IN THE SUPREME COURT OF THE STATE OF NEVADA

IRWIN GONOR, DECEASED; THE ESTATE OF IRWIN GONOR; AND ROBERT WOMBLE, SPECIAL ADMINISTRATOR, Appellants, vs. RICHARD J. DALE; KELLY MAYER; RICK'S RESTORATIONS, INC.; KIKI T'S LLC; MAKING HISTORY LLC; AND BOOKIN' IT LLC, Respondents.	**SUPREME COURT NO. 72949**

APPEAL
From the Eighth Judicial District Court, Clark County
The Honorable William Kephart, District Judge
District Court Case No. A-11-653755-C

APPELLANT'S PETITION FOR REHEARING

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I. STATEMENT OF THE ISSUES PRESENTED FOR REHEARING

1. NRCP 25 does not require that an executor special administrator be appointed prior to filing the motion to substitute - dismissal under NRS 41.100 is inappropriate because the District Court knew that Robert Womble had been appointed as the Special Administrator of the Estate of Irwin Gonor prior to the March 28, 2017 hearing.

2. To the extent that the Court relies on *Barlow*, the Defendants did not meet the requirements to trigger the 90-day deadline for a motion to substitute of the *Barlow* holding because they failed to serve the Suggestion of Death on all of the parties in interest.

II. STATEMENT OF THE CASE

After five years of bitter, combative litigation for breach of contract and fraud for unpaid commissions, the District Court ruled on January 10, 2017 that Plaintiffs/Appellants failed to file a timely motion to substitute party under the Nevada Rules of Civil Procedure ("NRCP") 25, after Plaintiff Irwin Gonor passed away. This hearing was only 76 days after the filing of the suggestion of death. The District Court judge ruled that Plaintiffs/Appellants waited too long after Plaintiff Gonor's death to file the suggestion of death notice. The District Court judge further stated that, because Plaintiffs/Appellants waited too long to notify the Defendants of

Plaintiff's death and to file the suggestion of death notice themselves, Plaintiffs/Appellants missed the 90-day deadline outline by NRCP 25.

Plaintiffs filed a second timely motion on January 24, 2017, moving to substitute Gonor's estate and its special administrator Robert Womble for the deceased Plaintiff – Womble was identified in the reply. At a hearing on March 28, 2017, the District Court judge stated that he had already ruled on the motion to substitute, that he considered the motion as a reconsideration, and he concluded that Plaintiffs had failed to meet the requirements of NRCP 25 by waiting from June 2016 to October 2016 to notify Defendants of Plaintiff's death. This Court has agreed that dismissal pursuant to NRCP 25 was inappropriate. However, this Court affirmed dismissal of the action pursuant to NRS 41.100 because it found that Special Administrator Robert Womble should have been the party identified as the substitute as Plaintiff in the second motion.

III. STATEMENT OF THE FACTS

On June 2, 2016, Irwin Gonor ("Gonor"), the plaintiff in the District Court case, passed away. At that time, the Third Amended Complaint was the operative complaint on file, it had not been answered by Defendants as an order was pending allowing a Fourth Amended Complaint to be filed. JA01-014. On October 26, 2016, the Defendants filed a suggestion of death notice and served it on Plaintiffs. JA015. On November 19, 2016, Plaintiffs filed a motion to substitute Gonor's mother in his

place as his sole intestate heir, or, in the alternative, for a 120-day extension to open an estate. JA017-024. At a hearing on January 10, 2017, the District Court judge found that Plaintiffs waited too long to notify Defendants that Gonor had died, had not filed the motion to substitute within 90 days of Gonor's death. JA049-059; JA083-086. At the hearing, Defendants argued that Plaintiffs did not move to substitute a proper party, because NRS 41.100 requires an executor or administrator to substitute the place of a deceased party. *Id*. The District Court granted a countermotion to dismiss the case with prejudice, prior to the expiration of the 90 days. *Id*.

On January 24, 2017, Plaintiffs filed a second motion to substitute Gonor's estate, having been filed with a proposed Special Administrator Mr. Robert Womble, in the place of Gonor. JA062-067. The first order dismissing the case was executed February 9, 2017. JA084. On February 27, 2017, the probate court finalized Mr. Womble as the special administrator of Gonor's estate. JA077. The second motion hearing was initially set for March 2, 2017 but continued to March 28, 2017. JA081. At the second motion hearing on March 28, 2017, the District Court judge stated that he had already ruled on the matter and he affirmed his ruling that Plaintiffs had failed to meet the requirements of NRCP 25 by waiting too long to notify Defendants that Gonor had died. JA03-086. Mr. Womble attended the hearing and was discussed in the argument regarding the party to be substituted:

> MR. ALEXANDER: I'm a little confused. Either the Estate's going to be the Plaintiff and the -- it's going to be run by the Special Administrator. I think what we're talking about here is a semantic game of who's going to be on the caption. **That would be him as a special -- it'd be Mr. Womble as a Special Administrator of the Estate of Irwin Gonor that takes over all of his claims. It's timely filed.**
>
> THE COURT: Okay. All right. With respect to your motion here I believe it's -- I truly believe this is nothing more than a motion to reconsider. I've already ruled on this. I made my determination. I' m going to deny your motion.

JA073-080. The Court thus recognized Mr. Womble and his appointment, but refused reconsideration in dismissing under NRCP 25, not NRS 41.100. Thereafter, the notice of entry of order was served *on the first motion only*, and this appeal followed. JA087; JA094.

IV. SUMMARY OF THE ARGUMENT

This Court agreed that pursuant to NRCP 25, a party has 90 days from the suggestion of death to file a motion for substitution. However, this Court affirmed the dismissal because the prayer of the motion to substitute party names the "Estate of Irwin Gonor" rather than the "Special Administrator of the Estate of Irwin Gonor." No prior decision in Nevada makes that distinction for the purposes of

dismissal of an action. The District Court knew the identity of the Special Administrator Robert Womble, and indeed, the Special Administrator attended the second hearing that was summarily denied as a 'reconsideration' of the first decision pursuant to NRCP 25. The purpose of the substitution statute is to ensure the survival of actions.

Therefore, because the District Court incorrectly interpreted NRCP 25 to impute a deadline for when a party must file a suggestion of death, and because affirming the District Court's ruling would unfairly prejudice Plaintiffs, this Court should reverse the ruling made by the District Court when it granted Defendants' motion to dismiss and denied Plaintiffs' motion for substitution. This Court should remand and allow a time certain, even 14 days (the first motion was heard 76 days after the suggestion) for the filing of a motion for substitution consistent with the Opinion regarding NRCP 25.

V. ARGUMENT

A. Standard of Review on Rehearing

This Court should grant rehearing if it: (1) overlooked or misapprehended a material fact in the record or a material question of law in the case; or (2) 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). Further, a

respondent may "assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment." NRCP 50(d). This petition should be granted on all three (3) bases.

B. NRCP 25 does not require that an executor or special administrator be appointed *prior* to filing the motion to substitute.

It is not clear from the Opinion whether the determinative factor for dismissal of a case under NRS 41.100 is the timing of the appointment of the Special Administrator relative to the motion, whether the Court is aware of a Special Administrator, or whether the exact recitation of "Special Administrator of the Estate" instead of "Estate" in the motion's prayer is what determines dismissal of the action. Because Nevada is a notice-pleading jurisdiction, our courts liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party. *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674, 1984 Nev. LEXIS 347, *3-4, citing NRCP 8(a); *Chavez v. Robberson Steel Co*., 94 Nev. 597, 599, 584 P.2d 159, 160 (1978). The Nevada Rules of Civil Procedure ("NRCP") allow a successor or representative to be substituted in for a deceased litigant in order to ensure that the causes of action survive an individual's death. *Lummis v. Eighth Judicial Dist. Court ex rel. County of Clark*, 94 Nev. 114, 576 P.2d 272 (1978). This is codified in NRCP 25(a)(1):

> "If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution

> may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. Unless the motion for substitution is made **not later than 90 days after the death is suggested upon the record by service of statement of the fact of the death** as provided herein for the service of the motion, the action shall be dismissed as to the deceased party."

N.R.C.P. 25 (emphasis added). The 90-day period is not triggered until the suggestion of death is filed. *Barto*, 101 Nev. 27 at 29.

The relation back effect of NRCP 15(c) applies to the addition or substitution of parties pursuant to NRCP 25. *Costello v. Casler*, 127 Nev. 436, 254 P.3d 631, 127 Nev. Adv. Rev. 36 (2011). Moreover, "except as otherwise provided in this section, no cause of action is lost by reason of the death of any person, but may be maintained by or against the person's executor or administrator." Nev. Rev. Stat. Ann. § 41.100(1). An heir has the power to substitute in as the plaintiff pursuant to NRS 138.010(2) because the substitution of the heir as a party can be a "necessary measure for the preservation of the estate." NRS 138.010(2). This Court has recently found that failure to name a party of record in the caption of a petition for judicial review is not jurisdictionally fatal where the party is named in the body of the petition and is properly served with the petition. *Prevost v. State Dep't of Admin.*, 418 P.3d 675, 675, 2018 Nev. LEXIS 40, *1, 134 Nev. Adv. Rep. 42.

After Gonor died intestate, never married and without children, his mother and sole heir agreed to be substituted for him in the pending litigation. Defendants

filed a suggestion of death on October 26, 2016, and Plaintiffs filed a motion for substitution on November 19, 2016. This motion was filed only three weeks after the suggestion of death had been filed. The statute clearly states that the substitution be made "not later than 90 days after the death is suggested upon the record." No party has contested the legitimacy of the suggestion of death, and no party has contested that Plaintiffs filed multiple motions to substitute a successor representative for Gonor within 90 days of the suggestion of death being filed.

The defendants contested Gonor's mother as being a legitimate executor or administrator under NRS 41.100(1). After the hearing on January 10, 2017, Plaintiffs filed a subsequent motion on January 24, 2017. JA062. The 90-day deadline to file a motion under NRCP 25 ended on January 27, 2017. The Reply filed on February 25, 2017 identified Robert Womble as Special Administrator. Mr. Womble then attended the hearing. The second motion met both the requirements of NRCP 25 and NRS 41.100 by being timely and by naming a proper administrator of Gonor's estate respectively.

The Opinion notes that the special administrator was not appointed until after the 90-day period to file a motion had expired. Although the probate proceedings took until February 27, 2017 to establish Robert Womble as the special administrator of Gonor's estate, the January 24, 2017 motion named the pending estate and the Reply then identified Mr. Womble as the administrator being substituted in Gonor's

place. Mr. Womble thereafter physically appeared at the hearing. **The rule does not indicate that the estate needs to be complete within 90 days of the suggestion of death, only that the motion needs to be filed** – indeed, in cases of multiple heirs or claimants the establishment of an estate in probate court could take far longer than 90 days. Procedurally, Plaintiffs followed the necessary steps to meet the requirements set forth by NRCP 25. As Plaintiffs promptly and timely filed a motion for substitution within 90 days of the suggestion of death being filed by Defendants, and no statute or case requires the appointment of the Special Administrator *prior* to the motion to substitute, Plaintiffs' motion was proper and should have been granted to allow substitution of Mr. Womble; District Court judge erred in denying the motion and in prematurely granting Defendants' motion to dismiss the case.

Although always the drawback with issues of first impression (particularly those that were not the issues of the opening appeal brief), no prior Nevada case mandates dismissal of an action merely because a motion to substitute for a deceased prays for the substitution of the "estate" versus "special administrator" or "executor". Especially when the District Court understands the relief sought and rules on other grounds. This Court has previously overturned dismissals over similar issues where such distinctions are unrelated to the merits of the controversy between the parties: "The incorrect designation in the complaint of the defendant as special administrator when he was, in fact, the general administrator, was an

inadvertence totally unrelated to the merits of the controversy between the creditor and the estate, and without prejudice to the rights of either. In these circumstances we do not hesitate to declare that the trial judge should have permitted the amendment in the interest of justice." *Weiler v. Ross*, 80 Nev. 380, 382, 395 P.2d 323, 324, 1964 Nev. LEXIS 177, *3-4. The District Court may even to appoint a special administrator for a deceased plaintiff to preserve an action, on its own initiative. *Nevada Paving v. Callahan*, 83 Nev. 208, 210, 427 P.2d 383, 384, 1967 Nev. LEXIS 257, *1. Respondents rely on the Ninth Circuit ruling in *Jones v. Las Vegas Metro. Police Dep't*, 873 F.3d 1123, 1128 (9th Cir. 2017) to determine that an estate is not a proper party in a motion for substitution; there, the Ninth Circuit ruled that the federal district court abused its discretion in failing to give plaintiffs a reasonable opportunity to substitute the administrator of the deceased plaintiff's estate. The Ninth Circuit's discussion is useful to include:

> "We have held that Rule 17 relief is available where counsel makes an "understandable" error in naming the real party in interest. *Goodman*, 298 F.3d at 1053-54. Plaintiffs claim they made an "honest and understandable mistake" by naming Jones's estate and father as plaintiffs (rather than naming the father as administrator of Jones's estate) because the district court had approved a stipulation amending their complaint to name Jones's estate as a plaintiff. While this is hardly the best excuse, it was not unreasonable for plaintiffs to have construed the district court's approval of the stipulation as a determination that they had named the proper party. The district court's summary judgment ruling disabused plaintiffs of this notion. Once this occurred, Rule 17 required the district court to give plaintiffs a reasonable opportunity to cure their error: A court "*may not* dismiss an action for failure to prosecute in the name of the real

> party in interest until, after an objection, a reasonable time has been allowed." Fed. R. Civ. P. 17(a)(3) (emphasis added). Rather than enter judgment immediately after noting the deficiency, the district court should have given plaintiffs a reasonable opportunity to substitute the right party. *See, e.g., Esposito*, 368 F.3d at 1272 (reversing district court's dismissal because plaintiff's mistake was honest, even if not understandable, so court was required to give plaintiff an opportunity to substitute); *Jaramillo v. Burkhart*, 999 F.2d 1241, 1246 (8th Cir. 1993) (reversing district court's dismissal because plaintiff wasn't given a reasonable opportunity to substitute); *Kilbourn v. West. Sur. Co.*, 187 F.2d 567, 571-72 (10th Cir. 1951) (reversing summary judgment so that real party in interest could be substituted); *cf. Kuelbs v. Hill*, 615 F.3d 1037, 1042-43 (8th Cir. 2010) (holding that district court gave plaintiffs reasonable time to substitute party when it ordered them to address the issue and waited six months before dismissing).
>
> The district court noted a "disconnect" between the date plaintiffs claimed their probate order appointing Jones's father as administrator was filed and the actual filing date of that order. *See* supra note 2. But this "disconnect" had little to do with plaintiffs' honest mistake — naming the estate, not the administrator of the estate, as a plaintiff — for which our case law requires relief under Rule 17. See, e.g., *Goodman*, 298 F.3d at 1053-54. Plaintiffs explained that they thought they had named the proper plaintiffs, and they did have the probate order signed — though not filed — at the time of the first amended complaint. They were entitled to a reasonable amount of time to correct their error."

Jones v. Las Vegas Metro. Police Dep't, 873 F.3d 1123, 1138 (9th Cir. 2017). The state equivalent, NRCP 17 also provides in pertinent part, "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as

if the action had been commenced in the name of the real party in interest." NRCP 17(a). While the District Court did not dismiss pursuant to NRCP 17, it is illustrative that it specifically provides for a reasonable period to cure an identified pleading defect.

The Opinion holds that the special administrator is the proper party in substitution. The District Court knew who the Special Administrator was when it denied the second motion. But the District Court had already dismissed the case on what this Court has found to be improper grounds. The District Court did not make a decision regarding which party was appropriate and then provide a deadline, however limited, where the substitution motion could be re-filed – the immediate decision was dismissal. If left without remedy, this new distinction and requirement to specifically name a special administrator would disrupt a lot of existing litigation in the District Courts, cutting through cases like a death ray. A wide swath of litigants, both in probate and in civil departments, commonly interpose the terms. The Special Administrator exists in representation of the Estate, an entity of itself. Further, the Opinion holds Appellants to a higher pleading standard than required within notice pleading, and does not afford sufficient due process for litigants who are obviously trying to perform a substitution, despite unfamiliarity or scrivener's error. Substitution has not required a talismanic phrase. From the pleadings and argument transcripts, the Defendants and the District Court understood the purpose

of the motions to substitute. When the Special Administrator was present in Court, literally seated in the Plaintiff's chair, the District Court merely backed up to reiterate its first decision based on NRCP 25's 90-day deadline.

C. Defendants did not satisfy the requirements to trigger the 90-day deadline for a motion to substitute per *Barlow* because they failed to serve the Suggestion of Death on "nonparty successors."

The Opinion approves of the procedure of *Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994), and cites that the second prong of appropriate service is (2) "the suggesting party must serve other parties **and nonparty successors or representatives of the deceased with a suggestion of death**." *Id* at 233. In *Barlow*, the plaintiff *Barlow* died during litigation against the City of San Diego, and no substitution was made within 90 days after the filing and service of the suggestion of death on Barlow's attorney. 39 F.3d at 232. Barlow's estate argued that because it was not properly served with the suggestion of death, the 90-day period under FRCP 25(a)(1) was never triggered. *Id*. The Ninth Circuit concluded that parties must be served with the suggestion of death in accordance with FRCP 5, and Barlow's non-party successors should have been served with the suggestion of death in accordance with FRCP 4. *Id*. at 233-34. In *Barlow*, the City of San Diego had a copy of Barlow's will, giving it actual knowledge of Barlow's heirs. *Id*. at 234. Here, Shirley Ann Hoffner was identified to Defendants as the sole heir. Defendants did not serve

Hoffner the Suggestion of Death. Later, Robert Womble was identified as Special Administrator. The Court found that the trigger was commencing the 90-day period was the service on counsel on October 26, 2016, but is silent whether the nonparty successors were properly served per *Barlow*. This failure of notice would toll the running of the 90 days' deadline.

VI. CONCLUSION

The Order Denying Motion to Amend Complaint to Substitute Shirley Ann Hoffner as Plaintiff or in the Alternative to Extend time to Substitute the Estate of Irwin Gonor as Plaintiff and Order Granting Defendant's Countermotion to Dismiss Case with Prejudice must be reversed and this matter remanded to the District Court for further proceedings.

Dated January 14, 2019.

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CERTIFICATE OF COMPLIANCE

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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman;

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40(b)(3) because it is:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains **3,566** words;
[ ] Does not exceed _____ pages.

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 January 14, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 14, 2019, I served a true and correct copy of the above and foregoing APPELLANT'S PETITION FOR REHEARING, via electronic service pursuant to Rule 9 of the N.E.F.C.R. (Administrative Order 14-2), or otherwise addressed to:

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