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6 Attorneys for DIANE COLLINS

7  
8 IN THE SUPREME COURT OF THE STATE OF NEVADA  
9

10  
11 JA CYNTA McCLENDON,

12 Appellant,

13 v.

14 DIANE COLLINS; and ROE  
CORPORATIONS I through X; and DOES I  
15 through X, inclusive,

16 Respondent.

Supreme Court No. 66473

Case No. A-13-680935

Dept. No.: XXX

**DECLARATION OF WADE M.  
HANSARD IN SUPPORT OF MOTION  
FOR EXTENSION**

17  
18 **DECLARATION OF WADE M. HANSARD**

19 I, Wade M. Hansard, hereby declare as follows:

20 1. I am an attorney licensed to practice law in the State of Nevada.

21 2. I am a partner at McCormick, Barstow, Sheppard, Wayte & Carruth LLP

22 3. I was contacted by Susan Cave of American National Property and Casualty  
23 company, that insures Respondent Collins, on Monday, June 8, 2015 and retained the same date,  
24 to substitute into the above referenced case to handle the appeal and request relief from the Court  
25 for the failure to file an Answering Brief.

26 4. In my conversation with Ms. Cave, she informed me that she had checked the  
27 Court's website to follow-up on the status of the appeal, and, seeing that Appellant's Opening  
28

1 Brief had been filed on April 2, 2015, and that the docket did not show that an Answering Brief  
2 was filed, she located, and contacted, Mr. Browne, at his new firm, Atkinson, Watkins &  
3 Hoffmann, who informed her for the first time that he had changed firms and left this matter for  
4 handling by Mr. McKay of Wilson, Elser. He also informed Ms. Cave that, to his knowledge,  
5 Appellant had not filed a brief.

6 5. I immediately, on May 8, 2015, went to the Court's website, checked, and printed  
7 the docket and the Appellant's Opening Brief. I determined that, most likely, the Court's record  
8 showed that electronic notice was to be sent to Mr. Browne at the Barski Drake Browne PLC firm.

9 6. I then contacted Mr. McKay and Mr. Browne, and determined that when Mr.  
10 Browne left Barski Drake Browne PLC, he inadvertently failed to update his electronic notice  
11 address.

12 7. I also confirmed that Wilson Elser, after Mr. Browne left that firm in mid-  
13 December 2014, did not received any notice that an Opening Brief had been filed and that neither  
14 Mr. Browne nor Mr. McKay had any notice that the Opening Brief had been filed.

15 8. I then had a substitution of attorney drafted and signed and well as a declaration by  
16 Mr. Browne in support of the Motion to File a Late Brief that I began drafting.

17 9. That I continued to draft said motion through today, Friday, June 12, 2015, and in  
18 the course of revising said Motion, my staff went back to the Court's docket to get a date for the  
19 revisions and discovered the June 9, 2015 Order from the Court to File Answering Brief.

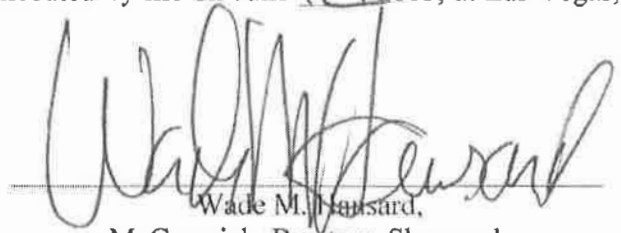
20 10. Based on that new information, I have revised the present motion to seek additional  
21 time to familiarize myself with the case and file the Answering Brief. I have not yet received the  
22 file from prior counsel.

23 11. Accordingly, I do not believe I can complete my review and drafting the  
24 Answering Brief within the time allotted by the Court's Order and respectfully request that the  
25 Court grant the within Motion for An Extension of 30 days, or such time as the Court determines  
26 is appropriate based upon the circumstances stated herein and in said Motion.

27 12. If called as a witness, I would and could competently testify to all facts stated  
28 herein from my personal knowledge except where stated upon information and belief and, as to

1 these matters, I am informed and believe them to be true. I am submitting this Declaration in  
2 support of Respondent's Motion for an Extension to file Answering Brief.

3 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is  
4 true and correct and that this declaration was executed by me on June 12, 2015, at Las Vegas,  
5 Nevada.



Wade M. Mansard,  
McCormick, Barstow, Sheppard,  
Wayte & Carruth LLP  
Nevada State Bar No. 8104

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14 DIANE COLLINS; and ROE  
CORPORATIONS I through X; and DOES I  
15 through X, inclusive,

16 Respondent.

Supreme Court No. 66473

Case No. A-13-680935  
Dept. No.: XXX

**DECLARATION OF BYRON F. L.  
BROWNE**

17  
18 DECLARATION OF BYRON F. L. BROWNE  
19

20 I, Byron F. L. Browne, hereby declare as follows:

- 21 1. I am an attorney licensed to practice law in the State of Nevada.  
22 2. I am currently a partner at the Atkinson Watkins Hoffmann law firm.  
23 3. I was previously employed at the law firm of Wilson Elser.  
24 4. Prior to working at Wilson Elser, I was a partner at the law firm of Barski Drake

25 Browne PLC. I left that firm in mid- December 2014.

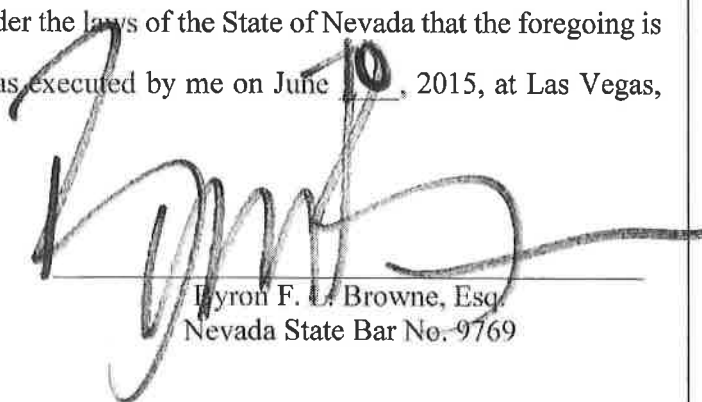
26 5. It was reflected in this Court's docket and record that electronic notice was to be  
27 sent to Byron Browne at the Barski Drake Browne PLC firm. When I left that firm, I  
28 inadvertently failed to update my electronic notice address.

1           6.       At no time did I receive either a paper copy served upon me nor did I receive  
2 electronic service of Appellant's Opening Brief in the above-referenced matter.

3           7.       I never received any communication from the staff or principles at Barski Drake  
4 forwarding any electronic or paper copy of Appellant's Opening Brief.

5           8.       If called as a witness, I would and could competently testify to all facts stated  
6 herein from my personal knowledge except where stated upon information and belief and, as to  
7 these matters, I am informed and believe them to be true. I am submitting this Declaration in  
8 support of new counsel's motion for leave to file an Answering Brief.

9           I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is  
10 true and correct and that this declaration was executed by me on June 10, 2015, at Las Vegas,  
11 Nevada.



Byron F. L. Browne, Esq.  
Nevada State Bar No. 9769

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Jun 12 2015 03:14 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

JA CYNTA McCLENDON,

Appellant,

v.

DIANE COLLINS; and ROE  
CORPORATIONS I through X; and  
DOES I through X, inclusive,

Respondent.

Supreme Court No. 66473

District Court Case No. A-13-680935  
Dept. No. XXX

**MOTION FOR EXTENSION  
TO FILE ANSWERING BRIEF  
UNDER RULE 26(b)(1)(A) AND  
RULE 27 (b)**

**I INTRODUCTION**

In order to protect her right to have new counsel properly understand and address the issues on the merits, Respondent files the present request for an extension to file a late brief to correct the oversight of prior counsel to notify this Court of a change in his electronic address that resulted in a failure to receive notice that Appellant had filed her Opening Brief.

For Respondent to be properly prepared to defend the present appeal, new counsel needs to review the underlying record to address the issues.



The failure to file a timely Answering Brief was caused by excusable neglect, and good cause exists which justifies granting an extension to file the Answering Brief. Hence, Respondent respectfully requests 30 days from the date of filing this motion, or such time as the Court deems appropriate, for new counsel to file an Answering Brief.

## **II FACTUAL AND PROCEDURAL BACKGROUND**

Byron Browne, former counsel for Respondent, was a partner at the law firm of Barski Drake Browne PLC, until he left that firm in mid- December 2014 to work at the law firm of Wilson Elser. (Exhibit A, Browne Declaration, ¶4). At the time that the Appellant's Opening Brief was filed on April 2, 2015, the Court's records regarding electronic service showed that notice was to be sent to Byron Browne at the Barski Drake Browne PLC firm. When Mr. Browne left that firm, he inadvertently failed to update his electronic notice address. (Browne Declaration ¶5). Neither Mr. Brown nor his subsequent firm, Wilson Elser, ever received either a paper copy nor an electronic notice of Appellant's Opening Brief. (Browne Declaration, ¶6). Further, Mr. Brown never received any communication from the staff or principles at Barski Drake forwarding any electronic or paper copy of Appellant's Opening Brief. (Browne Declaration ¶7).

As detailed in the Declaration of new counsel, the issue of the failure to file the Answering Brief came to light on Monday, June 8, 2015 when the claims

professional for the insurer for Respondent checked the Court's website and saw that an Opening Brief had been filed and that the Answering Brief was late. When Mr. Browne was contacted at his present firm, he indicated his belief that no Opening Brief had been filed. New counsel was retained on the 8<sup>th</sup> and immediately began working on a Motion for Leave to file a late brief. When revising said motion on Friday, June 12, 2015, the Court's Order of June 9, 2015 was discovered. (Exhibit B, Declaration of Wade M. Hansard ¶9).

### **III    LEGAL DISCUSSION**

#### **A.    Good Cause Exists**

Nevada Rule of Appellate Procedure (NRAP), Rule 27(a) contemplates that requests for relief from the Court be presented in a formal motion. *Matter Of Dunleavy*, 104 Nev. 784, 787-88, 769 P.2d 1271, 1273 (1988). NRAP Rule 27(b) allows the Court to act on a procedural order, including a motion under Rule 26(b), such as the present, without waiting for a response. Rule 26(b)(1)(A) allows the Court, for good cause, to extend time to file a brief after the time expires.

Under Nevada Rules of Appellate Procedure, Rule 25, a brief may be filed by electronically transmitting it to the Court's electronic filing system. NRAP Rule 25(a)(2)(B)(vi). Service under that Rule is made by "notice by electronic means to registered users of the Court's electronic filing system consistent with NEFCR 9." Rule 25(c)(1)(E). Such service by electronic means is believed to

have occurred here through the Court's electronic filing system and sent to the address of Mr. Browne showing on the Court's records. In the Court's master service list for this case, it indicates that electronic notification will be sent to Byron Browne.

Under NEFCR 9(b), when a document, such as the Opening Brief, is filed electronically, the Court provides notice to all registered users that a document has been filed and is available. Such notice is emailed to the addresses furnished by the registered users under NEFCR Rule 13(c). Under NEFCR 13(c) registered users, such as Mr. Browne, are required to furnish an electronic mail addresses and "it is the user's responsibility to ensure that the Court has the correct electronic mail address." Mr. Browne had, under Rule 13(c), furnished his electronic mail address as being at the Barski, Drake Browne and did not notify it of his new one when he changed firms.

As Declaration of Mr. Browne establish, neither of them received actual notice by electronic means or otherwise of the filing of Appellant's Opening Brief. Further, Mr. Browne's former firm, Barski, Drake, did not notify him that they have received any electronic notice from this Court. Further, as set forth in the declaration of new counsel, Wade M. Hansard, Respondent's insurer first became aware that the Answering Brief had not been filed simply by the fortuity of the claims professional checking the appellate status at the Court's website and

discovering that not only had an Opening Brief been filed, but that the Answering Brief was overdue. When that claims professional attempted to contact Mr. Browne, she determined that Mr. Browne was no longer with the Wilson Elser Firm, and sent Mr. Browne an email at his new firm. She was informed by Mr. Browne that, to his knowledge, no opening brief had been filed. New counsel was immediately retained and began working on a motion for relief, changed to this Motion for an extension when the Court's June 9<sup>th</sup> Order was discovered.

Accordingly, it is submitted that good cause exists for granting the relief requested.

**B. Standards Where There Is A Failure To Timely File An Answering Brief**

Although a failure to file an answering brief can amount to a confession of error, (see NRAP 31(d)), such an election to treat the failure as a confession of error has been used in circumstances **only** where the delay is significantly longer than the present one and where there has been other circumstances, such as a failure by respondent to reply to an order to show cause. (See *Hansen Plumbing and Heating of Nevada, Inc. v. Gilbert Development Corporation*, 97 Nevada 642 (1981) [brief two months late—no response to order to show cause]; *Las Vegas Sun, Inc. v. Nelson*, 96 Nevada 825 (1980) [respondent granted two extensions of time brief—eleven months overdue]; *Cressman v. Shangle*, 92 Nevada 216 (1976) [answering brief six months overdue and no explanation tendered for the failure to

do so.]

In *Knapp v. F. Lemieux*, 97 Nevada 450 (1981) respondents did not file an answering brief. On June 9, 1981, this Court issued an order to show cause why the failure to file a brief should not be treated as confession of error. In response, counsel for respondent filed an affidavit which did not set forth sufficient reasons for the failure to file an answering brief nor demonstrate good cause why that failure should not be treated as a confession of error. *Id.* In the Court's October 13, 1981 decision, four months after the Order to Show Cause, this Court elected to treat the failure as a confession of error. Here, however, the time that has passed has been less than two months and the Declarations of counsel submitted herewith, demonstrate both that they failed to receive actual notice of the filing of the Opening Brief and have explained why—due to an attorney, who changed law firms, inadvertently overlooking the need to change the electronic notice address to his new firm's. Thus, respondent submits that sufficient reasons for the failure to file an Answering Brief have been demonstrated as well as good cause why an extension is appropriate.

In *Huckabay Properties, Inc. v. NC Auto Parts, LLC*, 332 P.3d 429 (2014) this Court held that the factual nature of the underlying case was not an appropriate measure to evaluate whether an appeal should be dismissed for violation of the Court rules or orders. Thus, Respondent does not address the merits of the

appealable issues raised. In that case, the appeals were dismissed for failure to timely file an opening brief and appendix. Appellants argued that the dismissal was based upon the missteps of their lead appellate attorney and was contrary to the policy favoring dispositions on the merits. The Court noted that dissatisfaction with their attorney's performance does not entitle them to reinstatement of their appeals, as under general agency principles, a civil litigant is bound by the acts or omissions of its voluntarily chosen attorney. Here, in the personal injury action filed against Respondent, counsel was chosen not by Respondent, but by her insurer. There, the Opening Brief's due date was extended to April 11, 2013 and on April 12, 2013 Appellant filed a motion seeking a second extension until May 13, 2013. Because Appellant did not submit the brief by May 13, Appellant's motion for a second extension was denied as moot on May 24, 2013. Despite denying the motion, this Court allowed appellant eleven more days until June 4, 2013 to file and serve the brief. The brief was not filed by that deadline. No such egregious disregard exists here.

Unlike here, appellants had two attorneys, one responsible for briefing the appeal, who clearly received electronic notice of the Court's notices and orders. Appellants newly retained counsel filed a motion for reconsideration to reinstate the appeal arguing that they had no knowledge of appellate counsel's disregard of the Court's orders. Also unlike here, there was clear evidence that trial counsel

had significant information that should have put him on inquiry notice that the appeal was not being managed properly. The Court also indicated that when an appellant fails to adhere to Nevada's Appellate Procedure Rules, or fails to comply with Court's Orders, they do so at a risk of forfeiting appellate relief. The Court discussed that an attorney's act is considered to be that of the client in judicial proceedings when the client has expressly or impliedly authorize the act. The Court noted that not only did the attorneys not follow the rules governing the briefing deadlines set by Court Order, they did not provide any adequate basis for their failure to do so. Here, in contrast, Respondent has in fact provided the basis for the failure to file an opening brief - - former counsel's inadvertent failure to provide the Court with his new electronic email address.

**C. There Is No Prejudice To Appellant**

The obtaining of a quick but potentially unmerited victory is not sufficient to support a finding of prejudice to a non-moving party. *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1262 (9th Cir. 2010); *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1225 (9th Cir. 2000).

Here, the only result of allowing an extension to file the Answering Brief and considering the issues on the merits, would be to put the parties back where they would have been had Respondent timely received actual notice. Appellant will still have the normal time to file its Reply Brief. Thus, Appellant will not be

prejudiced in the least.

#### **IV CONCLUSION**

In the present matter, Respondent, the completely innocent and blameless client, should not be penalized because former counsel failed to timely notify this Court of his change of firm and electronic address. Rather, Respondent should be afforded the opportunity to have the issues decided on its merits. To do otherwise, based solely upon the error of counsel, would be an extreme measure.

Based upon the foregoing and the information presented in connection with the Declarations submitted in support hereof, Respondent respectfully requests that this Court grant Respondent an extension of 30 days, from the date of filing this Motion, or such other time as the Court deems appropriate, to file an Answering Brief on the merits.

Dated: June 12, 2015

McCORMICK, BARSTOW, SHEPPARD,  
WAYTE & CARRUTH LLP

By: /s/ Wade M. Hansard  
Wade M. Hansard  
Attorney for Respondent



### **CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of June, 2015, a true and correct copy of this completed **MOTION FOR EXTENSION TO FILE ANSWERING BRIEF UNDER RULE 26(b)(1)(A) AND RULE 27 (b)** upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

I hereby further certify that on this 12<sup>th</sup> day of June, 2015, a true and correct copy of **MOTION FOR EXTENSION TO FILE ANSWERING BRIEF UNDER RULE 26(b)(1)(A) AND RULE 27 (b)** was placed in an envelope, postage prepaid, addressed as stated below, in the basket for outgoing mail before 4:00 p.m. at MCCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP. The firm has established procedures so that all mail placed in the basket before 4:00 p.m. is taken that same day by an employee and deposited in a U.S. Mail box.

Raymond E. McKay, Esq.  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER, LLP  
300 S. Fourth Street, 11th Floor  
Las Vegas, NV 89101

By /s/ Cheryl A. Schneider

Cheryl A. Schneider, an Employee of  
MCCORMICK, BARSTOW,  
SHEPPARD, WAYTE &  
CARRUTH LLP