **section**.^[20] (emphasis added)

In the Bankruptcy proceedings, the Debtor asserted that “the Debtor is entitled to completely exempt his stock and all of the stockholder rights attributable to ownership of such stock from creditor claims” because, he argued, NRS 21.090(1)(bb) totally exempts the stock of those closely held corporations that are described in subsection 2 of NRS 78.746 (JA, 36). The Debtor went so far as to assert that “[o]nce the stock so qualifies [falls within the description of 78.746(2)], NRS 78.746-2(b) provides it an exemption of which the Debtor cannot be deprived.” (JA, 36)(emphasis added). However, the Debtor's mistaken interpretation completely ignores the last seven words of NRS 21.090(1)(bb): “except as set forth in that section.” That language expressly carves out an exception from any exemption granted by NRS 21.090(1)(bb) for the remedies of

²⁰ Note that it says “section” and not “subsection”.

creditors set forth in “that section” (i.e., in Section 746 of NRS Chapter 78)(emphasis added). If the legislature had intended to provide an exemption of both the economic and non-economic interests of stock of small corporations, it would have put a period after the words “Stock of a corporation described in” subsection 2 of NRS 78.746, and omitted the words “except as set forth in that section.” Thus, the right of creditors to reach the economic interest in stock in closely held corporations through the charging order provisions of NRS 78.746(1) and NRS 78.746(2)(a) is preserved and such economic interest is not exempt from recovery by a judgment creditor.

Note that the statute itself distinguishes between “sections” and “subsections”. The reference to “that section” in NRS 21.090(1)(bb) is a reference to all of Section 746 of Chapter 78, not just subsection 2 of 78.746, as the Debtor would desire. This is made apparent by examining the text contained in the Statutes of Nevada (2007) when NRS 21.090(1)(bb) and NRS 78.746 were originally enacted as part of Senate Bill 242. *See*, 2007 Statutes of Nevada, Chapter 480, §§171.4 and 43.5 at pages 2710-2713 and 2639²¹ which state in pertinent part:

Sec. 171.4. NRS 21.090 is hereby amended to read as follows:

21.090 1. The following property is exempt from execution, except as otherwise specifically provided in this section or required by federal law:

(y) Stock of a corporation described in **subsection 2 of section 43.5** of this act **except as set forth in that section.**

²¹ See Addendum, 18-20 and 16).

Section 43.5. Chapter 78 of NRS is hereby amended by adding thereto a **new section** to read as follows:

1. On application to a court of competent jurisdiction by a judgment creditor of a stockholder, the court may charge the stockholder's stock with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the stockholder's stock.

2. This **section**:

(a) Applies only to a corporation that:

(1) Has more than 1 but fewer than 75 stockholders of record at any time.

(2) Is not a subsidiary of a publicly traded corporation, either in whole or in part.

(3) Is not a professional corporation, as defined in NRS 89.020.

(b) Does not apply to any liability of a stockholder that exists as the result of an action filed before July 1, 2007.

(c) Provides the exclusive remedy by which a judgment creditor of a stockholder or an assignee of a stockholder may satisfy a judgment out of the stockholder's stock of the corporation.

(d) Does not deprive any stockholder of the benefit of any exemption applicable to the stockholder's stock.

(e) Does not supersede any private agreement between a stockholder and a creditor. (emphasis added)

It is obvious that the words "that section" in Section 171.4 refer to Section 43.5 and that the word "section" in Section 43.5(2) refers to the "new section" set forth in Section 43.5(1). There is no other construction that is sensible. That meaning did not change when the section numbers from the bill were codified into the Nevada statutes. If the legislature intended to say "except as set forth in that subsection" instead of "except as set forth in that section" it would have done so.

It is also interesting to note that the language of NRS 78.746(2)(b) was not new to the Nevada statutory scheme. In fact, similar language was contained in (a) Section 28(3) of the Uniform Partnership Act (1914)²² which was enacted in Nevada in 1931 as NCL Section 5028.27(3)²³ and is presently codified at NRS 87.280(3)²⁴, (b) Section § 504(d) of the Uniform Partnership Act (1997)²⁵ which was enacted in Nevada in 1985 as NRS 87.4342(4)²⁶, (c) Section 703 of the Uniform Limited Partnership Act (1976)²⁷ adopted in Nevada in 1985 (effective Jan. 1, 1987) as NRS 88.535(2)(b)²⁸, (d) Section 703(d) of the Uniform Limited Partnership Act (2001)²⁹ adopted in Nevada in 2007 as NRS 87A.480(2)(b)³⁰, and (e) NRS 86.401(2)(b)³¹, relating to limited liability companies which was enacted in Nevada in 1991. With this background in mind, there is no basis to conclude that NRS 78.746(2)(b) somehow conflicts with or is inconsistent with NRS 21.090(1)(bb) and NRS 78.746(1), or that subsection 2 provides an exemption that is not provided by NRS 21.090, or that it expands upon the exemption of the non-economic interest provided by NRS 21.090(1)(bb). It merely means that nothing in the corporate charging order statute will deprive the Debtor of any exemption

²² Addendum, 32.

²³ Addendum, 5.

²⁴ Addendum, 12.

²⁵ Addendum, 35.

²⁶ Addendum, 13.

²⁷ Addendum, 37.

²⁸ Addendum, 15.

²⁹ Addendum, 40.

³⁰ Addendum, 14.

³¹ Addendum, 11.

provided by NRS 21.090, such as the exemption of the Debtor's non-economic interest in Ensworth and in Eagle Rock Gaming provided by NRS 21.090(1)(bb).³²

The previous and repeated use by the legislature of the language in NRS 78.746(2)(b) shows that it is commonly-used verbiage which is intended to preserve whatever statutory exemptions exist, and it is not intended to modify or expand upon the exemption related to corporate stock contained in NRS 21.090(1)(bb).

To construe NRS 78.746(2)(b) in the manner advocated by the Debtor renders meaningless the "except as set forth in that section" language of NRS 21.090(1)(bb). It is a well-established principle of statutory construction that courts should avoid "statutory interpretation that renders language meaningless or superfluous." *In re Steven Daniel P.*, 129 Nev. Adv. Op. 73, 309 P.3d 1041, 1043-44 (2013), *quoting George J. v. State (In re George J.)*, 128 Nev. Adv. Op. 32, 279 P.3d 187 (2012). *See also Tomlinson v. State*, 110 Nev. 757, 761, 878 P.2d 311, 313 (1994) ("statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"). The Debtor's interpretation of NRS 21.090(1)(bb) as granting a "full exemption"³³ (i.e., an exemption of the Debtor's economic and non-economic rights) "of which the Debtor cannot be deprived"³⁴ for stock in closely held corporations described in NRS 78.746(2) would render meaningless the exception language contained in NRS 21.090(1)(bb) stating: "except as set forth in that section [NRS 78.746]". The

³² Note also that NRS 21.090(1)(z) (Addendum, 7) allows an exemption of up to \$1,000 for personal property that is not otherwise exempt from execution, including stock. Thus, if Debtor had chosen to do so (which he did not), he could have claimed an exemption for \$1,000 of his economic interest in the Enworth Stock or the Eagle Rock Gaming Stock.

³³ JA, 35.

³⁴ JA, 36.

only way such language is not rendered meaningless is to interpret it to mean that it is the economic interest which can be reached by a charging order that is not exempt.

V. NRS 78.746 DOES NOT PROHIBIT CHARGING ORDERS ON STOCK IN CLOSELY HELD CORPORATIONS.

Similarly, the statutory interpretation the Debtor urges—that NRS 78.746(1) has no application to stock in a closely held corporation described in NRS 78.746(2)—would make statutory subsections 78.746(1) and 78.746(2)(a) superfluous. NRS 78.746(2) reads in part:

Subject to the provisions of NRS 78.747, this section.^[35]

(c) Applies only to a corporation that:

(1) Has fewer than 100 stockholders of record at any time.

(2) Is not a publicly traded corporation or a subsidiary of a publicly traded corporation, either in whole or in part.

(3) Is not a professional corporation as defined in NRS 89.020.

NRS 78.746(2) (emphasis added). NRS 78.746 and all of its subsections, including 78.746(1) and 78.746(2)(a), expressly apply to all types of corporations described in 78.746(2)(c) (e.g., closely held corporations), and only to such closely held corporations. NRS 78.746(1) and NRS 78.746(2)(a) must therefore apply to the stock of such closely held corporations if those portions of the statute are to have any meaning or application at all. If the Debtor's position were correct, that would mean that stockholders in private small corporations could never be subject to a

³⁵ The words "this section" once again refer to all of section 746 of Chapter 78, and therefore do include to 78.746(1). That is the only construction that makes any sense, since NRS 78.746(2)(a) by its context refers back to NRS 78.746(1) as the exclusive remedy for a judgment creditor, and NRS 78.746(3) (which defines the term "rights of an assignee") by its context also refers back to NRS 78.746(1). Debtor is simply wrong in contending that 78.746(1) is inapplicable.

charging order. That is the exact opposite of what the statute was intended to do, and would mean that such corporate stockholders would have no financial responsibility for their debts.

If all interests in a small corporation are exempt, a debtor could place all his otherwise-nonexempt assets in a small corporation and then file bankruptcy and claim them completely exempt. Holding that these statutes do not exempt the debtor's economic interests will provide a fair result to creditors while still protecting other shareholders.

The history of the charging order remedy in Nevada, as set forth above, demonstrates the fallacy of the Debtor's position. It would be non-sensical to believe that a charging order is available on the economic interest in partnerships, limited partnerships and limited liability companies, but not for closely held corporations, especially when it is small businesses (in contrast to public corporations) that the charging order remedy is designed to protect.

A case remarkably similar to the instant case is *In re Foos*, 405 B.R. 604 (Bankr. N.D. Ohio 2009). Although that case dealt with the issue of exemption of an interest in a partnership, as opposed to a corporation, it is highly instructive. In that case, a Chapter 7 bankruptcy trustee objected to a debtor's claimed exemption of a 1/10th partnership interest under a statute that allowed a judgment creditor to obtain a charging order against a partnership interest. In holding that the Debtor's economic interest was not exempt, the court noted that Ohio's exemption statute provided an exemption for a person's rights in a partnership "except as otherwise set forth in section 1776.50 of the Revised Code." O.R.C. 2329.66(A)(14)³⁶. The

³⁶ Addendum, 29.

referenced Section 1776.50 provided for a charging order on a partner's economic interest and further provided in O.R.C. 1776.50(D)³⁷ that:

(D) Nothing in this chapter deprives a partner of any right under exemption laws with respect to the partner's interest in the partnership.

The debtor argued that O.R.C. 1776.50(D) operated to exempt his entire interest in the partnership, including his economic interest, just as the Debtor in the instant case has argued that NRS 78.746(2)(b) operates to exempt his entire interest in his stock. However, the court noted that O.R.C. 1776.50(D) does not create an exemption but only provides that it does not deprive him of any exemption to which he would otherwise be entitled. In the words of the court:

As such, O.R.C. §1776.50(D) simply serves as an interpretive guide, created by the legislature, to ensure that if a conflict with another statute arises, the court does not interpret Ohio partnership law so as to deprive any partner of an otherwise valid exemption. In this respect, the Debtor's position becomes circular: **he relies on §1776.50(D), which affords no right of exemption, to undo the limitations imposed by §2329.66(A)(14) which, among other things, then qualifies a debtor's right to exempt their interest in a partnership on the conditions set forth in §1776.50(D).**

In re Foos, 405 B.R. at 609 (emphasis added). The Debtor's position in the instant case suffers from the same flaw. He relies on NRS 78.746(2)(b) to undo the limitation imposed by NRS 21.090(1)(bb) when it states "except as set forth in that section". As the *In re Foos* court stated in 405 B.R. at 610:

But what these provisions plainly fall short of doing is affording a debtor a right to exempt their entire interest in a partnership. This is a practicable reading. Under Ohio law, partnerships are easily created. **Therefore, carried to its logical conclusion, the Debtor's position**

³⁷ Addendum, 24.

would allow persons, by simply transferring their property to a partnership entity, to easily place their assets beyond the reach of their creditors. The Court is not willing to countenance such a fundamental shift in the law given the lack of express statutory language exhibiting an intent to effectuate such a change. (emphasis added)

The same rationale and policy considerations apply in the instant case. Debtors should not be able to place their assets beyond the reach of creditors simply by transferring them to a closely held corporation and then arguing that their economic interest in their corporate stock is exempt from the scope of the charging order remedy. It should be incumbent on debtors to weigh the consequence of surrendering the economic benefit of their stock ownership to the bankruptcy estate for the benefit of creditors before they file for bankruptcy protection.

VI. CONCLUSION

The Court should rule that the Debtor's claimed exemption of his stock in Ensworth and in Eagle Rock Gaming only applies to his non-economic interest, and the Court should advise the Bankruptcy Court that the Trustee is permitted to administer the economic interest in that stock, such as the right to receive dividends, distributions, or the like, on account of the stock, for the benefit of

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creditors of the bankruptcy estate, and that the Debtor's economic interest in the stock is not exempt.

Respectfully Submitted this 14th day of October, 2014

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ATTORNEYS' CERTIFICATE PURSUANT TO NRAP 28.2

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 2007 in Times New Roman, size 14.

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 proportionately spaced, has a typeface of 14 points or more, and contains 7,397 words.

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: 14th day of October, 2014.

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