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Electronically Filed
May 13 2014 01:42 p.m.
Supreme Court Clerk Tara K. Lindeman
Clerk of Supreme Court

Real Party in Interest.

This Petition is made and based upon the points and authorities attached hereto and the Appendix filed concurrently with this Petition.

1 **I. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

2
3 This Petition arises out of a civil lawsuit currently pending in the Eighth Judicial
4 District Court, Clark County, Nevada. This case went to jury trial in February, 2013, with
5 the Honorable Ronald Israel presiding. The Trial commenced February 25, 2013 and
6 concluded with the jury's Verdict for the Defense on March 1, 2013. Petitioner's Appendix
7 "PA" 00001. On May 17, 2013, this Court signed the Judgment in this case, entering the
8 defense verdict. PA 00002-00003. On May 21, 2013, notice of entry of Judgment was
9 served on the Plaintiff. PA 00004-00009. After this matter proceeded to Trial, Defendant's
10 former counsel (and Trial Counsel in this matter), Marc Saggese, Esq., formally withdrew as
11 attorney of record on March 25, 2013. PA 00010-00011.

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14 On June 10, 2013, Plaintiff's counsel filed their Motion for New Trial or in the
15 Alternative Motion for Judgment Notwithstanding Verdict (JNOV). PA 00012-00021.

16
17 On June 19, 2013, Defendant Christopher Beavor retained the undersigned to defend
18 against Plaintiff's Motion for New Trial or in the Alternative Motion for Judgment
19 Notwithstanding Verdict (JNOV).

20 On June 20, 2013, the undersigned counsel contacted counsel for the Real Party in
21 Interest, Brian Morris, Esq., whose name was attached to the aforementioned Motion for
22 New Trial or in the Alternative Motion for Judgment Notwithstanding Verdict (JNOV).
23 During that contact, the undersigned counsel inquired of Mr. Morris as to how Plaintiff's
24 Motion for New Trial or in the Alternative Motion for Judgment Notwithstanding Verdict
25 (JNOV) was not untimely filed and thus, time barred. During that same conversation, Mr.
26 Morris conceded that Plaintiff's Motion appeared to be time barred and indicated Plaintiff's
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1 counsel may be forced to withdraw the Motion given its untimeliness. At the conclusion of
2 that telephone conversation, Plaintiff's counsel, Mr. Morris, indicated he did not see how
3 Plaintiff's Motion was not filed late, but if he found otherwise, he would contact Defense
4 Counsel.
5

6 Thereafter, on June 20, 2013, the undersigned counsel filed, on behalf of
7 Petitioner/Defendant Beavor, Defendant's Opposition to Plaintiff's Motion for New Trial or
8 in the Alternative Motion for Judgment Notwithstanding Verdict (JNOV). PA 00022-00025.
9 In the Opposition, the Defense stated "[a]s Plaintiff's Motion is untimely filed, and thus
10 procedurally time barred, Defendant need not address Plaintiff's motion on the merits" but
11 that "should this honorable Court desire additional briefing on the merits, Defense counsel
12 can provide same." Id.
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15 After the undersigned had contacted Plaintiff's counsel and received the above
16 referenced information, and after filing their opposition, Plaintiff's counsel, Mr. Morris,
17 contacted Defense counsel and stated that after reviewing the calendar, he now believed that
18 his Motion had been timely filed. The undersigned counsel informed Plaintiff's counsel that
19 he had already filed his opposition based on their earlier conversation, but that he had
20 included reference to the Court that should the Court requires or require additional briefing,
21 it would be provided. Plaintiff's counsel indicated he would have no objection to same.
22 Thereafter, Plaintiff's counsel, Mr. Johnson, filed their Reply, leaving out all of the pertinent
23 procedural facts relayed above. PA 00026-00032.¹
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27 ¹ It should be noted that the signing attorney on the document was Mr. Johnson and not Mr. Morris, whom had conferred
28 with Defense counsel regarding the matter. It should also be noted that this filing is not intended to convey to the Court
any attempt at intended unethical conduct on behalf of Mr. Morris, who is known to the undersigned as being an
extremely ethical and forthright litigator, simply that the Court made its decision without the necessary requisite facts to

1 This matter, having to do with a substantive issue which sought to invalidate the
2 Jury's determination of the facts, law and evidence, was never heard for argument, but was
3 placed on a "chambers calendar." The Matter was continued until a second chambers
4 calendar on August 7, 2013, at which time the District Court Court ruled, granting the
5 Plaintiff's Motion by Minute Order. PA 00033. Therafter, the Minute Order from the
6 Chambers decision was never served on counsel for the Petitioner. Instead, as the minutes
7 from the August 7, 2013 hearing clearly state, "CLERK'S NOTE: A copy of this minute
8 order was placed in the attorney folder(s) of: H. Stan Johnson, Esq. (Cohen- Johnson) and
9 Marc Saggese, Esq. (Saggese & Associates)" even though Mr. Saggese withdrew as counsel
10 of record on March 25, 2013. Id. The undersigned only discovered the Court's decision by
11 happenstance when checking the online Court minutes after realizing he had never received
12 a decision.
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16 Following the Court's decision on the Plaintiff's Motion for New Trial or in the
17 Alternative Motion for Judgment Notwithstanding Verdict (JNOV), the Petitioner filed a
18 Motion for Reconsideration with the District Court. PA 00034-00068. The Motion was
19 opposed. PA 00069-00111. Unlike the Plaintiff's Motion for New Trial or in the
20 Alternative Motion for Judgment Notwithstanding Verdict (JNOV), argument for the Motion
21 for Reconsideration was heard before the Court. On September 26, 2013, the parties
22 appeared and argued. PA 00112-00113. Following argument, the Court denied Defendant's
23 Motion for Reconsideration. Id. Defendant verbally requested a stay of the proceedings,
24 which was denied. Id. However, the Court thereafter contacted the undersigned and
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be fully informed on the issues.

1 indicated that the Court would entertain written Motion for Stay. This was included in the
2 Court minutes. Id. A findings of fact, conclusions of law and Order was filed on November
3 14, 2013. PA 000114-00115. Notice of Entry of Order was entered November 15, 2014.
4 PA 00116-00119. Therafter, Defendant/Petitioner filed a written Motion for Stay. PA
5 00120-00126. The Motion for Stay was not opposed and was granted by the District Court.
6 This Petition now follows.
7

8 9 10 LEGAL AUTHORITY

11 NRAP 21, which governs extraordinary writs, including writs of mandamus,
12 states as follows:

13 (a) Mandamus or Prohibition: Petition for Writ; Service and Filing.

14 (1) Filing and Service. A party petitioning for a writ of mandamus or
15 prohibition must file a petition with the clerk of the Supreme Court with
16 proof of service on the respondent judge, corporation, commission, board
17 or officer and on each real party in interest. A petition directed to a court
shall also be accompanied by a notice of the filing of the petition, which
shall be served on all parties to the proceeding in that court.

18 (2) Caption. The petition shall include in the caption: the name of
19 each petitioner; the name of the appropriate judicial officer, public tribunal,
corporation, commission, board or person to whom the writ is directed as
20 the respondent; and the name of each real party in interest, if any.

21 (3) Contents of Petition. The petition must state:

22 (A) the relief sought;

23 (B) the issues presented;

24 (C) the facts necessary to understand the issues presented by the
petition; and

25 (D) the reasons why the writ should issue, including points and
26 legal authorities.

27 (4) Appendix. The petitioner shall submit with the petition an
appendix that complies with Rule 30. The appendix shall include a copy of
any order or opinion, parts of the record before the respondent judge,
corporation, commission, board or officer, or any other original document
that may be essential to understand the matters set forth in the petition.

28 (5) Verification. A petition for an extraordinary writ shall be verified

1 by the affidavit of the petitioner or, if the petitioner is unable to verify the
2 petition or the facts stated therein are within the knowledge of the
3 petitioner's attorney, by the affidavit of the attorney. The affidavit shall be
4 filed with the petition.

5 A writ of mandamus is available to compel the performance of an act which the law
6 requires as a duty resulting from an office, trust, or station. Haley v. Eighth Judicial Dist.
7 Court ex rel. County of Clark, 120 Nev. 222, 88 P.3d 840 (2004). Writ relief may be
8 warranted when an important issue of law needs clarification. See State of Nevada v. Dist Ct.,
9 118 Nev 609, 55 P.3d 420 (2002). A writ will not issue if there is a plain, speedy, and adequate
10 remedy in the ordinary course of law. Id. (quoting Mineral County v. State, Dep't of Conserv.,
11 117 Nev. 235, 243, 20 P.3d 800, 805 (2001)); NRS 34.170; NRS 34.330.

12
13 Petitioners concede that a request for a writ of mandamus is an extraordinary remedy,
14 however Plaintiffs have no other plain, speedy, or adequate remedy of law other than seeking
15 the Writ of Mandamus as they have exhausted all requests and remedies in this regard at the
16 District Court level.
17

18 **II. STATEMENT OF ISSUES PRESENTED AND RELIEF SOUGHT**

19
20 The issues in this case are as follows: (1) whether EDCR 2.20 requires a district
21 court to grant a motion when a party files a limited opposition and indicates the
22 willingness to provide further briefing; (2) whether a court should allow the parties to
23 appear and argue on a Motion for New Trial rather than deciding the matter on a
24 "chambers" calendar; and (3) whether the district court improperly computed the time
25 allowed in which to file a motion for new trial.
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28 The relief sought in this matter is to direct the District Court to vacate its Order

granting Plaintiff's Motion for a New Trial.

III. STATEMENT OF REASONS WHY WRIT SHOULD ISSUE.

i. The District Court erred in granting Plaintiff's Motion for New Trial pursuant to EDCR 2.20

Pursuant to Nevada Rule of Appellate Procedure 8(a), and Fritz Hansen A/S v. Dist. Ct., 116 Nev 650, 6 P.3d 982 (2000), a party applying for a writ petition is required to first seek a stay in the district court when the order the petition seeks to challenge is one issued by a district court. As outlined in the above facts, the Defendant properly requested a stay of proceedings in the District Court in this case, which was granted by the District Court on January 7, 2014. PA 00120-00126. As such, by this Honorable Court's rules and requirements, the Plaintiffs' petition for relief is proper and ripe for determination.

A writ should issue in this matter because the District Court's decision ordering a new trial without addressing the motion for same on its merits leaves the Petitioner with no other this Court and dramatically changes the landscape of this case.

Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties. Costello v. Casler, 127, Nev. Adv. Op. 36, 254 P. 3d 631 (2011), *See also* Schmidt v. Sadri, 95 Nev. 702, 705, 601 P.2d 713, 715 (1979) ("The Legislature envisioned that [the Nevada Rules of Civil Procedure] would serve to simplify existing judicial procedures and promote the speedy determination of litigation upon its merits.").

Plaintiff claimed in their Motion for New Trial and subsequent Reply that Defendant's

1 failure to oppose the Motion on its Merits constitutes a waiver pursuant to EDCR 2.20.² PA
2 PA 00012-00021, 00026-00032. The record states otherwise however. As outlined above, the
3 undersigned defense counsel contacted Plaintiff's counsel and inquired about the Motion for
4 New Trial, and had in depth discussions about the timeliness of same. After that first
5 conversation, defense counsel was left with the notion that Plaintiff's counsel had, in fact,
6 conceded the lateness of their motion. Defendant then filed their opposition on that basis.
7 However, in that Motion, defense counsel expressly reserved the right to file additional points
8 and authorities should the Court so desire, by stating "**should this honorable Court desire**
9 **additional briefing on the merits, Defense counsel can provide same.**" PA PA 00022-
10 00025 (emphasis added). Following the filing of that Opposition, Plaintiff's counsel *then*
11 contacted defense counsel and indicated that he no longer thought the Motion for New Trial
12 was time barred. In that conversation, Plaintiff's counsel conceded that he would have no
13 objection to Defense counsel filing points and authorities on the merits should the Court agree
14 with Plaintiff's counsel as to the timeliness of the Motion for New Trial.
15

16
17 In ruling on Plaintiff's Motion, the District Court below indicated that the Court did
18 not have discretion in its grant of a new trial based on EDCR 2.20. However, as this Court is
19 aware, there is nothing within EDCR 2.20, or any other rule of law, which *requires* the Court
20 to find in Plaintiff's favor under these circumstances. EDCR 2.20 simply states that "[f]ailure
21 of the opposing party to serve and file written opposition *may* be construed as an admission
22 that the motion and/or joinder is meritorious and a consent to granting the same." *Emphasis*
23
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27 ² (a) All motions must contain a notice of motion setting the same for hearing on a day when the judge to whom the case
28 is assigned is hearing civil motions and not less than 21 days from the date the motion is served and filed. A party filing
a motion must also serve and file with it a memorandum of points and authorities in support of each ground thereof. The
absence of such memorandum may be construed as an admission that the motion is not meritorious, as cause for its
denial or as a waiver of all grounds not so supported.

1 **added.** This “may” language, as opposed to a directive such as “shall,” indicates that the
2 District Court has discretion and can make a decision based on the totality of the
3 circumstances. Here, it is crystal clear that the Defendant **did not** admit that the Plaintiff’s
4 motion had merit or consent to its granting. Conversely, defense counsel provided in its
5 opposition that despite its position that “Plaintiff’s Motion is untimely filed, and thus
6 procedurally time barred, Defendant need not address Plaintiff’s motion on the merits” –
7 something that had been conceded by the Plaintiff at the time Defendant filed his opposition –
8 but affirmatively stated that “should this honorable Court desire additional briefing on the
9 merits, Defense counsel can provide same.” The “may” provision within EDCR 2.20(a) is
10 designed to address a situation where a non-moving party simply “fails to serve and file
11 written opposition.” That didn’t happen here. The non-moving party (the Defendant) **did**
12 serve and file written opposition, addressing the issue of timeliness and offering to provide
13 additional briefing, an allowance discussed, and agreed to, by Plaintiff’s counsel.
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17 Therafter, the matter was placed on a “chambers” calendar, which prevented the
18 parties from appearing and arguing the merits of the matter or to place their agreement for
19 further briefing on the record. As such, a Motion having to do with a substantive issue which
20 sought to invalidate the Jury’s determination of the facts, law and evidence, was never heard
21 for argument, but was decided on a “chambers calendar” without argument from the parties.
22 Following the Court’s decision, the District Court Court did not even notify Defense counsel
23 of its decision, instead placing the Minute Order from the Chambers decision in the folder of
24 previous counsel who had since withdrawn. Had this matter been heard, as opposed to simply
25 relying incorrectly on EDCR 2.20, Plaintiff’s counsel would have conceded that Defense
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1 counsel should be allowed to brief the issue on its merits, something the parties had discussed
2 and agreed upon.

3 Given this procedural history and record below, a Writ should issue and this Court
4 should, consistent with previous decisions of this Court, mandate the District Court to decide
5 Plaintiff's Motion for a New Trial on its merits.
6

7 **ii. Plaintiff's Motion for New Trial was Not Timely Filed:**
8

9 Despite Plaintiff's clever attempt to draw out the time period to file the Motion for
10 New Trial pursuant to NRCP 59, their application of NRCP 6 to include the date in which
11 they filed their Motion is in error. In their analysis, they neglect the clear application of the
12 rules and incorrectly conclude that the three (3) day addition for mailing is exclusive or
13 weekends and non-judicial days. This is not the case.
14

15 As this Court is aware, Motions for New Trial after the 2004 Amendment to NRCP 6,
16 must be filed within ten days from the date when notice of the final judgment's entry is
17 served. NRCP 59(b). Under NRCP 6(a), this ten-day period does not include weekends and
18 nonjudicial days, including holidays. Further, under NRCP 6(e), three days are added to the
19 ten-day period when the notice of entry is served by mail or electronic means. To calculate
20 the due date, the ten-day period is determined and then the three (3) days are added to that
21 date. However, unlike the ten-day filing period, the three-day mailing period *includes*
22 weekends and nonjudicial days. Winston Products Co. v. DeBoer, 122 Nev. 517, 134 P.3d
23 726 (2006); *see also* Nalty v. Nalty Tree Farm, 654 F. Supp. 1315, 1318 (S.D. Ala. 1987)
24 (recognizing that the final day of the three-day mailing period could land on a weekend or
25 nonjudicial day). *See also* Comments on 2005 Amendments to FRCP 6(e), as adopted in
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1 NRCP 6(e), noting that "[i]ntermediate Saturdays, Sundays, and legal holidays are included
2 in counting these added three days." This distinction is one that Plaintiff fails to recognize in
3 their Reply to Defendants Opposition to Plaintiff's Motion for New Trial.

4 Here, the ten-day period commenced the day after notice of the final judgment's entry
5 was served, May 22, 2013 and ended on Wednesday, June 5, 2013. Thereafter, the three (3)
6 days are added onto that date for mailing. Unfortunately for the Plaintiff, they, in their
7 Reply, clearly apply the standard that is true in NRCP 6(a), namely that the ten (10) day
8 period for filing under that subsection does not include weekends and non-judicial days,
9 including holidays, **and** Plaintiff further applies that rule to the three (3) day mailing
10 provision under Rule 6 (e). However, this Court has clearly held that the three (3) day
11 mailing period under NRCP 6(e) **does** include both weekends and holidays. As such, their
12 Motion was due **before** they filed it on June 10, 2013. As the Nevada Supreme Court has
13 repeatedly held, "[u]ntimely motions for new trial . . . must be denied." Ross v. Giacomo, 97
14 Nev. 550, 553, 635 P.2d 298, 300 (1981) overruled on other grounds by Winston Products
15 Co. v. DeBoer, 122 Nev. 517, 134 P.3d 726.

16 As Plaintiff's Motion for a New Trial was untimely filed, a fact that was acquiesced
17 to at the time Defendant filed their opposition in this matter, this Court should grant the
18 instant Petition, and remand this matter to the District Court for proceedings consistent with
19 same.

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1 CONCLUSION

2

3 Based upon the foregoing, Petitioner respectfully requests the issuance of a Writ of

4 Mandamus. The District Court committed error under any standard of review and this

5 Honorable Court should issue a Writ of Mandamus requiring the District Court to vacate its

6 Order overriding the finding of the jury in this matter.

7

8 DATED this 12th day of May, 2014.

9

10 **HOFLAND & TOMSHECK**

11

12 By: 

13 Joshua Tomsheck, Esq.

14 Nevada Bar No. 9210

15 228 South Fourth Street, 1st Floor

16 Las Vegas, Nevada 89101

17 (702) 895-6760

18 Attorney for Christopher Beavor

19

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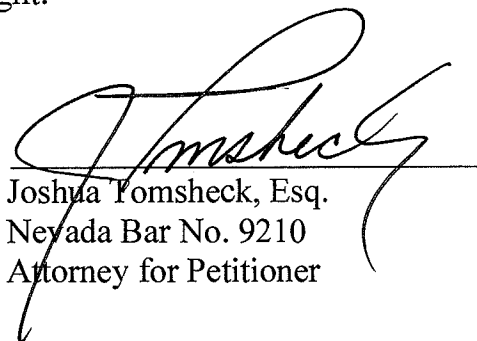
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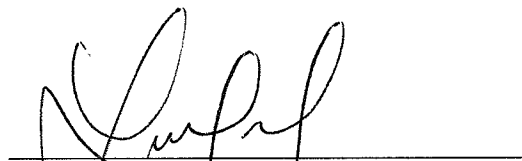
VERIFICATION AND AFFIDAVIT OF PETITIONER

I hereby certify and verify that in accordance with NRAP 21(5) that I have read this Petition for Writ of Mandamus and the facts stated herein are within the knowledge of the affiant's attorney.

Further Affiant sayeth naught.

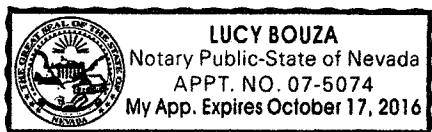

Joshua Tomsheck, Esq.
Nevada Bar No. 9210
Attorney for Petitioner

SUBSCRIBED and SWORN to before me
this 12th day of May, 2014



NOTARY PUBLIC in and for said County and State.

DATED this 12th of May, 2014.



CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Petition for Writ of Mandamus, 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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I hereby represent that this brief complies with the formatting requirements of Rule 32(a)(4)-(6) and either the page or type volume limitations as stated in Rule 32(a)(7). 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 12th day of May, 2014.

HOFLAND & TOMSHECK

By: 

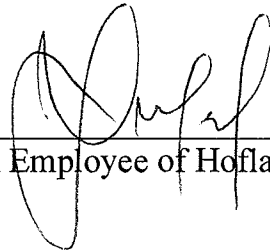
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(702) 895-6760
Attorney for Christopher Beavor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that in accordance to NRAP (25)(1)(d) I served a copy of the foregoing Petition for Writ of Mandamus on the 12th day of May, 2014, by depositing a copy of same in a sealed envelope in the United States Post Office Box, Las Vegas, Nevada, first class postage fully prepaid, and addressed to the the below recepients:

EIGHTH JUDICIAL DISTRICT COURT
The Honorable Ronald Israel, Dept. 28
District Court Judge
200 Lewis Avenue
Las Vegas, Nevada 89155

H. STAN JOHNSON, and
BRIAN A. MORRIS
c/o COHEN-JOHNSON, LLC
225 E. Warm Springs Road, Suite 100
Las Vegas, Nevada, 89119


An Employee of Hofland & Tomsheck