

IN THE SUPREME COURT OF THE STATE OF NEVADA

SPAR BUSINESS SERVICES, INC.

Appellant,

v.

RENEE OLSON, ADMINISTRATOR
OF THE EMPLOYMENT SECURITY
DIVISION; STATE OF NEVADA,
DEPARTMENT OF EMPLOYMENT,
TRAINING & REHABILITATION,
EMPLOYMENT SECURITY
DIVISION; and KATIE JOHNSON, in
her capacity as Chairperson of the
EMPLOYMENT SECURITY
DIVISION BOARD OF REVIEW,

Respondents.

Supreme Court Case No. 75783

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APPEAL

From the Eight Judicial District Court, Clark County
The Honorable Rob Bare, District Judge
District Court Case No.: A-17-755501-J

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

The following is a list of the names of all law firms whose partners or associates have appeared for the party in the case, including proceedings in Clark County district court.

Appellant has been represented in this litigation by Gina Bongiovi of Bongiovi Law Firm, LLC and Thomas Vollbrecht of Fabyanske, Westra, Hart & Thomson, P.A.

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JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal pursuant to NRAP 3A(b)(1). On May 31, 2017 Petitioner and Appellant Spar Business Services, Inc. (“Spar” or “Petitioner”) timely filed a Petition for Judicial Review (“Petition”) from a Board of Review Decision to challenge the findings of the State of Nevada, Department of Employment, Training and Rehabilitation, Employment Security Division (“ESD” or “Respondent”). *JA00133-JA00148*.

Through an order entered on November 15, 2017, the district court dismissed Spar’s Petition for failing to *serve* the Petition upon the ESD within forty-five days pursuant to NRS 233B.130(5). In doing so, the district court found that Spar failed to file a motion to enlarge the deadline and failed to show good cause, pursuant to NRS 233B.130(2). *JA00066-JA00071*.

Petitioner filed a timely Motion to Reconsider Pursuant to NRCP 59(2) and NRCP 60(b) on November 21, 2017. *JA00072-JA00086*. Without a hearing on the merits, the district court issued an order denying the Motion to Reconsider on April 11, 2018. *JA00125-JA00127*. Spar timely filed a Notice of Appeal herein on April 30, 2018. *JA00133-JA00148*.

ROUTING STATEMENT

This appeal is presumptively retained by the Nevada Court of Appeals because it is an administrative agency case not involving tax, water, or public utilities commission determinations. *See* NRAP 17(b)(10).

I. STATEMENT OF THE ISSUES

A. Did the district court err in granting the Respondent's Motion to Dismiss the Petition for Judicial Review, *effectively with prejudice*, when the Petition for Judicial Review was timely *filed*, yet with good cause, untimely *served*?

B. Did the district court err in granting the Respondents' Motion to Dismiss without considering Petitioner's good cause for the late service of the complaint upon the Respondent, thereby depriving the Petitioner of its right to a full and complete hearing on the merits?

II. STATEMENT OF THE CASE

In this case, the Court must determine whether the good faith failure of the Petitioner to timely serve a timely filed Petition for Judicial Review as prescribed NRS 233B.130(5), when the Petition for Judicial Review was timely filed, properly resulted in dismissal *with prejudice*. The district court improperly elevated form over substance in its dismissal of Spar's Petition for Judicial Review pursuant to NRS 233B.130(5). The Petition was timely filed. However, due to a misreading of the complex rules for service, Spar did not serve Respondent within the 45 days set forth in NRS 233B.135(5). *JA00034, JA00074-JA00076*. NRS 233B.039(3)(a) dictates that Petitions for Judicial review of decisions of the Employment Security Division of the Department of Employment, Training and Rehabilitation are governed by NRS 612. Because NRS 612 is silent as to service, Petitioner's counsel

believed that the NRCP 4(i) 120-day deadline for service applied, though the Respondents successfully argued that the deadline for service was instead 45 days, per NRS 233B.130(5). *Id.*

As soon as the ESD's counsel refused to accept service per Spar's counsel's request, Spar promptly effectuated proper service on the ESD, fourteen days beyond the 45-day window, but resulting in absolutely no prejudice to the ESD.

The statute at issue herein expressly contemplates that the deadline for service may be enlarged upon a showing of good cause by the district court. The Petition was timely filed, meeting the eleven-day deadline. The mistake in service was made in good faith, resulting in absolutely no harm or prejudice to the Respondents. Nevertheless, the district court dismissed the Petition, erroneously finding that strict compliance with NRS 233B.130(5) required strict compliance with service **in the absence of the plain language of the statute which states that the district court can extend the time for service upon a showing of good cause.** *See* NRS 233B.130(5) (emphasis added).

Additionally, Nevada law expressly favors that matters be heard on the merits. The district court's error in dismissing this matter after it was timely filed and served only a few days late, based on a good faith mistake, cuts against this very cemented principle.

III. STATEMENT OF FACTS

On May 31, 2017, Petitioner filed its Petition for Judicial Review (“PJR”) from a Board of Review decision by the Employment Security Division, Department of Employment, Training, and Rehabilitation. *JA00001-JA00008*.

It is undisputed that Petitioner strictly complied with the filing requirements for filing a Petition.

On May 31, 2017, Petitioner filed with this Court its Motion to Associate Mr. Vollbrecht, its out-of-state counsel. *JA00011-JA00024*. The hearing was set for July 18, 2017. *JA00012*. Spar believed it had 120 days under NRCP 4(i) to effectuate service of the already-filed Petition, and to ensure Mr. Vollbrecht was properly associated prior to the Petition proceeding, Petitioner waited until early July 2017 to contact Respondents’ counsel regarding acceptance of service. *JA00039, JA00074-JA00076*. When Respondents’ counsel thereafter declined to accept service, Petitioner promptly effectuated service on all Respondents on July 14, 2017. *JA00074-JA00076* Each of these statements were supported in the record by counsel for Petitioner, Ms. Gina Bongiovi. *JA00039, JA00074-JA00076*.

On or about July 21, 2017, Respondents filed their Motion to Dismiss, asserting that service was required to be completed on or before June 29, 2017 (45 days after filing of the action). *JA00026-JA00032*. In the motion to dismiss, Respondent stated:

Under the provisions of NRS 233B130(5), the Petition **must** be served within 45 days of its filing with the District Court. Accordingly, if service is not timely completed, then the case must be dismissed. *JA00028*.

The ESD went on to cite *Washoe Cty. v. Otto* for the proposition that because the Petition was served after the forty-five (45) day deadline, it must, as a matter of law, be dismissed. *Id.*; *see also Washoe Cty. v. Otto*, 128 Nev. Adv. Op. 40 (2012). The same argument was presented by the ESD in the Reply as the ESD further emphasize this incorrect notion that service “must” be made within forty-five (45) days or it must be dismissed. *JA00042-JA00052*. The Respondents cited additional case law, but each case construed NRS 233B.130(2) which applies only to the mandatory requirements for effective **filing** of the PRJ. *Id.* The issue herein concerns service, not filing.

Respondents further cemented this false notion in their reply brief by stating:

A district court is deprived of subject matter jurisdiction when a petition for judicial review is not properly served within 45-days. *See* NRS 612.530(3); NRS 233B.130(5). An examination of NRS 612.530(2) provides that “a petition...must be served upon the Administrator.” NRS 233B.130(5) provides that “a petition for judicial review...*must be served* upon the agency within 45 days after the filing of the petition.” Petitioner’s failure to timely serve ESD’s Administrator with the Petition within the 45-day statutory deadline divested this Court of subject matter jurisdiction to hear this administrative appeal. This Court has no other option that to dismiss the Petition for Judicial review. ...This Court must grant the motion to dismiss because this Court lacks subject matter jurisdiction to hear this case. *JA00045*.

The ESD in large part omitted reference to the “good cause” exception to NRS 233B.130(5). *Id.* The ESD made repeated efforts to misguide the district court to the conclusion that the district court lacked jurisdiction to consider the issues in the Petitioners’ opposition brief regarding good cause. *Id.* Respondents were so adamant about their position that they repeatedly used bold typeface and underline words such as “must” throughout their pleadings to the Court. *JA00028-JA00029, JA00045.* In spite of the Respondents’ representations and repeated efforts to misguide the district court to the conclusion that the district court lacked jurisdiction to consider the issues in Spar’s opposition brief regarding good cause for the late service, NRS 233B.130(5) expressly allows for and contemplates that the district court can, in fact, consider late service and extend the deadline for service. See NRS 233B.130(5).

The portion of NRS 233B.130 which was omitted in Respondents’ briefing to the district court is key: NRS 233B.130(5) states that the district court **can extend** the time for service upon a showing of good cause. *See* NRS 23B.130(5) (emphasis added). If service itself established the court’s jurisdiction, the district court could never enlarge the time for service, rendering this provision worthless.

In its Opposition, the Petitioner attempted to argue good cause for delayed service, and did so in the context of the Nevada Rules of Civil Procedure and Nevada law construing the same. *JA00033-JA00038.*

On November 15, 2017, and without sending the proposed Order or Notice to Petitioner’s counsel, Defendant filed a Notice of Entry of Order of Order Granting Motion to Dismiss Petition for Judicial Review and emailed a “courtesy copy” to Spar’s counsel. *JA00066-JA00071*. The Order provides a history of the procedural rules and a roadmap for their framework, then concludes, without analysis, among other things:

“Here, the Petition was filed on May 15, 2017. There was no request or motion to extend the time for service prior to the expiration of the 45 days. As such, the deadline for service of the Petition would have been June 29, 2017. It is undisputed that service of the Petition was not effectuated until July 14, 2017. Thus, the Petition was not timely served upon the Respondent as required by NRS 233B.130(5). Petitioner failed to make a showing of good cause for effectuating service of the Petition for Judicial Review after the statutory deadline in this case. *JA00071*.

The district court’s Order was in error. The Order adopted Respondents’ erroneous representation that the Court lacked jurisdiction to consider the matter, as the PJR was served after the expiration of the forty-five-day deadline articulated at NRS 233B.130(5). The only mention in the Order of the standard for good cause is in this concluding paragraph. *Id.* However, contrary to the Order, there is no requirement that a motion to enlarge must be filed prior to the expiration of the deadline.

As Petitioner noted, the timeframe in which the PJR was served did not evidence excessive delay. To the contrary, Spar’s counsel immediately

effectuated service when Respondents' counsel declined to accept. *JA00039, JA00074-JA00076.*

As this matter has been in the ESD's hands for approximately eight years, a dismissal based on a fourteen-day delay in service of the Petition is a grossly disproportionate consequence that robs Spar of an opportunity to be heard and, without doubt, represents error at law.

Further, and notably, the Respondents insisted in their Reply and during oral argument that they were, in fact, prejudiced by the delay in service, because Respondent had been relieved of paying its share of unemployment taxes during the pendency of the appeal. *JA00050.* On the contrary, Spar has, to this day, continued to pay these taxes and the ESD's written and verbal assertions to the contrary are patently false. *JA00076.*

In its Motion to Reconsider, Spar relied upon the *Fitzpatrick v. State ex rel. Dep't of Commerce, Ins. Div.*, 107 Nev. 486, 487, 813 P.2d 1004 (1991) which is directly on point. *JA00072-JA00086.* In *Fitzpatrick, supra*, the court held once a Petition is timely filed, the district court held jurisdiction to consider other matters, such as untimely filing. *Id.* In *Fitzpatrick*, the untimely filing was the Memorandum of Points and Authorities in support of the Petition for Judicial Review. *Id.* In reversing the district court's dismissal of a Petition for

Judicial Review for an untimely filing of a Memorandum of Points and Authorities, this Nevada Supreme Court held:

... the time allotted by statute for taking an administrative appeal is jurisdictional, and to invoke the appellate jurisdiction of the district court, **a petition for judicial review must be timely filed.** *Id.*

Accordingly, **the district court erred** when it concluded it was without jurisdiction to consider the merits of Fitzpatrick’s claim that he had good cause for filing a tardy memorandum of points and authorities in support of the timely filed petition for judicial review. We reverse and remand this matter back to the district court for further consideration. *See Fitzpatrick adv. State of Nevada*, 107 Nev. 486, 489 (1991).

Without any oral argument, on April 3, 2018 the district court issued an order denying Respondents’ Motion for Reconsideration. *JA00130-JA00132*. The Order found that while *Fitzpatrick* “does provide guidance for the district courts in this area of law, this case does not mandate reconsideration of this district court issue” *inter alia*. *JA00132*.

On April 30, 2018 Petitioner filed a timely appeal.

IV. SUMMARY OF ARGUMENT

In *Fitzpatrick adv. State of Nevada*, 107 Nev. 486, 489 (1991) the Nevada Supreme Court held that the time allotted by statute for taking an administrative appeal is jurisdictional, and to invoke the appellate jurisdiction of the district court, a petition for judicial review must be timely filed. *Id.* Accordingly, in *Fitzpatrick*, the district court erred when it concluded it was without jurisdiction to consider the

merits of Fitzpatrick’s claim that he had good cause for filing a tardy memorandum of points and authorities in support of the timely filed petition for judicial review. Herein, the district court herein failed to consider good cause or otherwise unlawfully concluded the late service was without good cause, in the face of long-standing Nevada public policy. Accordingly, the district court erred in dismissing the Petition for late service.

V. STANDARD OF REVIEW

Courts review de novo a district court’s order granting a motion to dismiss. *Moon v. McDonald, Carano & Wilson LLP*, 129 Nev. 547, 550, 306 P.3d 406, 408 (2013). However, this court reviews an order “granting a motion to dismiss for failure to effect timely service of process ... for an abuse of discretion.” *Abreu v. Gilmer*, 115 Nev. 308, 312–13, 985 P.2d 746, 749 (1999). Here the district court abused its discretion for failing to consider the factors constituting good cause.

VI. ARGUMENT

A. This District Court Erred in Granting Respondent’s Motion to Dismiss Because NRS 233B.130(5) Expressly Authorizes Judicial Expansion of the Service Deadline.

Initially, the ESD argued before the district court that strict compliance with NRS 233B.130(5) divested the district court of jurisdiction to address whether the failure of the Petitioner herein to timely serve was done so with good cause. *JA00026-JA00031*. However, as pointed out by Spar in its Motion to Reconsider,

the Nevada Supreme Court has held that failure to timely serve a party a petition for judicial review is not jurisdictionally fatal under NRS 233B.130(5). *JA00082*.

In a case directly on point, the Nevada Supreme Court reversed the district court's refusal to analyze good cause for the late filing of a memorandum of points and authorities. *See Fitzpatrick adv. State of Nevada*, 107 Nev. 486 (1991). In *Fitzpatrick*, the Petitioner filed its memorandum of points and authorities outside the deadline articulated at NRS 233B.133 which required the memorandum of points and authorities be filed and served within 40 days. *Id.*; *see also* NRS 233B.133. The State of Nevada, exactly like in the case at bar, moved to dismiss arguing that the Petitioner must strictly comply with the administrative procedure or the district court is divested of jurisdiction to hear the matter. *Id.* Exactly like the case at bar, the State of Nevada moved to dismiss and Petitioner responded that he had good cause for filing late. *Id.* Exactly like the case at bar, NRS 233B.133(6) provided that the court may extend the deadline for filing the memorandum of points and authorities for good cause shown. *Id.*; *see also* NRS 233B.133(6). In reversing the district court, the Nevada Supreme Court held as follows:

...the time allotted by statute for taking an administrative appeal is jurisdictional, and to invoke the appellate jurisdiction of the district court, a petition for judicial review must be timely filed. However, if the petition for judicial review is timely filed, NRS 233B.133 allows the district court to accept a tardy memorandum of points and authorities in support of the petition. **Accordingly, the district court erred when it concluded it was without jurisdiction to consider**

the merits of Fitzpatrick’s claim that he has good cause for filing a tardy memorandum of points and authorities in support of the timely filed petition for judicial review. *Id.* (emphasis added).

The “good cause” language at NRS 233B.133(6) is identical to the language at NRS 233B.130(5). Notably, *Fitzpatrick* did not seek leave to file his memorandum of points and authorities late; rather, the issue arose as it has at bar – in response to a motion to dismiss. Thus, the Court’s holding at bar, that Spar was required to file a motion for leave to serve late in advance of service, is without support and is contrary to *Fitzpatrick*.

Perhaps the statutory scheme at NRS 233B.130 could more artfully distinguish its separate and distinct requirements, as certain of its provisions are superseded by NRS 612, notably the statutory deadline for the filing of this kind of Petition, while itself containing guidelines for timeliness of service.

Even if, however, the statute, and others that partially supersede it, invite confusion, review of its plain language in the context of Nevada law requires the conclusion that filing of the Petition and service of process are separate and distinct acts with separate and distinct rules [NRS 612.530(1) and NRS 233B.130(5), respectively]. Once Spar timely and strictly complied with the filing requirements of NRS 612.530(1), this Court obtained and maintained jurisdiction to consider Spar’s good cause for delayed service and was, in fact, required to consider good cause.

The district court herein simply announced good cause was not established, without any analysis pursuant to the factors laid out by the Nevada Supreme Court. There was absolutely no consideration of good cause, moreover, the district court did not even consider oral argument in the Motion to Reconsider. This Supreme Court requires the weighing of ten factors in determining if good cause exists for delayed service of a complaint:

(1) difficulties in locating the defendant; (2) defendant's efforts at evading service or concealment of improper service until after 120-day period has lapsed; (3) plaintiff's diligence in attempting to serve defendant; (4) difficulties encountered by counsel; (5) running of applicable statute of limitations; (6) parties' good faith attempts to settle litigation during 120-day period; (7) lapse of time between end of 120-day period and actual service of process on defendant; (8) prejudice to defendant caused by plaintiff's delay in serving process; (9) defendant's knowledge of existence of the lawsuit; and (10) any extensions of time for service granted by district court. *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592 (2010).

Herein, the district court engaged in no analysis, simply announcing that there was no good cause. While the *Saavedra-Sandoval* analysis to enlargement of time pursuant to NRCP 4(i), the Supreme Court has announced no clear standard with respect to failure to timely effectuate service of a Petition for Judicial Review. However, the same analysis must be applied.

The ESD was actually served. The length of time between the end of the 45 days and service was a mere fourteen days. There was no prejudice to the ESD. Spar was exceptionally diligent by promptly effecting service once counsel learned

of her good faith mistake, and the failure to timely serve resulted in the expiration of the statute of limitations, among other things. *Id.* If ever there was a showing of good cause – it is this case.

Certainly, the district court abused its discretion by failing to engage in an analysis of good cause, rather believing he must dismiss for failure to strictly comply with the service deadlines.

B. This District Court Erred as Nevada law Requires Matters be Heard on the Merits and substantial Evidence Supported Good Cause for Delayed Service.

The district court’s dismissal is manifest error of law resulting in injustice for Petitioner in the face of Nevada policy dictating that cases be heard on the merits, as more fully addressed below. *See AA Primo Builders, L.L.C. v. Washington*, 126 Nev. Adv. Op. 53, 245 P.3d 1190 (2010).

The Nevada Supreme Court has reiterated its position that, absent blatant disregard for the rules of civil procedure, “good public policy dictates that cases be adjudicated on their merits.” *Kahn v. Orme*, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992) (citing *Hotel Last Frontier v. Frontier Prop.*, 79 Nev. 150, 155-56, 380 P.2d 293, 295 (1963)). The record at bar reflects Spar’s counsel’s good faith effort to promptly comply with the procedural rules – there is absolutely no evidence of any “blatant disregard.” *JA00039, JA00074-JA00076*. The district court’s granting of the ESD’s motion to dismiss falls squarely outside this principle.

Dismissing the case was effectively with prejudice, as the eleven-day deadline provided by NRS 612.530(1) for filing a Petition for Judicial Review expired on May 16, 2017. Thus, the district court's error denied Spar's opportunity to be heard.

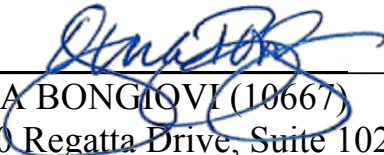
Dismissing this matter eight years in the making for a fourteen-day delay in service is a grossly disproportionate result which flies in the face of the Nevada Supreme Court's repeated admonitions that cases should be heard on their merits. *Hotel Last Frontier Corp. v. Frontier Properties, Inc.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963), "Finally we mention a proper guide to the exercise of discretion, to basic underlying policy to have each case decided on the merits." *Banks v. Heater*, 95 Nev. 610, 612, 600 P.2d 245, 246 (1979); "[T]he policy of this court is that each case be decided upon the merits whenever possible."

Additionally, a key factor of importance is the party's lack of knowledge as to procedural requirements. *Id.* at 154, 380 P.2d at 295. It is clear that a trial court could find from this record a lack of knowledge of procedural requirements; inadvertence or excusable neglect; no bad faith or an intent to delay; and the presentation of a meritorious defense. Had Spar known of the 45-day deadline, it would have complied.

The party in a better position to know and understand the procedural rules is the State of Nevada, the Respondent herein. Respondents should therefore have advised the Court of the *Fitzpatrick* decision, emphasized the need for the Court to analyze good cause, and frankly never should have brought the motion to dismiss in the first place.

VII. CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the district court's order dismissing its Petition for Judicial Review be reversed.

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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 it has been prepared in a proportionally spaced typeface using Microsoft Word in normal Times New Roman 14-point font.
2. I further certify that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 4,707 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.

4. 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 24th of September, 2018.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of BONGIOVI LAW FIRM, LLC and that on the 24th day of September, 2018, a true and correct copy of the foregoing Appellants' Opening Brief in Case No. 75977 was filed and served electronically with the Clerk of the Nevada Supreme in accordance with the master service list as follows:

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