

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Jul 08 2015 03:24 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court  
CASE NO.: 64773

J.W. BENTLEY AND MARYANN  
BENTLEY TRUSTEES OF THE  
BENTLEY FAMILY 1995 TRUST; JOY  
SMITH; DANIEL BARDEN; AND  
ELAINE BARDEN,

Appellants

vs.

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

Respondents.

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

CASE NO.: 66303

Appellants,

vs.

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; MARYANN BENTLEY,  
2 TRUSTEES OF THE BENTLEY FAMILY 1995  
3 TRUST; JERALD R. JACKSON, TRUSTEE OF  
4 THE JERALD R. JACKSON 1975 TRUST, AS  
5 AMENDED; AND IRENE M. WINDHOLZ,  
6 TRUSTEE OF THE WINDHOLZ TRUST DATED  
7 AUGUST 11, 1992,

CASE NO.: 66932

Appellants,

vs.

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

Respondents.

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**OPPOSITION TO MOTION TO STRIKE**

15 COME NOW, Appellants JOY SMITH, DANIEL BARDEN, and ELAINE  
16 BARDEN ("Smith & Barden"), by and through their counsel of record Dyer,  
17 Lawrence, Flaherty, Donaldson & Prunty, and Jessica C. Prunty, Esq., and hereby  
18 respond to Respondents Hall Ranches, LLC, Thomas J. Scyphers, Kathleen M.  
19 Scyphers, Frank Scharo, Sheridan Creek Equestrian, LLC, Donald S. Forrester,  
20 Kristina M. Forrester, Ronald R. Mitchell, and Ginger G. Mitchell's  
21 ("Intervenors") Motion to Strike.

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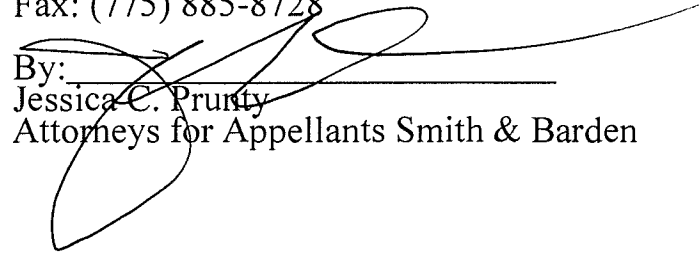
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1 This Opposition is made pursuant to Rule 27 of the Nevada Rules of  
2 Appellate Procedure, the following memorandum of points and authorities, and all  
3 other papers and pleadings on file herein.

4 Dated this 8<sup>th</sup> day of July, 2015.

5 Respectfully submitted,

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1     **I.     INTRODUCTION**

2             On or about July 6, 2015, Intervenor filed a Motion to Strike (“Motion”) in  
3     the instant matter, arguing that in their Reply Brief, Smith & Barden “raised for the  
4     first time ever an argument and issue never raised previously” in the proceedings  
5     before the district court or this Court. Mot. at 4.

6             Intervenor’s Motion is wholly without merit and appears to demonstrate a  
7     fundamental misunderstanding of the purpose of a reply brief. Even more  
8     bewildering is that Intervenor have irresponsibly accused Smith & Barden of  
9     raising a matter for the first time on appeal, without, apparently, first reviewing the  
10    district court pleadings in this matter. Therefore, for all of the reasons set forth  
11    below, Intervenor’s baseless Motion should be denied, and Respondents should be  
12    awarded fees and costs for having to file this opposition.

13    **II.    LEGAL ARGUMENT**

14            NRAP 28(c) provides that “[a] reply brief . . . must be limited to *answering*  
15    *any new matter set forth in the opposing brief.*” (Emphasis added). On or about  
16    May 15, 2015, Intervenor filed an Answering Brief in the instant matter.  
17    Intervenor’s Br. at 26 (May 15, 2015). One of Intervenor’s arguments in the  
18    Answering Brief was that Nevada’s common law controls in this case even if it  
19    may appear to conflict with a Nevada statute. *See* Int. Ans. Br. at 10 (“pre-statutory  
20    vested water rights are not subject to the limitations contained in the rotation-by-  
21    consent only statute, NRS 533.075); *id.* at 16 (“more than a century ago, this Court  
22    . . . approved the common law doctrine of rotation for vested water rights”); *id.* at  
23    13-14 (“[t]hus it is clear the 1913 statutory rotation-by-consent-only provision of  
24    NRS 533.075 cannot control the pre-statutory 1852 and 1905 vested water rights  
25    under review”).

26            In their Reply Brief, Smith & Barden responded to Intervenor’s common law  
27    argument. A portion of that response is contained in the footnote Intervenor  
28    request this Court to strike:

1 Furthermore, given the Legislature's enactment of NRS 533.075, any  
2 common law [contrary to the consent-based parameters of NRS 533.075]  
3 does not control. The "common law is the rule of decision in our courts  
4 unless in conflict with constitutional or statutory commands." *Hamm v.*  
5 *Carson City Nugget*, 85 Nev. 99, 100, 450 P.2d 358 (1968) (emphasis  
6 added); NRS 1.030. If the common law is contrary to a statutory enactment,  
7 that common law must give way to the statute. *Davenport v. State Farm*  
8 *Auto Ins. Co.*, 81 Nev. 361, 494 P.2d 10 (1965). Here, even if there was  
9 some pre-1913 support for the concept of authorized compulsory rotation,  
10 that law has been abrogated by the enactment of the consent-based  
11 provisions of NRS 533.075.

12 Smith & Barden Reply Br. at 6-7, fn 4 (June 23, 2015).

13 Contrary to Intervenor's assertions, footnote 4 is not an attempt to raise a  
14 new issue. Rather, it is simply an answer to an argument raised by Intervenor.  
15 See NRAP 28(c). Appellants are absolutely entitled to counter arguments raised  
16 in Intervenor's answering brief; that is the very *purpose* of a reply brief.

17 Moreover, Intervenor's state, "[a] review of the record in this case shows that  
18 the assertion set forth in footnote 4 was never made previously in this case and  
19 only appears in the [Appellants] Reply Brief." *Id.* They are wrong.

20 On June 7, 2013, Smith & Barden filed a reply brief in the district court  
21 proceedings ("District Court Reply"). 5 JA 900. In the District Court Reply, Smith  
22 & Barden argued:

23 Given that NRS 533.075 does not impair vested water rights, whatever the  
24 common law was in regards to rotation in 1913 was extinguished by NRS  
25 533.075 and is thus, irrelevant. The "common law is the rule of decision of  
26 our courts *unless* in conflict with constitutional or *statutory* commands."  
27 *Hamm v. Carson City Nugget*, 85 Nev. 99, 100, 450 P.3d 358 (1969)  
28 (emphasis added); NRS 1.030. In other words, of the common law is  
contrary to a statutory enactment, that common law must give way to the  
statute. *Davenport v. State Farm Auto Ins. Co.*, 81 Nev. 361, 404 P.2d 10  
(1965). Here, even if this Court finds that the common law supported the  
concept of forced rotation, that law has been abrogated by the enactment of  
the consent-based provisions of NRS 533.075. Hence, rotation in Nevada  
may only be done within the confines of that statute.

5 JA 906. Clearly, the argument Smith & Barden made in the District Court Reply  
more than two (2) years ago is the same argument put forth in footnote 4 in their  
Reply filed with this Court. Given this undisputable fact, Smith & Barden question  
Intervenor's motives in pursuing a Motion to Strike on such a flawed premise. Not

1 only have they caused Smith & Barden to incur unnecessary legal fees to counter  
2 the motion, but this Court now has to expend its resources in addressing it.

3 **III. CONCLUSION**

4 Smith & Barden simply answered the arguments put forth by Intervenor, as  
5 allowed pursuant to NRAP 28(c). Furthermore, Intervenor's accusation that Smith  
6 & Barden have raised an issue for the first time on appeal is not true, as a cursory  
7 review of the record demonstrates.

8 For the foregoing reasons, Appellants respectfully request that this Court  
9 deny Intervenor's Motion to Strike and award Smith & Barden attorneys' fees and  
10 costs for having to respond to Intervenor's baseless Motion.

11 Dated this 8<sup>th</sup> day of July, 2015.

12 Respectfully submitted,

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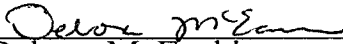
**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of Dyer, Lawrence, Flaherty, Donaldson & Prunty, and that on the 8<sup>th</sup> day of July, 2015, I caused a true and correct copy of the within **OPPOSITION TO MOTION TO STRIKE** to be deposited in the U.S. Mail, first-class postage prepaid, addressed to the persons listed below:

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