IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF FERNLEY, NEVADA, a Nevada municipal corporation,

Appellant,

vs.

THE STATE OF NEVADA ex rel. DEPARTMENT OF TAXATION; THE HONORABLE DAN SCHWARTZ, in his official capacity as TREASURER OF THE STATE OF NEVADA; and THE LEGISLATURE OF THE STATE OF NEVADA,

Respondents.

Supreme Court No.: 66851

District Court Case No.: 12 OC 00168 1B

PETITION FOR REHEARING PURSUANT TO NRAP 40

Attorneys for Appellant City of Fernley, Nevada:

Joshua J. Hicks, Esq.
Nevada Bar No. 6679
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
5371 Kietzke Lane
Reno, Nevada 89511
Telephone: (775) 324-4100
Email: jhicks@bhfs.com

Brandi L. Jensen, Esq.
Nevada Bar No. 8509
OFFICE OF THE CITY ATTORNEY,
FERNLEY, NEVADA
595 Silver Lace Boulevard
Fernley, Nevada 89408
Telephone: (775) 784-9861
Email: bjensen@cityoffernley.org

Clark V. Vellis, Esq.
Nevada Bar No. 5533
HOLLEY DRIGGS WALCH FINE
WRAY PUZEY & THOMPSON
800 South Meadows Parkway, Suite 800
Reno, Nevada 89521
Telephone: (775) 851-8700
Email: cvellis@nevadafirm.com

PETITION FOR REHEARING PURSUANT TO NRAP 40

Appellant City of Fernley, Nevada ("Fernley"), a municipal corporation of the State of Nevada, hereby files this Petition for Rehearing in Accordance with NRAP 40.[1]

I. INTRODUCTION

On January 14, 2016, the Court issued its opinion, *City of Fernley v. State, Dep't of Tax*, 132 Nev. Adv. Op. 4 (2016) (the "Opinion"), affirming the District Court's order granting summary judgment in favor of the Nevada Department of Taxation and the Nevada Treasurer (collectively, the "State") and the intervening respondent the Legislature of the State of Nevada ("Legislature"). With all due respect, several of the Court's statements in the Opinion demonstrate a misapprehension of material facts. Specifically, the Court stated that all services in Fernley are provided by Lyon County. In fact, Fernley ***does*** provide its residents many general purpose public services.

Additionally, the Court overlooked a material fact in affirming the District Court's costs award of $8,489.04 in favor of the State. The underlying litigation was filed after Fernley exhausted any available administrative remedies and was told by the State it was time-barred from others. On appeal, and well after the

[1] A party may file a petition for rehearing "within 18 days after the filing of the appellate court's decision under Rule 36." NRAP 40. The Court filed its opinion that this petition concerns on January 22, 2016; thus, the instant petition is timely.

District Court issued its decision, the State reversed its position in its answering brief to this Court and stated that an administrative remedy is available to Fernley even today. Had Fernley been able to attempt such administrative relief, this case may not have been necessary. This Court overlooked that issue and as such, rehearing on the award of costs is appropriate.

II. STANDARD OF LAW

A rehearing is warranted "[w]hen the court has overlooked or misapprehended a material fact in the record or a material question of law in the case." NRAP 40(c)(2)(A). Indeed, when "it appears that this court has overlooked material matters and that rehearing will promote substantial justice, we conclude that rehearing is warranted." *Calloway v. City of Reno*, 114 Nev. 1157, 1158, 971 P.2d 1250, 1250 (1998).

III. ARGUMENT

The Court misapprehended and overlooked several material facts in its Opinion. The following details each of those instances.

A. Fernley Does Provide Public Services to Its Residents.

In the Opinion, the Court stated the following:

> After its incorporation, Fernley neither entered into an interlocal agreement with Lyon County, ***nor did Fernley create or assume public services***. ***Instead, Lyon County continued to provide Fernley with all of its services.***
>
> Although Fernley incorporated as a city, its C–Tax base

> distribution was first created when Fernley was an unincorporated town. ***Because Fernley did not create, assume***, or enter into an interlocal agreement to provide services, Fernley never became eligible to receive an increase in its C–Tax distribution.

City of Fernley, 132 Nev. Adv. Op. at *4 (emphasis added). Similarly, the Court stated in the Opinion the following:

> In this case, Fernley presents the exact situation the Legislature evidently sought to avoid: Fernley incorporated hoping to collect more tax distributions, ***but it has not provided any new benefits to its residents, beyond those it provided when it was an unincorporated town, nor has it assumed the fiscal responsibility of Lyon County for providing its services***.

Id. at *9 (emphasis added).

However, a review of the record reveals that the above statements represent the Court's misapprehension of a material fact. The record proves that Fernley provides its residents with public services (and even with the limited finances available to it, Fernley has provided new benefits), including, but not limited to, public works including road improvements and maintenance, parks improvements and maintenance, waste water, animal control, cemetery, city attorney, city clerk, city treasurer, Municipal Court, building and planning, zoning, community development and business licenses. (*See* JA 15:2812-17:2859; JA 10:1917-11:1964; JA 20:3522.) Indeed, Fernley provided an expert opinion providing, in detail, examples of the municipal services that Fernley provides and the impact of

inadequate funding on those services. (*Id.*) That report was undisputed by the State and Legislature.

Although Fernley does not have a dedicated municipal fire department, Fernley and its residents fund the North Lyon Fire Protection District through property tax assessments on Fernley residents. (*See* Appellant's Opening Brief, at 20, dated May 20, 2015, on file herein.) This is unique to Fernley—no other Nevada municipality taxes its residents for a fire protection district. (*Id*.) For all practical purposes, the North Lyon Fire Protection District exists because of Fernley residents, and exists primarily to serve Fernley residents.

Essentially, Fernley provides the same services as provided by other general purpose governmental entities, with the exception of a dedicated municipal police department.

In short, there is absolutely no evidence in the record that supports the conclusion that Fernley does not provide public services to its residents or that all of its services are provided by Lyon County. In fact, the record supports the opposite conclusion—Fernley ***does*** provide considerable general purpose government services to its residents. In fact, the obligation to provide such public services without adequate funding is the whole reason Fernley brought a lawsuit against the State. As the Court repeatedly relied on the misapprehension regarding

the services Fernley provided to its residents in reaching decision to deny Fernley's appeal, a rehearing is warranted.

B. The State's Reversal of Its 2011 Advisory Opinion, which Occurred for the First Time on Appeal, Justifies a Reversal of the District Court's Award of Costs.

As the Court aptly noted, in December of 2011, before the underlying complaint was filed, the State issued an advisory opinion to Fernley stating that it was not eligible to request a C-Tax adjustment pursuant to NRS 360.740 because that statute only allowed adjustments within one year of a municipal incorporation. *City of Fernley*, 132 Nev. Adv. Op. at *4. Advisory opinions are official interpretations of tax law issued by the Nevada Department of Taxation. NAC 360.200, *et. seq*.

In reliance on this opinion stating that an administrative request for relief was time-barred, Fernley did not pursue administrative relief pursuant to NRS 360.740, and instead Fernley instituted the underlying litigation. *See City of Fernley*, 132 Nev. Adv. Op. at *4, fn. 4; *see also* Appellant's Opening Brief, at 4.

Throughout most of the underlying litigation, the State and the Legislature took differing opinions on whether NRS 360.740 operated as a one-year time bar from incorporation. The State did not retreat from its advisory opinion until July 8, 2015 (*see* Respondents' Joint Answering Brief, at 21, dated July 8, 2015, on file herein), when it signed onto a joint answering brief with the Legislature, and

argued that the one year period of limitation in NRS 360.740 "runs, not from the date of incorporation, but from the date the city commits to provide services." This Court aptly noted that the State had "reversed course." *City of Fernley*, 132 Nev. Adv. Op. at *4, fn. 3.

With respect to a request for rehearing, this is important for several reasons. First and foremost, the State had not yet "reversed course" when the district court issued its dispositive decision on October 6, 2014. (*See* JA 22:3948-4000.) Second, and perhaps more importantly, and in keeping with its position that litigation is a last resort, Fernley would have attempted to obtain an adjustment under NRS 360.740 prior to filing its complaint had it not been precluded from doing so by the 2011 advisory opinion. Had Fernley not pursued all available administrative remedies, the State certainly would have argued that Fernley failed to exhaust its administrative remedies. Finally, the State is the party to whom costs were awarded – the very party that may well have unnecessarily caused years of litigation.

Although the Court clearly noted that the State's 2011 advisory opinion led to Fernley initiating the instant lawsuit, the Court overlooked this fact in affirming the State's cost award against Fernley. Indeed, Fernley would not have initiated the lawsuit and ultimately become liable to the State for $8,489.04 as Fernley "filed suit ***only*** as a last resort after efforts to reach an administrative and

legislative resolution were unsuccessful." (*See* Appellant's Opening Brief, at 41 (emphasis added).)

A rehearing is warranted because the Court affirmed an award of costs that was made before the State "reversed course" on a key legal position for the first time on appeal. The district court was unaware of the State's impending vacillation on this key legal point when it awarded costs to the State. Rehearing on the award of costs is therefore appropriate.

IV. CONCLUSION

For the reasons stated, Fernley respectfully requests that the Court grant a rehearing, withdraw its Opinion entered January 14, 2016, and reverse the District Court's Orders on appeal.

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DATED this 1st day of February, 2016.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: */s/ Joshua J. Hicks*
JOSHUA J. HICKS, ESQ.
Nevada Bar No. 6679
5371 Kietzke Lane
Reno, Nevada 89511
Telephone: (775) 324-4100
Facsimile: (775) 3338171
Email: jhicks@bhfs.com
Attorneys for Appellant City of Fernley, Nevada

OFFICE OF THE CITY ATTORNEY, FERNLEY, NEVADA

By: */s/ Brandi L. Jensen*
BRANDI L. JENSEN, ESQ.
Nevada Bar No. 8509
595 Silver Lace Boulevard
Fernley, Nevada 89408
Telephone: (775) 784-9861
Facsimile: (775) 784-9868
Email: bjensen@cityoffernley.org
Attorneys for Appellant City of Fernley, Nevada

HOLLEY DRIGGS WALCH FINE WRAY PUZEY & THOMPSON

By: */s/ Clark V. Vellis*
CLARK V. VELLIS, ESQ.
Nevada Bar No. 5533
800 South Meadows Parkway, Suite 800
Reno, Nevada 89521
Telephone: (775) 851-8700
Facsimile: (775) 622-9554
Email: cvellis@nevadafirm.com
Attorneys for Appellant City of Fernley, Nevada

CERTIFICATE OF COMPLIANCE

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 Office Word in size 14 Times New Roman.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding parts of this brief exempted by NRAP 32(a)(7), it is proportionately spaced, has a typeface of 14 points or more, and contains approximately 1462 words.

Finally, I hereby certify that to the best of my knowledge, information, and belief, this brief 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 that every assertion in this brief regarding matters in the record be supported by appropriate references to the record on appeal. 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 1st day of February, 2016.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: */s/ Joshua J. Hicks*
JOSHUA J. HICKS, ESQ.
Nevada Bar No. 6679
5371 Kietzke Lane
Reno, Nevada 89511
Telephone: (775) 324-4100
Facsimile: (775) 3338171
Email: jhicks@bhfs.com
Attorneys for Appellant City of Fernley, Nevada

OFFICE OF THE CITY ATTORNEY, FERNLEY, NEVADA

By: */s/ Brandi L. Jensen*
BRANDI L. JENSEN, ESQ.
Nevada Bar No. 8509
595 Silver Lace Boulevard
Fernley, Nevada 89408
Telephone: (775) 784-9861
Facsimile: (775) 784-9868
Email: bjensen@cityoffernley.org
Attorneys for Appellant City of Fernley, Nevada

HOLLEY DRIGGS WALCH FINE WRAY PUZEY & THOMPSON

By: */s/ Clark V. Vellis*
CLARK V. VELLIS, ESQ.
Nevada Bar No. 5533
800 South Meadows Parkway, Suite 800
Reno, Nevada 89521
Telephone: (775) 851-8700
Facsimile: (775) 622-9554
Email: cvellis@nevadafirm.com
Attorneys for Appellant City of Fernley, Nevada

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2016, I electronically filed the foregoing **PETITION FOR REHEARING PURSUANT TO NRAP 40** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System.

I certify that all participants in the case are listed below and are registered electronic filing users and that service will be accomplished by the Court's Electronic Filing System:

Adam Paul Laxalt, Esq.
Gina C. Session, Esq.
Andrea Nichols, Esq.
OFFICE OF THE ATTORNEY GENERAL
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
Telephone: (775) 688-1818
Email: anichols@ag.nv.gov
Attorneys for Respondents Nevada Department of Taxation and Hon. Dan Schwartz, State Treasurer

Brenda J. Erdoes, Esq.
Kevin C. Powers, Esq.
J. Daniel Yu, Esq.
LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
401 South Carson Street
Carson City, Nevada 89701
Telephone: (775) 684-6830
Email: kpowers@lcb.state.nv.us
Attorneys for Respondent Nevada State Legislature

/s/ Kelly J. Chouinard
an employee of Brownstein Hyatt Farber Schreck, LLP