

1
2
3 IN THE SUPREME COURT OF NEVADA
4

Electronically Filed
Jul 06 2015 04:28 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

5
6 J.W. BENTLEY and MARYANN
7 BENTLEY, TRUSTEES OF THE
8 BENTLEY FAMILY 1995 TRUST;
9 JOY SMITH; DANIEL BARDEN;
10 and ELAINE BARDEN,

Supreme Court Case No.
64773
(Consolidated with
Supreme Court Case Nos.
66303 & 66932)

11 Appellants,

District Court
Consolidated Case No.
08-CV-0363-D1

12 v.

13 STATE OF NEVADA, OFFICE OF
14 THE STATE ENGINEER; DONALD S.
15 FORRESTER; KRISTINA M. FORRESTER;
16 HALL RANCHES, LLC; THOMAS J. SCYPHERS;
17 KATHLEEN M. SCYPHERS; FRANK SCHARO;
18 SHERIDAN CREEK EQUESTRIAN CENTER, LLC;
19 RONALD R. MITCHELL; AND GINGER G.
20 MITCHELL,

21 Respondents /

22 J.W. BENTLEY AND MARYANN
23 BENTLEY, TRUSTEES OF THE
24 BENTLEY FAMILY 1995 TRUST;
25 JOY SMITH; DANIEL D. BARDEN;
26 AND ELAINE BARDEN,

27 Appellants.

28 v.

HALL RANCHES, LLC; THOMAS J.
SCYPHERS; KATHLEEN M. SCYPHERS;
FRANK SCHARO; SHERIDAN CREEK
EQUESTRIAN CENTER, LLC, A
NEVADA LIMITED LIABILITY COMPANY;
DONALD S. FORRESTER; KRISTINA M.
FORRESTER; RONALD R. MITCHELL;
AND GINGER G. MITCHELL,

Respondents /

1 J.W. BENTLEY AND MARYANN
2 BENTLEY, TRUSTEES OF THE
3 BENTLEY FAMILY 1995 TRUST,

4 Appellants,

5 v.

6 THE STATE OF NEVADA, STATE
7 ENGINEER; HALL RANCHES, LLC;
8 THOMAS J. SCYPHERS; KATHLEEN M.
9 SCYPHERS; FRANK SCHARO; SHERIDAN
10 CREEK EQUESTRIAN CENTER, LLC;
11 DONALD S. FORRESTER; KRISTINA M.
12 FORRESTER; RONALD R. MITCHELL;
13 AND GINGER G. MITCHELL,

14 Respondents /

15 **MOTION TO STRIKE**

16 COME NOW, Respondents HALL RANCHES, LLC, a Nevada
17 Limited Liability Company, THOMAS J. SCYPHERS, KATHLEEN M.
18 SCYPHERS, FRANK SCHARO, SHERIDAN CREEK EQUESTRIAN CENTER,
19 LLC, a Nevada Limited Liability Company, DONALD S. FORRESTER,
20 KRISTINA M. FORRESTER, RONALD R. MITCHELL and GINGER G.
21 MITCHELL, by and through their counsel Thomas J. Hall, Esq.,
22 and pursuant to Rules 27 and 28 of the Nevada Rules of
23 Appellate Procedure, move to strike a portion of the Reply
24 Brief of Appellants Joy Smith, Daniel Barden and Elaine
25 Barden ("Smith/Barden"), filed here in on June 23, 2015, as
26 follows:

27 \\\

28 \\\

1 **A. Brief History.**

2 This appeal stems from the Findings of Fact, Conclusions
3 of Law, Judgment and Decree entered below rendering void a
4 Water Diversion Agreement and granting awards of attorney
5 fees in the amount of \$90,000 and costs in the amount of
6 \$7,127.05. The following pleadings were filed, to wit:
7

8 On April 30, 2012, Smith/Barden filed their Petition for
9 Judicial Review in district court case 08-CV-0363-D. 1 JA 1-
10 18.

11 On January 22, 2013, Smith/Barden filed their Opening
12 Brief.
13

14 On March 15, 2013, Intervenors filed their Answering
15 Brief to Opening Brief of Petitioners' Joy Smith, Daniel
16 Barden and Elaine Barden. 4 JA 712-806.

17 On June 7, 2013, Smith/Barden filed their Reply Brief.
18 5 JA 900-927.

19 In their Reply Brief, Smith/Barden responded to
20 Intervenors' arguments that the common law allows rotation in
21 the use of water even over the objection of other water users
22 with the same or different priorities. 5 JA 903-906. See
23 Intervenors' Answering Brief to Opening Brief of Petitioners'
24 Joy Smith, Daniel Barden and Elaine Barden. 4 JA 727-734.
25

26 \\\

27 \\\

1 **B. A New Issue was Raised in the Reply Brief.**

2 Now, in the Reply Brief of Appellants Joy Smith, Daniel
3 Barden and Elaine Barden filed herein on June 23, 2015,
4 Smith/Barden have raised for the first time ever an argument
5 and issue never raised previously. This argument and issue
6 were not raised in the lower court nor have they been raised
7 in this Court until now. Specifically, on page 6, lines 16-
8 20, Smith/Barden state:

9
10 Here the question is whether the State Engineer may
11 administer rights by mandated rotation that
12 contradicts the division by quantity in the Decree
13 and required by law. This is not an issue reached
14 in Barnes [sic], and the Court in that case did not
15 adopt a compulsory rule of rotation in the
16 administration of water rights that trumps the
17 consent-based parameters of NRS 533.075. FN4.

18 **FN4 Furthermore, given the Legislature's enactment**
19 **of NRS 533.075, any common law to the contrary does**
20 **not control. The "common law is the rule of**
21 **decision in our courts unless in conflict with**
22 **constitutional or statutory commands." *Hamm v.***
23 ***Carson City Nugget*, 85 Nev. 99, 100, 450 P.2d 358**
24 **(1969) (emphasis added); NRS 1.030. If the common**
25 **law is contrary to a statutory enactment, that**
26 **common law must give way to the statute. *Davenport***
27 ***v. State Farm Auto Ins. Co.*, 81 Nev. 361, 404 P.2d**
28 **10 (1965). Here, even if there was some pre-1913**
support for the concept of authorized compulsory
rotation, that law has been abrogate by the
enactment of the consent-based provisions of NRS
533.075.

29 A review of the record in this case shows that the
30 assertion set forth in footnote 4 was never made previously

1 in this case and only appears in the Smith/Barden Reply
2 Brief.

3 **C. Legal Authorities and Analysis.**

4 It has been the universal, unwavering and long-standing
5 rule of this Court that matters not raised in the district
6 court are waived and may not be raised for the first time on
7 appeal. Sherman v. State, 89 Nev. 77, 78, 506 P.2d 417-418
8 (1973); Penrose v. O'Hara, 92 Nev. 685, 686, 557 P.2d 276
9 (1977); Davis v. State, 102 Nev. 600, 606, 817 P.2d 1169
10 (1991).

11 Furthermore, it has been the long-standing rule of this
12 Court that it will not consider a point raised for the first
13 time in a reply brief. Leonard v. State, 114 Nev. 639, 662,
14 958 P.2d 1220 (1989). In State v. Bennett, 119 Nev. 589,
15 608, 81 P.3d 1 (2003), this Court held:

16 Bennet is therefore barred from raising this claim
17 in his reply brief pursuant to NRAP 28(c), which
18 requires reply briefs to be limited to new matters
19 in the answering brief. Consequently, we will not
20 consider this claim.

21 NRAP Rule 28 (c) provides in pertinent part:

22 (c) A reply brief . . . must be limited to
23 answering any new matter set forth in the opposing
24 brief.

25 **D. Conclusion.**


26 The issue and argument of statutory enactment trumping
27 Nevada's common law was not previously raised by Smith/Barden
28

1 and should be stricken from the record. Therefore it is
2 respectfully requested that the Court strike Footnote 4
3 contained in the Smith/Barden Reply Brief as discussed above.
4 Intervenorors have never had the opportunity to oppose such
5 assertion.
6

7 The undersigned does hereby affirm that the preceding
8 document does not contain the social security number of any
9 person.

10 Respectfully submitted this 6th day of July, 2015.

11 LAW OFFICES OF THOMAS J. HALL
12

13 
14 THOMAS J. HALL, ESQ.

15 Nevada Bar No. 675

16 305 South Arlington Avenue

17 Post Office Box 3948

18 Reno, Nevada 89505
19
20
21
22
23
24
25
26
27
28


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

9
10
11
12
13
14
15
16
17
18
19

20
21
22
23
24
25
26
27
28

LL
W
ON
948
05

Frank Scharo
Post Office Box 1225
Minden, Nevada 89423


Misti Hale

7