

IN THE SUPREME COURT OF THE STATE OF NEVADA

ORIGINAL

PETER M. SOUTHWORTH,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE ROB
BARE, DISTRICT COURT JUDGE,

Respondents,

and

LAS VEGAS PAVING CORPORATION,

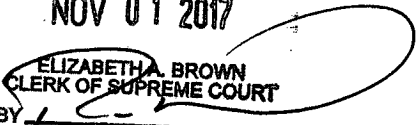
Real Party in Interest.

S.C. No.: 73655

D.C. No.: A-17-754175-A

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**PETITIONER'S REPLY TO REAL PARTY IN INTEREST'S ANSWERING
BRIEF**

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TABLE OF CONTENTS

TABLE OF CONTENTS	Page 2
TABLE OF AUTHORITIES	Pages 3 - 4
LEGAL ARGUMENT	Pages 5 - 17
CONCLUSION	Pages 17 - 18
CERTIFICATE OF COMPLIANCE	Pages 19 - 20
CERTIFICATE OF MAILING	Page 21

TABLE OF AUTHORITIES

The Court is directed to the following legal authority, which supports the argument contained in this brief:

Statutes

JCRCP 1	Pages 10, 13 - 17
JCRCP 2	Pages 5, 8
JCRCP 6(b)	Pages 13 - 16
JCRCP 12(h)(3)	Page 12
JCRCP 38	Page 9
JCRCP 50(b)	Page 14
JCRCP 52(b)	Page 14
JCRCP 59	Page 14
JCRCP 72(a)	Page 11
JCRCP 72B	Pages 5, 8 - 10
JCRCP 76B	Pages 14 - 15
JCRCP 98	Pages 5 - 11, 13, 14, 16
NRS 2.120	Page 6
NRS 4.355(4)	Pages 6, 8 - 9
NRS 4.370(1)(o)	Page 9
NRS Chapter 73	Pages 5, 9
NRAP 3(a)(2)	Page 11
NRAP 4(a)(4)	Pages 15 - 16

NRCP 6(b)	Page 15
NRCP 12(h)(3)	Page 12

Cases

<i>Cheung v. Eighth Judicial Dist. Court</i> , 121 Nev. 867, 124 P.3d 550 (2005)	Pages 9, 11, 16 - 17
<i>Gladys Baker Olsen Family Trust, By & Through Olsen v. Olsen</i> , 109 Nev. 838, 858 P.2d 385 (1993) (quoting <i>Thompson v. I.N.S.</i> , 375 U.S. 384 (1964) (Clark, J. dissenting))	Page 12
<i>Healy v. Volkswagenwerk</i> , 103 Nev. 329, 741 P.2d 432 (1987)	Pages 12, 16
<i>Hotel Last Frontier Corp. v. Frontier Properties</i> , 79 Nev. 150, 380 P.2d 293 (1963)	Page 12
<i>Kahn v. Orme</i> , 108 Nev. 510, 835 P.2d 790 (1992)	Page 12
<i>Phelps v. State</i> , 111 Nev. 1021, 900 P.2d 344 (1995)	Page 17
<i>State Indus. Ins. System v. Sleeper</i> , 100 Nev. 267, 679 P.2d 1273 (1984)	Page 13
<i>Walker v. Scully</i> , 99 Nev. 45, 657 P.2d 94 (1983)	Page 12
<i>Winston Products Co. v. DeBoer</i> , 122 Nev. 517, 134 P.3d 726 (2006)	Page 16

POINTS AND AUTHORITIES

I. LEGAL ARGUMENT

A. Real Party in Interest's Notice of Appeal Was Untimely under JCRCP 98.

In the first argument of its answering brief, Real Party in Interest ("LVPC") attempts to re-litigate the applicability of JCRCP 72B vice JCRCP 98 with respect to small claims justice court appeals. LVPC states its continued belief that JCRCP 72B governs the instant matter. The respondent district found JCRCP 98 to be the governing rule.¹

The justice court is empowered to hear three types of cases: civil actions, small claims actions, and summary eviction actions.² Civil actions are governed by JCRCP 3 - 87, small claims actions by JCRCP 88 - 100, and summary eviction actions by JCRCP 101 - 110.³ It cannot be disputed that the underlying complaint began life as a small claims matter.⁴ The matter was therefore subject to JCRCP 88 - 100. Small claims matters are additionally subject to NRS Chapter 73.

LVPC contends that Petitioner's formal objection to the Referee's Findings of Fact, Conclusions of Law, and Recommendations ("Referee's Decision") on

¹ Petitioner's Appendix ("PA") 104 - 106.

² JCRCP 2.

³ Id.

⁴ PA 5.

December 7, 2016,⁵ constituted an “appeal” pursuant to JCRCP 98. In so stating, LVPC conflates the formal objection process and the formal appeal process when they are two distinct proceedings. A formal objection is merely a request for a new trial as the formal objection notice states:

The Plaintiff, Peter M. Southworth, In the above entitled matter formally objects to the decision entered on the 2nd Day of December, 2016 In the above entitled Court and requests A new Trial.⁶

The formal objection process is codified in NRS 4.355(4) whereas appeals for small claims actions are governed by JCRCP 98.

The Legislature saw fit to limit the time to take post-trial action in small claims matters to just 5 days by passing NRS 4.355(4) which states:

The findings of fact, conclusions of law and recommendations of the referee must be furnished to each party or his or her attorney at the conclusion of the proceeding or as soon thereafter as possible. Within 5 days after receipt of the findings of fact, conclusions of law and recommendations, a party may file a written objection. If no objection is filed, the court shall accept the findings, unless clearly erroneous, and the judgment may be entered thereon. If an objection is filed within the 5-day period, the justice of the peace shall review the matter by trial de novo, except that if all of the parties so stipulate, the review must be confined to the record.

Empowered by NRS 2.120, this Court has followed the Legislature’s example and limited the time to appeal a small claims matter to just 5 days by adopting JCRCP 98 which states:

⁵ PA 10.

⁶ Id.

A plaintiff or defendant may appeal from the judgment against him or her **to the district court as in other cases arising in the justice courts, pursuant to Rule 72 et seq., except that the filing of a notice of appeal must be done within 5 days from the entry of the judgment, rather than the 20-day period provided for in Rule 72B.** No formal Notice of Entry of Judgment is required. The form of appeal and appeal bond shall be pursuant to Rules 99 and 100. (Emphasis added.)

Even the most cursory examination of JCRCP 98 provides the reader with the understanding that any appeal of judgment pursuant to JCRCP 98 *necessarily* precipitates transfer of jurisdiction to district court. LVPC either forgot or has chosen to ignore the guidance provided under the NOTICE section of the Referee's Decision which states, in pertinent part:

If both the Plaintiff and Defendant have appeared for hearing before the referee, either party may object to the referee's findings of fact, conclusions of law, and recommendations by filing a formal objection within **5 days** after the receipt of this document. Because of this rule, two outcomes are possible. (1) A timely objection can be filed, and a justice of the peace will review the matter by a trial de novo before issuing a final judgment. OR (2) If a timely objection is not filed, the Court will automatically accept these findings, and the referee's decision will become a judgment. At that time, copies of the final judgment can be obtained at the Justice Court Front Counter and the case can be appealed to District Court. However, a notice of appeal must be filed within **5 days** from the entry of the judgment. (Detailed information relating to small claims appeals is contained in the small claims information packet[.]) **PLEASE NOTE THAT THIS REFEREE'S DECISION DOES NOT BIND THE PARTIES AND IS NOT ENFORCEABLE IN ANY MANNER UNTIL THE FORMAL OBJECTION PERIOD HAS EXPIRED.**⁷

⁷ PA 6.

The guidance, consistent with NRS 4.355(4) and JCRCP 98, is clear: only a *final judgment* can be appealed to the district court. That final judgment can come from either a trial de novo, if a formal objection is timely filed, or from the Referee's Decision if no formal objection is filed (or if filed untimely). Here, Petitioner's timely formal objection prevented the Referee's Decision from becoming a final judgment and resulted in a formal objection hearing being ordered.⁸ Pursuant to NRS 4.355(4), the formal objection hearing was in the form of a trial de novo *again* conducted in justice court,⁹ thus the formal objection could not possibly have been an appeal of judgment.

LVPC filed its notice of appeal from the small claims judgment stemming from the formal objection hearing.¹⁰ LVPC stipulates that it acted on the belief that JCRCP 72B applied to the notice of appeal. Irrespective of that belief, JCRCP 2 plainly dictates that, given its rule number, the 20-day deadline in JCRCP 72B applies only to civil actions within justice court while also clearly distinguishing between civil actions and small claims actions. Having begun life as a small claims action,¹¹ the only way the 20-day deadline in JCRCP 72B could apply would be if somehow the formal objection process transformed the matter from a small claims action to a civil action. LVPC appears to believe that the formal objection process

⁸ PA 11.

⁹ Id.

¹⁰ PA 19 - 21.

¹¹ PA 5.

took the matter from “small claims court” to justice court. This logic is flawed as there is no separate venue called “small claims court;” justice court presides over *all* small claims matters.¹²

An “elevation” of the proceedings from small claims action to civil action cannot be inferred from NRS 4.355(4) nor does such a transformation stand to reason, as at least two far-reaching consequences would immediately be engendered. First, as NRS Chapter 73 would no longer apply, attorney’s fees could now be pursued. Second, JCRCP 38 could be applied and a jury trial requested. This Court has ruled that there is no right to a jury trial in small claims actions.¹³ Surely it cannot be the interpretation that the Legislature intended to create a vehicle, in the form of the formal objection process, which could be used to allow an unscrupulous party to circumvent both statute and Nevada Supreme Court opinion.

Subject to de novo review, this Court should find that JCRCP 98 governs small claims appeals even subsequent to a party’s formal objection, making LVPC’s appeal untimely.

¹² NRS 4.370(1)(o).

¹³ *Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 124 P.3d 550 (2005).

B. The Respondent District Court's Use of JCRCP 1 to Allow an Untimely Appeal Was Inappropriate.

In the first element of the second argument of its answering brief, LVPC continues to claim ambiguity between the application of JCRCP 72B and JCRCP 98. The previous discussion need not be duplicated here. Any ambiguity in the instant matter was manufactured by LVPC. LVPC stipulated reliance upon the non-authoritative Civil Law Self-Help Center website. A disclaimer on the Civil Law Self-Help Center website states:

This website was designed and is maintained by Legal Aid Center of Southern Nevada, Inc., a private, nonprofit, 501(c) (3) organization that operates the Civil Law Self-Help Center through a contract with Clark County, Nevada. This website is intended to provide general information, forms, and resources for people who are representing themselves in a Clark County court without a lawyer. The information on this website is NOT a substitute for legal advice. Talk with a lawyer licensed in Nevada to get legal advice on your situation.¹⁴

LVPC, represented by experienced counsel, is entirely culpable for its actions and must not be allowed to abdicate the responsibility to study, comprehend, and abide by the authorities governing the instant matter.

In the second element of its second argument, LVPC contends that the respondent district court had jurisdiction over the instant matter and was empowered to assert JCRCP 1 to allow the appeal despite having found the notice of appeal untimely under JCRCP 98. LVPC further contends that the interests of

¹⁴ Civil Law Self-Help Center, <http://www.civillawselfhelpcenter.org>.

justice and fairness are better served by permitting its appeal to be determined on the merits and justifies its tardiness by claiming two-day lateness is trifling.

Under JCRCP 98, the small claims appeal process is additionally subject to the provisions of JCRCP 72, et seq. Thus JCRCP 72(a) is applicable and states, in pertinent part:

Failure of an appellant to take any step **other than the timely filing of a notice of appeal** does not affect the validity of the appeal, ...
(Emphasis added.)

This is analogous to NRAP 3(a)(2), which states, in pertinent part:

An appellant's failure to take any step **other than the timely filing of a notice of appeal** does not affect the validity of the appeal, ...
(Emphasis added.)

The clear implication in both JCRCP 72(a) and NRAP 3(a)(2) is that failure to timely file a notice of appeal *does* affect its validity. Since any justice court appeal takes place in district court, JCRCP 72(a) must be viewed as imposing a mandatory jurisdictional requirement to timely file a notice of appeal. LVPC attempts to dismiss this requirement as a mere legal technicality. This Court has found that there are aspects of a small claims *trial* where the rigor imposed at higher courts does not apply by stating:

small claims trials are intended to be “informal, with the sole object of dispensing fair and speedy justice between the parties.” Not surprisingly then, no court rule authorizes a jury trial in a small claims action. There are also no formal pleadings or discovery mechanisms.¹⁵

¹⁵ *Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 124 P.3d 550 (2005).

It cannot be inferred, however, that this informality applies to invoking a higher court's jurisdiction given that this Court has routinely found that timely filing a notice of appeal is a mandatory and jurisdictional requirement and dismissed untimely appeals irrespective of merit.¹⁶ In other words, a test of jurisdiction occurs *before* any discretionary options avail themselves. This Court has additionally found the suspension of rules to create jurisdiction where there is none to be improper.¹⁷

LVPC cites *Kahn v. Orme*, 108 Nev. 510, 835 P.2d 790 (1992) and *Hotel Last Frontier Corp. v. Frontier Properties*, 79 Nev. 150, 380 P.2d 293 (1963) as authorities providing a court with the guidance to settle matters on their merits. *Kahn* and *Hotel Last Frontier Corp.* both focus on a court's discretion with respect to default. The instant matter is distinguished from *Kahn* and *Hotel Last Frontier Corp.* because jurisdiction was not in question in those cases as it is here. It is undisputed that a court has inherent and expressed power over a matter properly before it. However, JCRCP 12(h)(3) (or the identical NRCPP 12(h)(3)) provides a court no authority to perform *any* action other than dismissal if deprived of

¹⁶ *Healy v. Volkswagenwerk*, 103 Nev. 329, 741 P.2d 432 (1987); *see also Walker v. Scully*, 99 Nev. 45, 657 P.2d 94 (1983).

¹⁷ *Gladys Baker Olsen Family Trust, By & Through Olsen v. Olsen*, 109 Nev. 838, 858 P.2d 385 (1993) (quoting *Thompson v. I.N.S.*, 375 U.S. 384 (1964) (Clark, J. dissenting)).

jurisdiction and this Court has held that any judgment from a court without jurisdiction is void.¹⁸

Should this Court find that the respondent district court was empowered to enforce justice court rules, the issue then becomes one of scope. LVPC essentially contends that compliance with requirements need not apply because JCRCP 1 provides leeway to overcome defects. JCRCP 1 states, in pertinent part:

Whenever it is made to appear to the court [1] that a particular situation does not fall within any of these rules or [2] that the literal application of a rule would work hardship or injustice in a particular situation, the court shall make such order as the interests of justice require. (Numbering added.)

To invoke JCRCP 1, either of its conditions must be satisfied. The small claims process is clearly codified in JCRCP 98, causing failure of the first condition and forcing LVPC to rely upon satisfaction of the second. LVPC fails to substantiate the claim that dismissal of its appeal for its failure to comprehend and follow the rules constitutes an injustice. Even when positing for analysis that dismissal of LVPC's untimely appeal for its failure to abide by the rules could be construed as an injustice, LVPC's argument is still unsound. LVPC relies on the argument that JCRCP 6(b) allows enlargement of time to file a notice of appeal because that action is not specifically prohibited under JCRCP 6(b). In so stating, LVPC

¹⁸ *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 679 P.2d 1273 (1984).

concedes that any action specifically prohibited under JCRCP 6(b) *is* beyond the discretionary reach of JCRCP 1. JCRCP 6(b) states:

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the parties, by written stipulation of counsel filed in the action, may enlarge the period, or the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 50(c)(2), 52(b), 59(b), (d) and (e) and 60(b), except to the extent and under the conditions stated in them.

On its face, JCRCP 6(b) may not appear to prohibit enlargement of time to appeal. However, under JCRCP 98, the small claims appeal process is additionally governed by JCRCP 72, et seq. Specifically, JCRCP 76B limits the circumstances in which it is permissible to enlarge the time to file a notice of appeal by stating, in pertinent part:

Enlargement of time for appeals: Time for taking appeal may be enlarged by timely motion for: (1) Judgment under Rule 50(b). (2) Additional or amended findings of fact under Rule 52(b). (3) Altering or amending judgment under Rule 59. (4) New trial under Rule 59. The time for taking appeal commences anew upon entry of an order granting or denying any of the above motions.

The instant matter cannot be described by any of the conditions in JCRCP 76B. If the only mechanisms to enlarge the time to appeal are actions under JCRCP 50(b), JCRCP 52(b), or JCRCP 59, and enlarging the time to take those actions is

specifically prohibited under JCRCP 6(b), it must logically follow that the respondent district court had no authority to enlarge time for LVPC's untimely appeal *despite* the existence of JCRCP 1. Furthermore, JCRCP 6(b) requires that after expiration of a specified period, extension of that period can only be made upon motion and LVPC made no such filing.

LVPC additionally attempts to draw a distinction between the appeal processes in justice court and district court, but analysis reveals the two processes to be identical. NRCP 6(b) is analogous to JCRCP 6(b) and states:

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the parties, by written stipulation of counsel filed in the action, may enlarge the period, or the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 50(c)(2), 52(b), 59(b), (d) and (e) and 60(b), except to the extent and under the conditions stated in them.

NRAP 4(a)(4) is analogous to JCRCP 76B and states:

If a party timely files in the district court any of the following motions under the Nevada Rules of Civil Procedure, the time to file a notice of appeal runs for all parties from entry of an order disposing of the last such remaining motion, and the notice of appeal must be filed no later than 30 days from the date of service of written notice of entry of that order: (A) a motion for judgment under Rule 50(b); (B) a motion under Rule 52(b) to amend or make additional findings of fact; (C) a motion under Rule 59 to alter or amend the judgment; (D) a motion for a new trial under Rule 59.

Performing the preceding analysis using NRCP 6(b) and NRAP 4(a)(4) leads to the same conclusion as before.

Finally, LVPC rationalizes its appeal tardiness by saying it was only two days late. Petitioner believes that calculation of the deadline to file its notice of appeal using this Court's finding in *Winston Products Co. v. DeBoer*, 122 Nev. 517, 134 P.3d 726 (2006) actually reveals the notice of appeal to be four days late. Regardless, it would seem a stretch to claim that even two days is a trivial amount when the underlying period was only five days to begin with. This Court's rationale in deliberately choosing to differentiate appeals in small claims matters from appeals in other justice court matters by adopting JCRCP 98 and specifying the 5-day deadline is manifested in this Court's finding that "Nevada small claims court law demands a party be able to bring his case to justice **quickly** and affordably."¹⁹ (Emphasis added.)

There is little case law regarding the scope of JCRCP 1, but it stands to reason that the broad discretion it provides to a court must not be limitless. For matters originating in district court, passage of the deadline to appeal offers litigants a sense of finality, knowing the case cannot be revived.²⁰ LVPC argues that, for small claims actions, JCRCP 1 does away with the burden of appeal

¹⁹ *Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 124 P.3d 550 (2005).

²⁰ *See Healy v. Volkswagenwerk*, 103 Nev. 329, 741 P.2d 432 (1987).

deadlines, offering small claims litigants no such comfort and undermining this Court's findings that "[t]he rules delineating the timely filing of a notice of appeal must therefore be specific to avoid uncertainty."²¹ Under LVPC's theory, small claims litigants would instead be left to twist in the wind for an indefinite time, surrendering to the whims of district court judges over whether to allow an appeal after expiration of the appeal deadline. LVPC's sentiment is antithetical to this Court's findings that the sole reason for small claims courts' existence is "to provide an avenue for **speedy** and effective remedies in civil actions involving minimal sums."²² (Emphasis added.) In the instant matter, the respondent district court's conferring of jurisdiction upon itself by resuscitating an invalid appeal using a mechanism not provided for in the rules must be considered an overreach. Accordingly, this Court should grant Petitioner's request for writ of mandamus or prohibition.

II. CONCLUSION

Permitting the respondent district court's use of JCRCP 1 to allow LVPC's untimely appeal to proceed would render toothless the small claims appeal deadline under JCRCP 98 in this case and allow mischief in similar matters going forward. The respondent district court's ruling is indefensible as a matter of law as


²¹ *Phelps v. State*, 111 Nev. 1021, 900 P.2d 344 (1995).

²² *Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 124 P.3d 550 (2005).

it was deprived of subject matter jurisdiction to entertain the appeal. Therefore, Petitioner respectfully requests that writ of mandamus or prohibition issue directing the respondent district court to vacate its order denying Petitioner's motion to dismiss appeal and to dismiss the appeal before it as outside its jurisdiction.

DATED this 25th day of OCTOBER, 2017.

Pursuant to NRS 53.045, I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.



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Petitioner, In Proper Person

CERTIFICATE OF COMPLIANCE

1. I am the Petitioner herein.
2. There is no plain, speedy, and adequate remedy in the ordinary course of law available to the Petitioner.
3. I hereby certify that this *Petitioner's Reply to Real Party in Interest's Answering 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 the *Reply* has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.
4. I further certify that this *Petitioner's Reply to Real Party in Interest's Answering Brief* complies with page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP 32(a)(7)(C), the *Reply* contains 4,407 words which is less than the type-volume limit of 7,000 words.
5. Finally, I hereby certify that I have read the preceding *Petitioner's Reply to Real Party in Interest's Answering 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 *Reply* complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the *Reply* regarding matters in the record to be supported by appropriate references to the record in the Appendix. I understand that I may be subject to

sanctions in the event that the accompanying *Reply* is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 25th day of OCTOBER, 2017.

Pursuant to NRS 53.045, I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.



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CERTIFICATE OF MAILING


Pursuant to Nev. R. Civ. P 5(b), I HEREBY CERTIFY that on the 25th day of OCTOBER, 2017, I placed a true and correct copy of the above **PETITIONER'S REPLY TO REAL PARTY IN INTEREST'S ANSWERING BRIEF**, in the United States Mail, with first-class postage prepaid, addressed to the following:

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LAS VEGAS PAVING CORPORATION

The Honorable ROB BARE
Eighth Judicial District Court, Department 32
200 Lewis Avenue
Las Vegas, NV 89155
Respondent District Court Judge

DATED this 25th day of OCTOBER, 2017.

Pursuant to NRS 53.045, I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.



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