

BEFORE THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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THE COMMISSION ON ETHICS)
OF THE STATE OF NEVADA,)

Appellant,)

vs.)

IRA HANSEN, IN HIS OFFICIAL)
CAPACITY AS NEVADA STATE)
ASSEMBLYMAN FOR ASSEMBLY)
DISTRICT 32; AND JIM WHEELER,)
IN HIS OFFICIAL CAPACITY AS)
ASSEMBLYMAN FOR ASSEMBLY)
DISTRICT 39,)

Respondents.)

Case No. 69100

NEVADA STATE CONTRACTORS BOARD AMICUS CURIAE BRIEF
IN SUPPORT OF PETITION FOR REHEARING

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I. POINTS AND AUTHORITIES

A. STANDING AS AMICUS CURIAE

NRAP 29(a) provides: “The United States, the State of Nevada, an officer or agency of either, a political subdivision thereof, or a state, territory or commonwealth may file an amicus curiae brief without the consent of the parties or leave of court.” The Nevada State Contractors Board (the Board) is an agency of the State of Nevada, created and authorized by NRS chapter 624. The Board, therefore, may file and participate in this matter as amicus curiae without consent of the parties or leave of this Court.

B. STANDARD OF REVIEW ON PETITION FOR REHEARING

NRAP 40(c)(2)(B) allows this Court to consider rehearing a matter “When the court has overlooked, *misapplied or failed to consider a statute, procedural rule*, regulation or decision *directly controlling a dispositive issue in the case*.” (Emphasis supplied.) “Under our long-established practice, rehearings are not granted to review matters that are of no *practical consequence*. Rather, a petition for rehearing will be entertained only when the court has overlooked or misapprehended some material matter, *or when otherwise necessary to promote substantial justice*.” (Emphasis supplied.) *In re Estate of Hermann*, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984).

Reconsideration is appropriate “when the case implicates important precedential, ***public policy***, or constitutional issues.” (Emphasis supplied.) *Huckabay Prop. v. NC Auto Parts, LLC*, 130 Nev. ____, at ____, 322 P.3d 429, 432 (2014).

C. ARGUMENT

The Board urges this Court to rehear and reconsider its majority opinion in this matter for two reasons: (1) the majority opinion misapplied or failed to consider controlling Rules of Appellate Procedure and provisions of the Nevada Open Meeting Law; and (2) the majority opinion violates public policy that favors the making of court rules through amendments to the NRAP and the making of laws through legislative action, and in so doing, has raised considerable and far-reaching practical consequences and concerns.

1. The Majority Opinion Misapplied or Failed to Consider the Controlling Law of the Case

The majority opinion misapplies or failed to consider the clear language and import of the Court’s own NRAP 3, 3A, and 4 and the Nevada Open Meeting Law (NRS chapter 241). The practical consequence and effect of the majority opinion is the creation of a new and uncodified condition precedent to the perfection of a notice of appeal by a public agency. This misapplies or fails to acknowledge the present state of the law. In particular, NRAP 3, 3A,

and 4 set out in detail this Court's rules regarding what, where, when, and how a civil appeal may be pursued. Nowhere in NRAP 3, 3A, or 4 is an appellant's counsel required to prove or certify to this Court that the appeal was authorized by the client.¹ Nowhere in all the minutiae of the Nevada Open Meeting Law is there a provision requiring that a public agency must publicly hear and determine any particular legal option of the public agency, such as the filing of a notice of appeal, as a condition precedent for the validity of the public agency's taking such legal action.

The *Huckabay Prop. v. NC Auto Parts, LLC* is instructive because it was written by Justice Hardesty – also the author of the instant majority opinion – and it stands for the proposition that a client's potentially meritorious appeal may be dismissed without reaching the merits of the appeal where the appellant's counsel failed to comply with the NRAP. In reaching this conclusion and while acknowledging the harm such a holding would have on the client, this Court held that agency is implied from the actions of the appellant's counsel and under the principles of agency, the client is bound by

¹ Interestingly, the Court has created, in NRAP 3D, a special set of appellate rules applicable solely to proceedings of the Nevada Judicial Discipline Commission, an organization that for judges functions similarly to how the Appellant functions for state officials and employees.

the acts of its counsel. *Huckabay Prop. v. NC Auto Parts, LLC*, 130 Nev. ____, at ____, 322 P.3d 429, 437 (2014).

The instant case is the exact opposite of *Huckabay* because in the instant case Appellant's counsel faithfully discharged her obligations under the NRAP to timely perfect the appeal on behalf of her client. Yet the appeal was dismissed without consideration of the merits despite the majority's identifying any portion of the NRAP with which the appellant's counsel did not comply. In so holding, the majority did not allow the agency of the Appellant's counsel to bind her client. The instant case is novel in dismissing an otherwise perfected and valid appeal where no violation of this Court's rules was found.

2. The Majority Opinion Is Against Sound Public Policy

It is axiomatic that legislatures make law and courts apply it. This Court, though, does possess the inherent power to administer its affairs, including the power of rule-making. *Goldberg v. Eighth Jud'l Dist. Ct.*, 93 Nev. 614, 615-616, 572 P.2d 521, 522 (1977). In the instant matter, neither this Court's NRAP nor NRS chapter 241 establish that the Appellant was required to establish *as a condition precedent* that the Appellant publicly heard and determined to pursue the instant appeal. No such requirement is contained in NRAP 3, 3A, or 4, even though the Court amended NRAP 3, 3A, and 4 as recently as

January or August, 2015. No such requirement is contained in NRS chapter 241, even though the Legislature of which Mr. Hansen and Mr. Wheeler are members just recently heard bills related to NRS chapter 241.

It is ironic that the parties arguing for the judicial creation of nonexistent conditions in NRS chapter 241 are themselves legislators who might normally be expected to argue on behalf of the Legislature's exclusive power to make Nevada's laws. It also is troubling that this Court has chosen to add a condition precedent to the NRAP through fiat rather than through its rule-making process. Had amendments been pursued through the Court's or the Legislature's usual and ordinary processes, the public, attorneys, and affected public agencies could have participated in the crafting of any such new rules so that the particulars of such rules would be workable and reflect sound public policy. The instant majority opinion bypassed both potential avenues to create the condition precedent that is the end result of the majority opinion, thus resulting in unworkable and untenable public policy. Rehearing and reconsideration is, therefore, appropriate, as the only means to correct the majority opinion's usurpation of the usual mechanisms for the creation of such policy that would and must be worked only through amendment to the NRAP or NRS chapter 241.

II. CONCLUSION

The Board supports the intent of the Nevada Open Meeting Law and, to the best of its ability, scrupulously complies with it. The Board is, unfortunately, sometimes a party to civil litigation, and as such, supports the necessary work performed by this Court in such civil litigation. Rehearing and reconsideration of this matter is necessary because no provision in the NRAP or NRS chapter 241 support or compel the outcome of the majority opinion in the instant matter. The Board would gladly participate in any open, collaborative proceeding, either conducted by this Court to amend NRAP 3, 3A, or 4 or by the Legislature to amend NRS chapter 241, to explore and craft the contours of a condition precedent to Board legal action. The instant majority opinion was the wrong vehicle by which to effectuate such a drastic, radical, and far-reaching new public policy. The matter should be reheard, reconsidered, and ultimately reversed.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Respondent's Notice of Change of Address 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:

[X] It has been prepared in a proportionally spaced typeface using Microsoft Word for Macintosh 2008, Version 12.3.6 in Goudy Old Style 14 Point type.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it is:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 1,415 words.

3. Finally, I hereby certify that I have read this brief, 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 this 24th day of August, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, the 24th day of August, 2017, I submitted the foregoing Nevada State Contractor Board's Amicus Curiae Brief in Support of Petition for Rehearing via the Court's eFlex electronic filing system. According to the electronic service list, notification will be served upon the following:

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