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6 **SUPREME COURT OF THE STATE OF NEVADA**

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8 **The Board of Review for the Nevada**
9 **Department of Employment,**
10 **Training and Rehabilitation,**
11 **Employment Security Division; and**
12 **the Administrator of the Nevada**
13 **Department of Employment,**
14 **Training and Rehabilitation,**
15 **Employment Security Division,**

16 **Petitioners,**

17 **vs.**

18 **The Second Judicial District Court**
19 **of the State of Nevada, in and for the**
20 **County of Washoe, and the**
21 **Honorable Scott Freeman, District**
22 **Judge,**

23 **Respondent.**

24 **and,**

25 **McDonald's of Keystone,**

Real Party in Interest.

Supreme Court No. 69499

District Court No. CV15-00671

21 **McDONALD'S OF KEYSTONE'S POINTS AND AUTHORITIES IN**
22 **SUPPORT OF THE MOTION TO STRIKE PETITIONER'S**
23 **APPLICATION TO THE SUPREME COURT FOR A STAY**
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1 **I. Introduction**

2 The petitioner, the Employment Security Department of the State of Nevada
3 (ESD), has filed with this Court a petition for a writ of mandamus or prohibition,
4 coupled with an application for a stay of the proceedings before the District Court.
5 The application for a stay is contained in the conclusion to the petition. *See*,
6 Petition, pp. 9;18-19, 10;1-15. Nothing in the application for a stay indicates that
7 ESD asked the District Court, first, for a stay of the proceedings before it. As
8 explained below, the application for a stay to this Court is premature without an
9 indication that the ESD had first asked the District Court and was denied such
10 relief or that there was some showing that an application to the District Court for
11 the stay would have been impracticable.

12 **II. Because the ESD's Application for a Stay Fails to Indicate That It Had**
13 **First Requested a Stay From the District Court Which Was Denied Or**
14 **That It Would Have Been Impracticable For The ESD To Seek a Stay**
From The District Court, Initially, The Application For A Stay Made
To This Court Is Premature And Should, Therefore, Be Denied

15 The ESD has asked this Court to stay the proceedings on a petition for
16 judicial review before the District Court below, pending this Court's disposition of
17 ESD's petition for a writ of mandamus or prohibition. From a review of the ESD's
18 application to the Court for a stay made as a part of ESD's request for the
19 extraordinary relief of mandamus or prohibition, it is evident that no such request
20 for a stay was first made to the District Court, below. No showing was made,
21 either, that the application for a stay to the District Court would have been
22 impracticable. The application for a stay, thus, runs afoul of Rule 8, NRAP.

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1 Rule 8, NRAP, plainly states:

2 **Rule 8. STAY OR INJUNCTION PENDING APPEAL OR**
3 **RESOLUTION OF ORIGINAL WRIT PROCEEDINGS**

4 **(a) Motion for Stay.**

5 **(1) Initial Motion in the District Court.** A party must ordinarily
6 move first in the district court for the following relief:

7 (A) a stay of the judgment or order of, or proceedings
8 in, a district court pending appeal or resolution of
9 a petition to the Supreme Court for an
10 extraordinary writ... Rule 8, NRAP.

11 Rule 8, NRAP, therefore, describes precisely the situation we have, here,
12 before the Court. ESD has filed with this Court, an application for extraordinary
13 relief, applications for mandamus and prohibition. Thus, based upon the plain
14 wording of Rule 8, NRAP, which should be applied to an unambiguous command
15 such as that set forth in the Rule, *see, State Indus. Ins. Sys. v. Bokelman*, 113 Nev.
16 1116, 1122, 946 P.2d 179 (1997); *Maxwell v. SIIS*, 109 Nev. 327, 330, 849 P.2d
17 267 (1993), the petitioner should have first approached the District Court for
18 leave to stay the proceedings before it. The word, "ordinarily" could be
19 interpreted no other way. Rule 8(1)(A), NRAP, requires the petitioner to first
20 petition, then, the District Court if it wants the proceedings before it to be stayed
21 pending disposition by this Court of ESD's petition for a writ of mandamus or
22 prohibition.

23 There is a qualification, however, to the clear requirement of Rule
24 8(a)(1)(A), NRAP. Rule 8(a)(2), NRAP, allows a petitioner to proceed with an
25 application for a stay when the applicant can "(A)(i)...show that moving first in the
district court would be impracticable; or (ii) state that, a motion having been made,
the district court denied the motion or failed to afford the relief requested...." Rule

1 8(a)(2)(A)(i) and (ii),NRAP. If either of these subsections of Rule 8(a)(2), NRAP,
2 are met, the ESD would be able to proceed directly to this Court with its
3 application for a stay.

4 Reading, however, Rule 8(a)(1) and (2),NRAP, in concert, however, it is
5 evident that an application for a stay must be made in the first instance with the
6 District Court, if the clause "ordinarily move in the first instance" is to have any
7 meaning, absent a showing that the application to the District Court would have
8 been impracticable. The ESD, here, has made no attempt to show that it would
9 have been impracticable to have asked for a stay in the first instance from the
10 District Court. Further, there is no showing that the ESD asked the District Court,
11 respondent herein, for a stay and was denied.

12 The ESD has, thus, failed to satisfy the requirements of Rule 8, NRAP, for
13 pursuing an application for a stay with this Court. The application for a stay is
14 premature, since ESD failed to give the District Court the first opportunity to
15 consider the application for a stay as required by Rule 8, NRAP, or failed to make
16 a showing it should not have been required to ask the District Court for such relief
17 on impracticality grounds. The application of ESD for a stay submitted to this
18 Court should be denied as the elements for asking this Court to stay the
19 proceedings in the first place, bypassing the District Court, have not been met.

20 CONCLUSION

21 Having made no showing in its application for a stay that the District Court
22 had denied an application, in the first instance, for a stay of the proceedings before
23 the District Court, or that it would have been impracticable to seek a stay from the
24 District Court in the first place, the ESD's application for a stay to this Court is
25 premature. It should therefore be denied.

1 The undersigned does hereby affirm that the preceding document does not
2 contain the social security number of any person.

3 Dated this 11th day of January, 2016.

4
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6 By: 

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10 *Attorneys for McDonald's of Keystone*
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1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of The Law Offices of Charles R. Zeh, Esq.,
3 and that on this date I served the attached *McDonald's of Keystone's Points and*
4 *Authorities in Support of the Motion to Strike Petitioner's Application to the*
5 *Supreme Court for a Stay*, on those parties identified below by placing an original
6 or true copy thereof in a sealed envelope, postage prepaid, placed for collection
7 and mailing in the United States Mail, at Reno, Nevada:

8 Joseph L. Ward, Jr., Esq.
9 1340 South Curry Street
10 Carson City, NV 89703

11 Honorable Scott Freeman
12 Department 9
13 Second Judicial District Court
14 75 Court Street
15 Reno, NV 89501

16 Dated this 11th day of January, 2016.

17 
18 Karen Kennedy

19 S:\Clients\McDonalds\Gerry Jessica\Supreme Court\Motion to Strike 001 R2.wpd
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Electronically Filed
Jan 12 2016 08:34 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

SUPREME COURT OF THE STATE OF NEVADA

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**The Board of Review for the Nevada
Department of Employment,
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**McDONALD'S OF KEYSTONE'S MOTION TO STRIKE PETITIONER'S
APPLICATION TO THE SUPREME COURT FOR A STAY**

1 COMES NOW, McDonald's of Keystone, the real party in interest, and
2 moves this Court pursuant to Rule 8, NRAP, for an order striking the petitioners'
3 application for a stay. The application for a stay fails to indicate any attempt to
4 approach the District Court, the respondent herein, in the first instance for a stay
5 of the proceedings before the District Court and, therefore, pursuant to Rule 8,
6 NRAP, the application for a stay is premature and should be denied. This motion
7 is based upon the accompanying points and authorities and upon all other
8 documents and records on file herein.

9 The undersigned does hereby affirm that the preceding document does not
10 contain the social security number of any person.

11 Dated this 11th day of January, 2016.

12 By: 

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