

IN THE SUPREME COURT OF THE STATE OF NEVADA

PACIFIC WESTERN BANK, a California
banking corporation,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT
COURT, in and for the County of Clark,
State of Nevada, and THE HONORABLE
SUSAN W. SCANN, District Judge,

Respondent,

and

JOHN A. RITTER, an individual; DARREN
D. BADGER, an individual; VINCENT T.
SCHETTLER, an individual; and DOES 1
THROUGH 50,

Real Party in Interest.

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Tracie K. Lindeman
Clerk of Supreme Court

District Court No: A-14-710645-B
Dept. No. XXIX

PETITION

**From the Eighth Judicial District Court
The Honorable Susan W. Scann, District Judge**

**REPLY TO RESPONSE TO
PETITION FOR WRIT OF MANDAMUS**

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INTRODUCTION

Real party in interest, Darrin Badger, partially opposed Pacific Western Bank's Petition, on the single basis that the district court correctly concluded that the funds in the 529 Accounts are located in New Mexico, and therefore beyond the reach of the Nevada courts.

Badger's Response fails to provide this Court with any reason it should not issue the writ relief Pacific Western Bank seeks. Rather, often relying on facts outside of the record, Badger argues that the 529 Accounts are located in New Mexico, and therefore beyond the jurisdiction of the district court. In so arguing, Badger wholly fails to impeach the reasoning in the Petition, which explains in detail why the Accounts are within the court's jurisdiction, regardless of their "location" in New Mexico.

Likewise, Badger's attempt to artificially limit the scope of the Petition to a single issue is improper, unsupported by law, and should be construed as a confession of error. Badger's refusal to respond to the remaining issues raised in the Petition based only on his assertion that any issue not explicitly decided by the district court is not properly before this Court constitutes a confession of error.

This Court should issue the writ.

ARGUMENT

I. Badger's Failure to Respond to Issues Raised in the Petition Is a Confession of Error.

In only partially opposing Pacific Western Bank's Petition, Badger failed to respond to Pacific Western Bank's arguments that (1) as a resident of Nevada, Badger is entitled only to exemptions under Nevada law; (2) Badger's 529 Accounts are not exempt under Nevada law; (3) Badger did not timely claim an exemption based on New Mexico law;¹ and (4) the district court could have

¹ Badger's argument that Pacific Western Bank abandoned its claim of untimeliness is based on his obfuscation of the circumstances. To be clear, Pacific Western Bank served two sets of writs. The first was served on April 29, 2015. A party that claims property is exempt from execution "must, within 10 days after the notice of a writ of execution or garnishment is served on the judgment debtor" . . . "serve on the sheriff, the garnishee and the judgment creditor and file with the clerk of the court issuing the writ of execution the judgment debtor's claim of exemption." NRS 21.112(1). Badger untimely filed a claim of exemption on May 15, 2015, sixteen days after service. Badger argues that since the ten day period in NRS 21.112(1) is less than 11 days, intermediate Saturdays, Sundays and non-judicial days shall be excluded in the computation pursuant to NRCP 6(a). Such an argument is not supported by NRS 21.112, however. Subsection 1 of that statute requires a claim of exemption to be filed within "10 days after the notice of a writ of execution or garnishment is served on the judgment debtor." Conspicuously absent from that sentence is a reference to "judicial" days. Other portions of the statute, however, expressly refer to "judicial" days. *See* NRS 21.112(3) (providing that objections to claims of exemption requires that such objections be filed within "8 judicial days after the claim of exemption is served on the judgment creditor" and providing that notice of the hearing on the objection shall be served "not less than 5 judicial days before the date set for the hearing"); NRS 21.112(6) (requiring that the hearing on the objection "be held within 7 judicial days after the objection to the claim and notice for a hearing is filed"). Thus, by not inserting the word "judicial" before the phrase "10 days" in subsection 1 of the statute, but inserting the word "judicial" before every reference

ordered Badger to turn over the funds pursuant to NRS 21.320, making the Court's direct jurisdiction over the 529 Accounts irrelevant. Badger explicitly indicated his choice not to respond to issues (1) through (3), erroneously arguing without authority that they are not properly before this Court. His omission of issue (4) may have been inadvertent, but is no less waived.²

Any issue Pacific Western Bank raised before the district court is appropriately raised on appeal, even if the district court did not rule on that basis, because an appellate court can consider any issue supported by the record. It is undisputed that Pacific Western Bank raised each of these issues below. The district court's ruling implicitly rejected each of them, and thus each was raised in

to a number of days less than ten, it is clear that the Nevada legislature did not intend for the 10 day period to be 10 judicial days. Pacific Western Bank consistently and correctly maintained that Badger's claim of exemption was untimely, and at no time abandoned its position. However, the district court quashed that writ for other, unrelated reasons. Accordingly, the April 2015 writ is not before this Court.

Pacific Western Bank subsequently caused a new writ to be served on July 29, 2015. Badger filed a timely claim of exemption on August 6, 2015. However, as the Petition explained, Badger's claim of exemption did not claim any exemption under New Mexico law. In fact, Badger did not raise that claim of exemption until his response to objections on August 28, 2015, almost 30 days after service of the writ. In other words, Badger's claim of exemption under New Mexico law is untimely because he failed to assert it in his claim of exemption, not because the filed exemption itself was filed late, and did not raise the relevant issue for almost a month. Badger's claims concerning timeliness address the wrong writ, and are therefore spurious.

² Badger also did not contest Pacific Western Bank's claim that its Petition satisfies the standard for writ relief.

the Petition. Importantly, Badger's election not to respond to any of these arguments constitutes a confession of error on each of those issues.

A. Badger's Failure to Address the District Court's Authority to Order Badger to Turn Over the Funds in the 529 Accounts Is Dispositive.

Pacific Western Bank argued below and in its Petition that the district court had the jurisdiction and authority simply to order Badger to turn over the funds in the 529 Accounts pursuant to NRS 21.320. That argument has gone unanswered.

In ruling that Pacific Western Bank must attempt to recover against Badger's 529 Accounts in New Mexico, through New Mexico courts, the district court necessarily rejected Pacific Western Bank's contention that the district court could have ordered Badger to turn over the funds, making its direct jurisdiction over the 529 Accounts irrelevant. To rule that Pacific Western Bank must go to New Mexico and litigate in New Mexico courts is necessarily to reject that argument.

As the district court's ruling entailed a rejection of this argument, it cannot be disputed that this issue is properly before this Court for review. Indeed, Badger does not contest that this issue is properly before the Court – nor can he, as this falls squarely within what he terms the “jurisdictional issues,” and which he concedes are properly before this Court.

In wholly failing to respond that that argument, which is dispositive of the “jurisdictional issue,” and indeed the entire writ, Badger has waived it, as

discussed in further detail below. Pacific Western Bank has consistently argued that, even without jurisdiction over the Accounts, Nevada courts have the authority to require Badger to withdraw the funds and deliver them to Pacific Western Bank under NRS 21.320. It argued that position before the district court. It argued that position in its Petition. And, it argued that position in its request for a stay before this Court.

Indeed, Pacific Western Bank has offered this simple alternative at every turn. The district court rejected it by ordering Pacific Western Bank to execute in New Mexico, and Badger waived Pacific Western Bank's appellate challenge by failing to address it in his responsive briefing. This Court may and should issue the writ on that basis alone.

B. Each Issue to Which Badger Elected Not to Respond Is Properly Before this Court.

Badger asserts, entirely without citation or support, that issues (1) through (3), which he terms the "exemption issues," are not properly before this Court because the district court did not explicitly reach them. However, any issue Pacific Western Bank raised before the district court is appropriately raised on appeal, even if the district court did not rule on that basis, because an appellate court can consider any issue supported by the record.

Badger argues, without support, that any issue the district court did not explicitly reach below cannot be before this Court on appeal. However, that is not

the standard. What matters is whether Pacific Western Bank raised below the issues it raises in its Petition – not whether the district court actually ruled on all of them. *See In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989) (noting that while the lower court did not rule on a particular issue, “it could have” because the appellant raised it, and that is what mattered). That a lower court has not actually ruled on an issue “is not controlling.” *Id.* “[A]ppellate courts may consider any issue supported by the record, even if the [lower court] did not consider it. *Id.* (citing *Pizza of Hawaii, Inc. v. Shakey’s, Inc.*, 761 F.2d 1374, 1379 (9th Cir. 1985)).

Indeed, trial courts frequently decline to reach issues, especially where their rulings moot their consideration. For example, where a trial court dismisses a negligence claim on the basis that no duty exists, it is not required also to determine whether a breach occurred, had it found a duty. *See, e.g., Miller v. Southland Corp.*, 944 F.2d 909 (9th Cir. 1991). But, when an appeal follows, the parties would be well within their rights to argue breach as well. Moreover, even if a district court has improperly failed to reach a question below that becomes critical on appeal, an appellate court may resolve the issue on appeal rather than remand to the district court. *Hudson United Bank v. LiTenda Mortgage Corp.*, 142 F.3d 151, 159 (3d Cir. 1998); *Chase Manhattan Bank, N.A. v. American Nat’l Bank and Trust Co.*, 93 F.3d 1064, 1072 (2d Cir. 1996).

It cannot be disputed that Pacific Western Bank raised each of these four issues before the district court. Though the district court did not explicitly rule on each of them, it could have. That is sufficient to put those issues squarely and properly before this Court.

C. The Court Should Treat Badger's Choice Not to Respond to These Issues as a Confession of Error.

Badger's calculated refusal to respond to significant issues raised in the Petition is, under these circumstances, a confession of error. "NRAP 31(d) is a discretionary rule providing that if a respondent fails to file an adequate response to an appeal, this court may ... consider the failure to respond as a confession of error." *Polk v. State*, 126 Nev. 180, 184, 233 P.3d 357, 359-60 (2010). While failure to file an answering brief is a clear failure, this Court has "also determined that a party confessed error when that party's answering brief effectively failed to address a significant issue raised in the appeal." *Id.*, 126 Nev. at 185, 233 P.3d at 360. *Polk* recognized this Court's history of applying NRAP 31(d). *Id.* (citing *Bates v. Chronister*, 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984) (treating the respondent's failure to respond to the appellant's argument as a confession of error); *A Minor v. Mineral Co. Juv. Dep't*, 95 Nev. 248, 249, 592 P.2d 172, 173 (1979) (determining that the answering brief was silent on the issue in question, resulting in a confession of error); *Moore v. State*, 93 Nev. 645, 647, 572 P.2d 216, 217 (1977) (concluding that even though the State acknowledged the issue on

appeal, it failed to supply any analysis, legal or otherwise, to support its position and “effect[ively] filed no brief at all,” which constituted confession of error), *overruled on other grounds by Miller v. State*, 121 Nev. 92, 95–96, 110 P.3d 53, 56 (2005)). For example, in *Polk*, the respondent filed a lengthy answering brief addressing all but one of appellant’s issues on appeal. *Id.* However, the issue it failed to address was substantial and raised in the opening brief. *Id.* As a result, the Court found the respondent’s silence to be a confession of error. *Id.*

Likewise, where a respondent’s answering brief acknowledged an argument, and stated in one sentence that it failed, that was “insufficient to discharge a party’s obligation to the court to provide legal authority and analysis.” *Polk*, 126 Nev. at 183 n.2, 233 P.3d at 359 n.2 (citing *Smith v. Timm*, 96 Nev. 197, 201–02, 606 P.2d 530, 532 (1980)). “[A respondent] who fails to include and properly argue a contention in the [respondent’s] brief takes the risk that the court will view the contention as forfeited.” *Id.* (quoting 16AA C. Wright, A. Miller, E. Cooper & C. Struve, *Federal Practice and Procedure* § 3974.2, at 274 (4th ed. 2008)).

Badger’s Response announces that it addresses only one of several issues Pacific Western Bank raised on appeal, because in Badger’s erroneous judgment, the other issues were not properly raised. For the reasons addressed above, Badger’s assessment is incorrect. His choice not to respond should be construed as a confession of error. Moreover, Badger’s purported reservation, stating that his

refusal to respond to these issues should not be considered a concession is inadequate. *See* Resp. at 5, n.20. His mere assertion that he does not intend to concede these issues is inadequate as a matter of law under *Polk* and *Smith*. *Polk*, 126 Nev. at 183 n.2, 233 P.3d at 359 n.2; *Smith*, 96 Nev. at 201–02, 606 P.2d at 532). A placeholder-style objection, unsupported by law or analysis is ineffective.

Because Badger knowingly failed to respond to at least three substantial issues Pacific Western Bank raised in its Petition, this Court should find that he has confessed error as to those issues.

II. Badger’s Contention that the 529 Accounts Are “Physically Located” in New Mexico, and Therefore Beyond the Reach of Nevada Courts Is in Error.

A. Badger Failed to Refute Pacific Western Bank’s Position that It Properly Garnished Accounts by Executing Against Wells Fargo Advisors, a Broker Doing Business in Nevada.

All of the available case law, along with the Restatement, support the position Pacific Western Bank articulated in the Petition: like mutual funds, a judgment creditor may execute against any funds held in securities or 529 Accounts, even if governed by laws from another state, via a broker that *does business in* the state where the judgment is domesticated. *See Country Bank v. Broderick*, 120 A.D. 3d 463, 464-65 (N.Y. App. Div. 2014); *Hicks v. Midwest Transit, Inc.*, 2006 WL 644814, at *7 (S.D. Ill. Mar. 9, 2006). The law is clear that a court need not have personal jurisdiction over the actual account; jurisdiction

over the person holding the funds, whether an individual, broker, or bank, is sufficient. *In re Marriage of Kosmond*, N.E.2d 596 (Ill. App. Ct. 2005).

The Petition also explained in detail that this is a proceeding to garnish a debt, which is treated differently from proceedings to garnish chattels and other personal property: garnishment of a debt only requires jurisdiction over the garnishee and the situs of the thing being garnished is not relevant.

Section 68 of the *Restatement (Second) of Conflict of Laws* provides:

A state has power to exercise judicial jurisdiction to apply to the satisfaction of a claim an obligation owed to the person against whom the claim is asserted if the obligor is subject to the judicial jurisdiction of the state and the requirements of § 66(1)³ have been satisfied.

Restatement (Second) of Conflict of Laws, § 68.

Stunningly, Badger's Response offers no contrary position. It offers no affirmative law in support of an alternative. Indeed, it does not even argue that the law or analysis Pacific Western Bank provides is incorrect. Rather, Badger argues

³ Section 66(1) provides:

A state has power to exercise judicial jurisdiction to seize a tangible thing that is situated in the state, by attachment, sequestration, or similar procedure, in an action concerning a claim against the owner of the thing if:

- (a) The court could properly exercise jurisdiction to adjudicate the claim under the rules stated in §§ 27- 65; or
- (b) The action is to enforce a judgment against the owner of the thing; or
- (c) The action is properly in aid of other proceedings concerning the claim; or
- (d) The exercise of such jurisdiction is otherwise reasonable.

Restatement (Second) of Conflict of Laws § 66 (1971) (1988 Revision).

that some of the authority cited in the Petition is from other jurisdictions (which it is) and that WFA is not a bank (which is irrelevant). That is all.

Pacific Western Bank cited to and otherwise relied on the available authority on this issue, relying on Nevada law when available. Badger's complaint that Pacific Western Bank cites law from outside Nevada rings hollow, considering that he provided *no* applicable law on the issue, from Nevada or elsewhere. Badger's Response is empty – complaining of the origin of Pacific Western Bank's authority, without providing a shred himself.

Badger does not offer a scintilla of legal analysis contrary to that Pacific Western Bank offers in its Petition. Indeed, the Petition contains at least six pages of analysis explaining execution against monetary accounts across jurisdictions. Badger does not contradict the application of the Restatement, or call into question the analysis, except to repeat that the 529 Accounts are maintained in New Mexico.

Badger's "argument," however, simply begs the question. The actual location of the Accounts is irrelevant under the exhaustive analysis in the Petition. Rather, the relevant inquiry is whether the broker or bank maintaining the Accounts is subject to service in the county where the writ was served. In other words, jurisdiction over the broker means jurisdiction over the Accounts. Badger only complains that the Petition necessarily cites authority from outside the jurisdiction, yet offers no alternative analysis or Nevada authority. Badger fails to

identify any error in the Petition's analysis. Badger fails to offer any reason why the Restatement does not govern under these circumstances. Badger fails to explain why the "location" of intangible property under these circumstances is determinative.

Likewise, Badger's fixation on the apparent fact that WFA is not a bank is unremarkable, and, in fact, immaterial. Badger repeatedly asserts, often impermissibly citing evidence outside the record, that "WFA is not a bank." Yet, Pacific Western Bank never asserted that WFA is a bank, nor does it matter. Indeed, the Restatement does not mention the word "bank" in this section. Rather, as the Petition explains, the law is clear that a court need not have personal jurisdiction over an actual account; jurisdiction over the person owing payment to the judgment debtor is sufficient, regardless of whether it is a person, bank, broker, or other entity. Badger freely admits that WFA is a broker. Opp'n at 6. Indeed, the cases Pacific Western Bank relied upon apply to all types of financial institutions, including to 529 Accounts. *See, e.g., Ellsworth Land and Livestock, Inc. v. Bush*, 233 P.3d 655 (Ariz. Ct. App. 2010) (garnishing annuity payments issued by an insurance and wealth management company); *Country Bank v. Broderick*, 120 A.D. 3d 463, 464-65 (N.Y. App. Div. 2014) (holding a creditor possessing Connecticut judgment, which was domesticated in New York, may

execute against 529 accounts that were established under New Hampshire law if the *broker* does business in New York).

Thus, Badger's insistence that WFA is not technically a bank is irrelevant to the question at issue. No case law, nor the Restatement, limit their analysis or application to banks. Because WFA is a broker within the Nevada courts' jurisdiction, the district court has jurisdiction over the 529 Accounts.

Badger offers no reason why this Court should not issue the writ.

CONCLUSION

This Court should issue the writ to enable Pacific Western Bank to recover against Badger's 529 Accounts – either directly, or by ordering Badger to turn over the funds.

Dated: January 12, 2016

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the Reply to Response to 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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: January 12, 2016

SNELL & WILMER L.L.P.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date January 12, 2016, I caused to be served a true and correct copy of the foregoing **REPLY TO RESPONSE TO PETITION FOR WRIT OF MANDAMUS** by the method indicated:

- ☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document.
- ☒ **BY U.S. MAIL:** by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

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- ☐ **BY PERSONAL DELIVERY:** by causing personal delivery by _____, a messenger service with which this firm maintains an account, of the document listed above to the person(s) at the address(es) set forth below.

- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court pursuant to EDCR 8.05(a) and 8.05(f) to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail.

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