CASE NO. 71472

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBAIRE PREVOST, Appellant

v.

STATE OF NEVADA DEPARTMENT OF ADMINISTRATION, et al.,
Respondent

APPEAL FROM THE
EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. The Appellant, ROBAIRE PREVOST (not a pseudonym) is a natural person and is the only person or entity that is an Appellant in this case;

2. The undersigned counsel of record for Mr. Prevost is the only attorney who has appeared on his behalf in this matter in this Court. The undersigned and Virginia Hunt, Esq. both appeared on behalf of Mr. Prevost before the District Court. Attorney Hunt appeared for Mr. Prevost in the administrative proceedings before the Appeals Officer.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 21st day of August 2017.

/s/ James P. Kemp

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I. THIS IS THE CASE THAT JUSTICE PICKERING HAS BEEN WAITING FOR.

Five Days after the Petitioner filed his Opening Brief, in *THE BOARD OF REVIEW v. THE SECOND JUDICIAL DISTRICT COURT*, 133 Nev. Adv. Op. 35 (June 22, 2017) (herein "*McDonald's* case") the Supreme Court of Nevada granted an extraordinary writ petition to direct the District Court to dismiss a petition for judicial review brought by McDonald's of Keystone in an unemployment matter for failure to name all parties under NRS 612.530(1).[1] McDonald's of Keystone had failed to personally name the unemployment claimant, Jessica Gerry, in the caption, or in the body of the petition for judicial review, although her full name and address were included within an attachment to the petition for judicial review. Crucially, Ms. Gerry was NEVER SERVED with the petition. The District Court ruled that NRS 612.530(1) did not jurisdictionally require the naming of all relevant parties and it permitted amendment of the petition. The Supreme Court disagreed and held that the requirement to name all parties in NRS 612.530(1) was jurisdictional and as the employer McDonald's of Keystone had not complied, the District Court was issued a writ of prohibition and compelled to dismiss the matter.

[1] It is important to remember that the *McDonald's* case was not decided under NRS 233B.130(2)(a) or the *Otto* case, although the issues are strikingly similar.

Although the *McDonald's* case did hold that the District Court lacked jurisdiction and the extraordinary writ petition was granted so that the matter would have to be dismissed by the District Court, Justice Pickering authored a concurring opinion that supports Mr. Prevost in the present case. Although it is somewhat lengthy, the pertinent parts of Justice Pickering's concurrence are important and are quoted here:

> I write separately only to note that the employer did not argue, and so we do not have occasion to decide, whether the failure to name a person who was a party to an agency proceeding in the caption of a petition for judicial review is jurisdictionally fatal. In that regard, I note that the rules of procedure for reviewing an administrative decision are the same as in civil cases, unless expressly provided otherwise or the civil rules conflict with the state's administrative procedure act. 2 Am. Jur. 2d. *Administrative Law* § 516 (2014); 73A C.J.S. *Public Administrative Law and Procedure* § 430 (2014); *see* NRCP 81(a). ***If the body of a civil complaint "correctly identifies the party being sued or if the proper person actually has been served," the defendant is adequately identified as a party to the litigation. 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1321, at 391-92 (3d ed. 2004);*** *see also* NRCP 10(c) ("Statements in a pleading may be adopted by reference in a different part of the same pleading. . . . A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."). ***It follows that a defendant not named in the caption of a petition for judicial review may still be a party to the action if named in the petition or its exhibits and properly served.***
>
> Many petitions for judicial review of adverse agency actions are filed by individuals who do not have a lawyer. ***I do not want to foreclose our consideration, in an appropriate case, of the holding in Green v. Iowa Department of Job Services, 299 N.W.2d 651, 654 (Iowa 1980),*** which allowed a petition for judicial review to proceed — even though the employee did not name the employer in the caption of the

> petition — where the employee timely served the employer and the petition incorporated and attached the agency decision, which did name the employer. *See Sink v. Am. Furniture Co.*, No. 1160-88-3, 1989 WL 641960, at *1-2 (Va. Ct. App. 1989) (concluding that a failure to name a respondent in the caption did not invalidate the petition because respondent was mentioned in body of the petition and the prayer for relief).

THE BOARD OF REVIEW v. THE SECOND JUDICIAL DISTRICT COURT, 133 Nev. Adv. Op. 35 at 7-8 (Pickering, J concurring) (June 22, 2017) (Emphasis added)

This is exactly the case that Justice Pickering has been waiting for to consider the issues that she identified in her concurrence in the *McDonald's* case. It must be noted that Justice Pickering did concur in the result in the *McDonald's* case, but her reasoning appears to be primarily because the employee, Ms. Gerry, was not named in the caption, not named in the body of the petition, and most importantly was NEVER SERVED with the petition. *Id*.

Here in Mr. Prevost's case it appears that Justice Pickering may support Mr. Prevost's position based on her citation to *Green v. Iowa Department of Job Services*, 299 N.W.2d 651, 654 (Iowa 1980) which held that there was no jurisdictional defect and a statute similar to NRS 233B.130(2)(a) was complied with where the necessary parties were named in the attached and incorporated administrative decision and they were all served. Mr. Prevost did incorporate the administrative decision in his petition, attached the administrative decision, and served CCMSI with a copy. Under the cases and other authorities cited by Justice

Pickering in her concurrence in the *McDonald's* case, Mr. Prevost did enough to adequately name CCMSI as a party to the judicial review case. Accordingly, any technical deficiency such as a failure to name CCMSI in the caption of the petition is not jurisdictionally fatal and amendment under NRCP Rule 15 should be permitted.

Respondent CCMSI argues, at pp. 6-7 and 10 of its Answering Brief, that only Chapter 233B applies to this case. Notwithstanding that such an argument is inconsistent with NRS 233B.039(3)(b) (special provisions of the NIIA control over Chapter 233B), and the fact that jurisdiction for judicial review of workers' compensation matters actually is conferred by NRS 616C.370 rendering the requirements of NRS 233B.130 merely procedural rather than jurisdictional (as argued more fully in the Appellant's Opening Brief), Justice Pickering's concurrence in the *McDonald's* case points out that the court rules also apply:

> I note that the rules of procedure for reviewing an administrative decision are the same as in civil cases, unless expressly provided otherwise or the civil rules conflict with the state's administrative procedure act. 2 Am. Jur. 2d. *Administrative Law* § 516 (2014); 73A C.J.S. *Public Administrative Law and Procedure* § 430 (2014); *see* NRCP 81(a).

THE BOARD OF REVIEW v. THE SECOND JUDICIAL DISTRICT COURT, 133 Nev. Adv. Op. 35 at 7-8 (Pickering, J concurring) (June 22, 2017) (Emphasis added)

Contrary to CCMSI's contention, where Chapter 233B is silent on an issue, the court's rules of civil procedure do apply. *Id.;* See NRCP Rule 81(a) There is

nothing in NRS 233B.130, or anywhere else in the Administrative Procedures Act, that expressly forbids the District Court from permitting amendment under NRCP Rule 15. In the absence of such an express prohibition in the statutes, the District Court should follow NRCP Rule 15(a)'s direction that amendment be freely permitted where the ends of justice are thereby served.

This Court should REVERSE the District Court's dismissal of Mr. Prevost's Petition for Judicial Review and remand the matter back to the District Court with direction to permit amendment under NRCP Rule 15 and for further proceedings on the merits of the case.

II. WHETHER OR NOT MR. PREVOST SERVED THE PETITION ON THE ATTORNEY GENERAL OR THE ADMINISTRATIVE HEAD OF THE DEPARTMENT OF ADMINISTRATION WAS NOT RAISED OR LITIGATED BELOW AND IS NOT AN ISSUE IN THIS CASE.

Respondent has added an issue and argument that was not raised in the District Court. NRS 233B.130(2)(c) was added to the statute in the 2015 legislative session by AB 53. The statute states as follows:

> 2. Petitions for judicial review must:
> …
> (c) Be served upon:
> (1) The Attorney General, or a person designated by the Attorney General, at the Office of the Attorney General in Carson City; and
> (2) The person serving in the office of administrative head of the named agency;…

Most importantly it should be noted that this issue was not part of the basis for the District Court's decision to dismiss Mr. Prevost's Petition for Judicial Review. The District Court only considered the applicability of *Washoe County v. Otto*, 128 Nev. Adv. Op. No. 40, 282 P.3d 719 (2012) and whether or not CCMSI was named as a party under NRS 233B.130(2)(a). The issue of service on the Attorney General or the administrative head of the Department of Administration was not raised or litigated below.

Notwithstanding the fact that it was not raised and litigated, even if it had this argument is not properly before this court. First, the statute does not make the Attorney General or the "person serving in the office of administrative head of the named agency" a ***party*** to the case. The statute provides no specific deadline by which service of the petition must be served on these two state officials. Presumably, the petition could be served at any time prior to a merits decision being rendered by the District Court. In other words, the District Court should ensure that the state officials designated in the statute have been served before it considers and decides the matter. On the other hand if the state officials are to be considered parties for the purposes of service, then the provisions of NRS 233B.130(5) apply:

> 5. The petition for judicial review and any cross-petitions for judicial review must be served upon the agency and every party within 45 days after the filing of the petition, unless, upon a showing of good cause, the district court extends the time for such service. …

The Department of Administration and all of the parties, including CCMSI were served within 45 days. At this point, undersigned counsel is unsure if the Petition for Judicial Review was served on the Attorney General and the administrative head of the Department of Administration. Attorney Virginia Hunt's estate would have to be consulted to see if there is a record of those entities having been served. However, that is expressly NOT an issue for this court at this time. If the Supreme Court of Nevada rules in favor of Mr. Prevost and sends this matter back to the District Court, then it will be a matter for consideration by the District Court, whether it can be proved that Ms. Hunt did serve the Attorney General and the administrative head of the Department of Administration, or if the District Court determines to extend the time to serve the state officials in accordance with NRS 233B.130(5). Presumably, if the District Court is required to permit amendment, then the state entities can be timely served with an amended petition.

Accordingly, the issue of service on the state officials required under NRS 233B.130(2)(c) is irrelevant in this appellate matter. To the extent that a subsequent motion were to be brought in the District Court seeking dismissal for an alleged failure to serve the state officials, then Mr. Prevost can address the merits of that to the District Court and, if necessary, apply for an extension of time to serve the state officials. The Supreme Court of Nevada has no occasion to

decide this matter when the issue of extension of time to serve is expressly delegated to the District Court in the statute.

CONCLUSION

In accordance with the above, the Appeals Officer's Decision and Order in this matter rests on an error of law. The dismissal of Mr. Prevost's Petition for Judicial Review should be reversed and the case remanded with directions to permit an appropriate amendment so that the case may proceed on the merits.

To the extent that the Respondent argues that the Petition was not served on the administrative head of the agency or the Attorney General under NRS 233B.130(2)(c), if that is factually true: 1) those persons are not parties to the case so there is no time limit in the statute to effect such service; or, 2) it is up to the District Court (not this Court), under NRS 233B.130(5) to determine if it will allow additional time to effect such service on the Attorney General and the administrative head of the agency. Moreover permitting amendment will reset the clock and provide a new 45 day period in which to serve the amended petition on the parties, the administrative head of the Department of Administration, and the Attorney General.

RESPCTFULLY SUBMITTED this 21st day of August 2017.

/s/ James P. Kemp
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ATTORNEY'S CERTIFICATION IN COMPLIANCE WITH RULE 28.2 OF THE NEVADA RULES OF APPELLATE PROCEDURE

James P. Kemp, Attorney for Appellant, by signing below herby certifies in compliance with Rule 28.2 of the Nevada Rules of Appellate Procedure that:

1. I hereby certify that this brief 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:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman size 14 font;

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

Proportionately spaced, has a typeface of 14 points or more, and contains 6,019 words;

3. Finally, I hereby certify that I have read this appellate 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 21st day of August 2017

/s/ James P. Kemp

JAMES P. KEMP, ESQ., Bar No.6375

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 21, 2017, I filed the foregoing Appellant's Opening Brief through the Supreme Court of Nevada's electronic filing system along with the Appellant's Appendix. Electronic service of the foregoing shall be made in accordance with the Master Service List as follows:

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DATED this 21st day of August 2017

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