IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL SARGEANT, Individually and on behalf of other similarly situated, M.D., Appellant, v. HENDERSON TAXI, Respondent.	Supreme Court Case No. 69773 District Case No. A-15-714136-C

Electronically Filed
Mar 28 2017 10:14 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Appeal from Eighth Judicial District Court, State of Nevada,
County of Clark,

The Honorable Michael P. Villani, District Judge

RESPONDENT'S ANSWER TO "MOTION TO REHEAR AND REVISE THE COURT'S ORDER OF NOVEMBER 3, 2016"

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Docket 69773 Document 2017-10246

I. INTRODUCTION

Proposed Intervenors Michael Zeccarias and Tracy Cheatham ("Proposed Intervenors") never moved to intervene in the district court. They instead belatedly attempted to intervene in this Court by filing a Petition for Extraordinary Writ Granting Intervention ("Petition for Intervention"). But an unbroken line of authorities establish that intervention may not be sought for the first time in this Court. Instead, intervention must first be timely sought below. Indeed, this Court is ill-equipped to entertain a request for intervention without a developed record from the district court.

In accord with these principles, this Court rightly denied Proposed Intervenors'[1] thirteenth-hour maneuver to bypass the district court. Not only is the Proposed Intervenors' motion to "Rehear and Revise the Court's Order of November 3, 2016" ("Motion to Rehear") untimely, but they concede, without explanation, that they did not seek to intervene with the district court. Even if this Court erred in denying the Petition for Intervention on the ground that such relief should first be sought in the district court, intervention should be disallowed as it would be unfairly prejudicial at this stage. Additionally, the Proposed Intervenors failed to show the substantive requirements for intervention. For the reasons explained herein, Respondent Henderson Taxi ("Henderson Taxi") respectfully submits that this Court should deny the Motion to Rehear.

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[1]In a bizarre twist, Appellant Michael Sargeant ("Appellant") states that it is he—not Proposed Intervenors—who seeks rehearing. Appellant lacks standing to do so.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

To facilitate this Court's review, Henderson Taxi will briefly set forth a timeline of the key procedural events in this matter.

- **February 19, 2015.** Appellant files Complaint. 1 AA 1-7.
- **March 27, 2015.** Appellant seeks class certification, 1 AA 16-43, and Proposed Intervenor Zecarrias files supporting declaration. *Id.* at 42-43, 87-90.
- **October 8, 2015.** The District Court denies class certification, determining that Appellant was not an adequate class representative. 1 AA 318-22.
- **January 28, 2016.** The District Court grants Henderson Taxi summary judgment. 1 AA 413-18.
- **February 17, 2016.** Appellant files his notice of appeal.
- **July 8, 2016.** The District Court grants Henderson Taxi's Motion for Attorneys' Fees. 1 AA 419-426.
- **July 28, 2016.** Appellant files his Opening Brief, seeking, among other things, reversal and reassignment of this case upon remittitur, despite admitting he was "unable to locate" any Nevada authority supporting his request. *See* AOB at 54.
- **September 16, 2016.** Appellant files motion to stay enforcement of the District Court's Order granting Henderson Taxi's Motion for Attorney's Fees, arguing a stay is necessary to preserve his appellate rights.
- **September 28, 2016.** Proposed Intervenors submit a Petition for Intervention, ***for the first time***, directly to this Court, arguing that intervention is necessary to preserve their rights because enforcement of Henderson Taxi's attorney's fees award may prevent Appellant from maintaining his appeal.
- **October 10, 2016.** Appellant files a motion to disqualify District Judge Michael Villani, arguing he has "irrational

bias and prejudice against plaintiff." 1 Respondent's Appendix Answer to Petition for Rehearing ("RAA") 1-242.

- **November 3, 2016.** This Court denies the Petition for Intervention.
- **November 22, 2016.** Proposed Intervenors file their Motion to Rehear with this Court.
- **November 28, 2016.** Chief Judge David Barker denies Appellant's motion to disqualify District Judge Villani, 1 RAA 278-81, finding the motion "lacks merit" and is without "legal basis." *Id.* at 279-80.
- **December 22, 2016.** This Court grants Appellant's Motion to Stay enforcement of the District Court's Order awarding Henderson Taxi Attorney's Fees.

As this timeline shows, although the Proposed Intervenors participated in the district court proceedings, and had ample opportunity to seek to intervene, they chose not do so as part of their efforts to bypass District Judge Villani. As can also be seen from this timeline, the stay entered by this Court has rendered moot the Proposed Intervenors' purported justification for seeking to intervene.

III. REHEARING STANDARD

Rehearing is only appropriate "[w]hen the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or . . . [w]hen the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c)(2).

IV. REHEARING IS NOT WARRANTED

A. The Motion to Rehear was not Timely Filed

Rehearing must be sought within 18 days of the filing of the decision being challenged. *See* NRAP 40(a)(1). Since this Court filed its Order Denying the Petition for Intervention on November 3, 2016, the

Motion to Rehear was due on November 21, 2016. Thus, the November 22, 2016 Motion to Rehear is untimely.

B. The Motion to Rehear Improperly Reargues Points Presented in the Petition for Intervention

The Motion to Rehear also fails as it reargues the Petition for Intervention. Indeed, Proposed Intervenors admit they are rearguing. *See, e.g.*, Motion to Rehear at 1-2 ("As held by the authority cited in their Petition [for Intervention] . . . ."). The Motion to Rehear should be denied on this ground alone. *See* NRAP 40(c)(1).

C. This Court Correctly Denied Intervention

1. Intervention must initially be sought in the district court

Nevada law has been settled for seventy years, since *Stephens v. First National Bank of Nevada*, that absent extraordinary circumstances, intervention may not be sought for the first time in an existing appeal in this Court.[2] 64 Nev. 292, 303-37, 182 P.2d 146, 151-53 (1947). Intervention instead must first be sought in the district court. *Id.* Thus, in *Stephens*, this Court rejected a request for intervention brought directly to this Court. *Id.* As this Court reasoned, it lacked jurisdiction to even entertain the request:

> This court has original jurisdiction only as to the issuance of writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus; also all writs necessary or proper to the complete exercise of its appellate jurisdiction. . . .
>
> Referring again to our intervention statute, *supra*, same makes provision for intervention "before the trial." ***This necessarily means that***

[2]*Stephens* and its progeny are directly controlling on the issues presented here. Proposed Intervenors' failure to even mention these authorities is indefensible.

> ***such intervention must be had in the district court***, in any case of the same class as the instant case, which is a case involving more than $ 300. ***The statute makes no provision for intervention in the supreme court***, in any case, at any stage of the proceedings, or at all.

Id. at 304, 182 P.2d at 151 (emphases added).

The *Stephens* court further explained that "the great weight of authority is opposed to intervention after a case has reached an appellate court." *Id.* at 307-08, 182 P.2d at 153.

This Court built upon this blueprint in *Lopez v. Merit Insurance Company*, observing that "[t]he plain language of NRS 12.130 clearly indicates that intervention is appropriate ***only during ongoing litigation***." 109 Nev. 553, 556, 853 P.2d 1266, 1267 (emphasis added). Thus, Nevada law "does not permit intervention subsequent to the entry of the final judgment." *Id.* at 556, 853 P.2d at 1268. And, it is well-settled that a district court order granting summary judgment is a final judgment. *See Lee v. GNLV Corp.*, 116 Nev. 424, 427–28, 996 P.2d 416, 418 (2000). Therefore, intervention must be sought early in proceedings and, in all cases, no later than entry of summary judgment.

The Nevada Rules of Civil Procedure twice provide that intervention is only permitted "[u]pon timely application." *See* NRCP 24(a)-(b). And, the rules contemplate that such an application must be filed in the district court, stating, a person seeking to intervene "shall serve a motion to intervene" and "shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." *See* NRCP 24(c).[3] Yet, the Proposed

[3]In notable contrast, the Nevada Rules of Appellate Procedure contain no provisions providing for intervention.

Intervenors failed to file an application for intervention in the district court at all, let alone a timely one. Although Proposed Intervenors complain that the district court is now without jurisdiction grant intervention given that it has entered final judgment, this "problem" is of Proposed Intervenors' own making—not this Court's.

2. *The Nevada cases cited by the Proposed Intervenors do not help their cause*

A careful reading of Proposed Intervenors' cases underscores the critical procedural distinction they overlook. Their cases establish only that ***if*** a timely-filed application for intervention ***brought first in the district court*** is denied, then the appropriate procedural mechanism to challenge the lower court's order is by way of an a petition for an extraordinary writ. This Court has never embraced the novel proposition that a would-be intervenor can bypass the district court altogether and seek an extraordinary writ for intervention directly in this Court, in the first instance, in an existing appeal.

Olsen v. Olsen is not to the contrary. 109 Nev. 838, 858 P.2d 385 (1993). There, a trust sought, unsuccessfully, to intervene in the district court. *Id.* at 839, 858 at 385. This Court dismissed the trust's appeal from the district court's denial of the request for intervention, observing that because the trust had not been permitted to intervene, it was not an "aggrieved party," as required to maintain an appeal. *Id.* at 840, 858 P.2d at 386. The Court explained that "[t]he appropriate remedy ***for challenging an order*** by a non-party is by way of a petition for an extraordinary writ." *Id.* (emphasis added).

Similarly, *Aetna Life & Casualty*, 107 Nev. 362, 363, 812 P.2d 350, 350-51 (1991), and *Albany v. Arcata Associates*, 106 Nev. 688, 690, 799

P.2d 566, 567 (1990), simply reiterated the unremarkable proposition that a non-party cannot appeal from orders of the district court, such as an order denying intervention. "***Review of such orders***," this Court explained, "may be had in this court only by a petition for extraordinary relief." *Aetna*, 107 Nev. at 363, 812 P.2d at 351 (emphasis added). In sum, this Court has never held that a proposed intervenor can end-run the district court and seek intervention directly in this Court.[4]

D. Any Supposed Error was Harmless

Even if this Court erred in denying the Petition for Intervention on the ground that such relief should first be sought below, rehearing is unwarranted because this Court reached the right result.

1. Intervention at this stage would be unfairly prejudicial

Any supposed error by this Court was plainly harmless because intervention at this stage would be unfairly prejudicial. "Determining whether an application is timely under NRCP 24 involves examining the extent of prejudice to the rights of existing parties resulting from the delay and then weighing that prejudice against any prejudice to the

[4]Although Proposed Intervenors' cited federal intervention jurisprudence in their Petition for Intervention, *see* Pet. for Interv. at 5-6, they have largely abandoned these authorities in their Motion to Rehear. Even if this Court examines federal caselaw, it will learn what is evident from Nevada law—all untimely applications for intervention are disfavored, and "[t]here is even more reason to deny an application to intervene made while an appeal is pending." *See* 7C Wright & Miller, Federal Practice and Procedure § 1916 (3d ed. 2017). As federal courts have held, "[a] court of appeals may permit intervention where none was sought in the district court only in an exceptional case for imperative reasons." *Landreth Timber Co. v. Landreth*, 731 F.3d 1348, 1353 (9th Cir. 1984) (reversed on other grounds in 471 U.S. 681)). Here, the entire basis for Proposed Intervenors' Petition for Intervention—their speculation that Appellant's rights might be jeopardized by Henderson Taxi's attorney's fees award—has been rendered moot by this Court's Order Granting Appellant's Motion to stay enforcement thereof. Thus, there is no justification, let alone an imperative one, for the Proposed Intervenors' request to intervene.

rights of the applicant if intervention is denied." *American Home*, 122 Nev. at 1244, 147 P.3d at 1130 (internal quotation omitted). In addition, "the timeliness of an application may depend on when the applicant learned of its need to intervene to protect its interests." *Id.*

It would be highly prejudicial to Henderson Taxi if intervention were permitted at this juncture. The deadline to join additional parties passed long ago. Extensive motions for certification and for summary judgment were briefed, and decided by the district court. Appellant's appeal of those orders has been fully briefed. Thus, allowing intervention at this stage would likely necessitate new discovery, new briefing on certification and summary judgment, and delay trial if this Court reverses and remands this case.

In contrast, any prejudice to Proposed Intervenors from denial of intervention is self-inflicted. Proposed Intervenors knew about this case, and their interest in it, from its inception. Proposed Intervenors actively participated in those proceedings by supporting Appellant's motion for certification. Yet, for nearly two years, they failed to intervene, even though they are represented by the same counsel as Appellant. And, Proposed Intervenors were free to file individual actions at any time to preserve their rights, but they did not.

Instead, Proposed Intervenors, and their counsel, made a strategic decision to hang their fortunes on Appellant's case in the hopes of benefiting from his filing date (and thereby obviating statute of limitations concerns). Thus, rather than intervening, and rather than bringing their own actions, Proposed Intervenors made a tactical decision to sit on their rights. Any possible harm to their interests is therefore of their own making. Proposed Intervenors cannot now

change course simply because things appear to be going poorly for Appellant. Given all this, Proposed Intervenors' concern about the statute of limitations rings hollow, *see* Pet. for Interv. at 6-8, and does not justify their belated, prejudicial, and procedurally-improper request for intervention.

2. *Proposed Intervenors failed to meet their burden to show that intervention is appropriate*

Further, Proposed Intervenors have failed to meet their burden to show that intervention is appropriate. "Petitioners have the burden of demonstrating that writ relief is warranted." *Hairr*, 132 Nev. Adv. Op. 16, at 4. The longer a would-be intervenor waits, "the stronger the showing" required. *See American Home*, 122 Nev. at 1242, 147 P.2d at 1129.

Here, although Proposed Intervenors waited to seek intervention until the waning moments of this case, they offer virtually nothing to meet the strong showing required. Proposed Intervenors do not even identify whether they are seeking intervention of right under NRCP 24(a), or permissive intervention under NRCP 24(b). Nor do Proposed Intervenors cogently articulate what interest they supposedly seek to protect through intervention. In light of the Court's Order staying enforcement of the District Court's Order granting Henderson Taxi's attorney's fees, the most the Proposed Intervenors can argue is that they might be harmed in the event that Appellant's appeal is denied. *See* Pet. for Reh'g. at 2; *see also American Home*, 122 Nev. at 1238-39, 147 P.3d at 1127 ("a general, indirect, contingent, or insubstantial interest is insufficient" to justify intervention of right).

Moreover, Proposed Intervenors do not explain why their interests

cannot be adequately represented by Appellant, especially given Proposed Intervenors' representation that their interests are "identical" and that they have the same counsel. *See* Pet. for Interv. at 10. Intervention of right is totally unwarranted in these circumstances. *See American Home*, 122 Nev. at 1238, 147 P.3d at 1126 (intervention by right is improper where the applicant's interests are adequately represented by an existing party). Nor do Proposed Intervenors explain why their interests cannot be protected by seeking to file an amicus brief. *See Hairr*, 132 Nev. Adv. Op. 16, at 11 (allowing a proposed intervenor to file an amicus brief is an adequate alternative to permissive intervention). In summary, Proposed Intervenors have not met their burden to demonstrate that an intervention is appropriate.

V. CONCLUSION

Based upon the foregoing, Henderson Taxi respectfully submits that this Court should deny the Motion to Rehear.

DATED: March 28, 2017.

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CERTIFICATE OF COMPLIANCE

I 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relief on is to be found. The Brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and the page limitation stated in NRAP 27(d)(2) because it does not exceed 10 pages.

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.

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AFFIRMATION

The undersigned does hereby affirm that the preceding document DOES NOT contain the Social Security Number of any person.

DATED: March 28, 2017.

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PROOF OF SERVICE

I, the undersigned, hereby certify that I electronically filed the forgoing **ANSWER TO "MOTION TO REHEAR AND REVISE THE COURT'S ORDER OF NOVEMBER 3, 2016"** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on March 28, 2017.

I further certify that all participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individuals through the Court's E-filing System:

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