

NO. 75783

IN THE SUPREME COURT OF THE STATE OF NEVADA

SPAR BUSINESS SERVICES, INC.,

Appellant,

vs.

RENEE OLSON, ADMINISTRATOR OF THE EMPLOYMENT SECURITY
DIVISION; STATE OF NEVADA, DEPARTMENT OF EMPLOYMENT,
TRAINING & REHABILITATION; *et al.*,

Respondents.

On Appeal from an Order Granting Motion to Dismiss Petition for Judicial Review
of the Eighth Judicial District Court of
The State of Nevada, in and for Clark County
District Court Case No. A755501

RESPONDENT ESD'S ANSWERING BRIEF

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1 **NRAP 26.1 DISCLOSURE STATEMENT**

2 The Nevada Employment Security Division of the Nevada
3 Department of Employment, Training and Rehabilitation; Renee Olson, in her
4 official capacity as Administrator, are “governmental parties” and are therefore not
5 required to file a disclosure statement under NRAP 26.1.
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1 **JURISDICTIONAL STATEMENT**

2 This Court has jurisdiction to consider this appeal from the Eighth
3 Judicial District Court under the provisions of Nevada Revised Statute 612.530(6).
4 The final order of the District Court Granting Motion to Dismiss the Petition for
5 Judicial Review was filed on November 14, 2017. (Joint Appendix (JA), 119) The
6 Notice of Entry was filed with the District Court on November 15, 2017. (JA, 117)
7 The District Court Ordered that Appellant's Motion to Reconsider be denied on
8 April 10, 2018. (JA, 125) The Notice of Entry was filed on April 11, 2018. (JA,
9 128) The Notice of Appeal was filed timely under Nevada Rule of Appellate
10 Procedure 4(a)(1) on April 30, 2018. (JA, 133)

11 Appellant incorrectly observed in its Jurisdictional Statement that the
12 "district court found that Spar failed to file a motion to enlarge the deadline;" this
13 statement is not supported by the administrative record. *See*, Opening Brief (OB),
14 iv; JA, 71. Rather, the District Court appropriately found that "Petitioner failed to
15 make a showing of good cause for effectuating service of the Petition for Judicial
16 Review after the statutory deadline in this case." JA, 71.

17 **ROUTING STATEMENT**

18 Pursuant to NRAP 17(a) the matter is retained by the Supreme Court
19 because it is an administrative agency's case involving taxes (unemployment
20 insurance taxes), and because it is a matter of first impression, under NRAP 17(a).
21

1 **STATEMENT OF THE ISSUES**

2 **1. Did the District Court Err When it Granted Respondent's**
3 **Motion to Dismiss Petition for Judicial Review for Lack of Subject Matter**
4 **Jurisdiction, Without Prejudice, for Untimely Service of the Petition?**

5 **2. Whether the District Court Appropriately Found That**
6 **Appellant Failed to Show Good Cause for Untimely Serving the Petition for**
7 **Judicial Review?**

8 **3. Whether Relevant Nevada Law Requires a Hearing on the**
9 **Merits in this Special Statutory Proceeding, When Jurisdiction is Absent?**

10 **STATEMENT OF THE NATURE OF THE CASE**

11 The Eighth Judicial District Court, Dept. XXXII, Hon. Rob Bare,
12 appropriately dismissed, *without prejudice*¹, Appellant's Petition for Judicial
13 Review for lack of subject matter jurisdiction. Appellant failed to timely serve the
14 Petition for Judicial Review within the 45-day statutory deadline, under NRS
15 233B.130(5).

16 Appellant, Spar Business Services (formerly Spar Marketing Services,
17 LLC), a Florida Limited Liability Company, filed a Petition for Judicial Review on
18 May 15, 2017. Spar Business Services (hereafter, Spar) appealed the administrative
19 decision of the Appeal Tribunal (referee), affirmed by the Board of Review,
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1 finding that its Nevada merchandisers performing services for Appellant were
2 indeed employees and therefore their wages are subject to unemployment tax, *inter*
3 *alia*. (JA, 55-60; Supplemental Appendix (SA), 1-12) At the administrative
4 hearing below, Appellant contended that its Nevada merchandisers were
5 independent contractors and thus were not entitled to unemployment insurance
6 benefits. (SA, 001-002)

7 Appellant filed a Petition for Judicial Review in the Eighth Judicial
8 District Court on May 15, 2017, appealing the referee's administrative decision.
9 (JA, 1) ESD filed a Motion to Dismiss Petition for Judicial Review on July 21,
10 2017, as the District Court lacked subject matter jurisdiction. (JA, 26) Under NRS
11 612.530(2), the Petition must be served upon ESD's Administrator. Under the
12 provisions of NRS 233B.130(5), the Petition must be served within 45 days of
13 filing in the District Court.² Appellant, admittedly, made no attempt whatsoever to
14 serve the Administrator of ESD with a copy of the Petition for Judicial Review
15 before July 14, 2017. (JA, 34, ll. 13-16) Service upon the ESD Administrator
16 must have been accomplished by Thursday, June 29, 2017, pursuant to NRS

17 ¹ Appellant admitted in its opposition that dismissal was without prejudice. (JA
18 37, l. 23)

19 ² The Nevada Administrative Procedures Act (APA) (Chapter 233B of NRS)
20 applies absent special provisions in Chapter 612 of NRS to the contrary. NRS
21 233B.039(3)(a). NRS 612.530(2) is silent as to when the Petition must be served
upon ESD's Administrator. Accordingly, Chapter 233B of NRS requires it to be
served within 45 days of filing.

1 612.530(2) and NRS 233B.130(5); and thus, the Petition was personally served
2 fifteen (15) days *after* the statutory deadline. The District Court was therefore
3 deprived of subject matter jurisdiction to hear the Petition for Judicial Review.

4 On August 1, 2017, Appellant filed Petitioner's Opposition to Motion
5 to Dismiss. (JA, 33) In its opposition, Appellant incorrectly argued that the
6 District Court was vested with subject matter jurisdiction by the sole act of filing
7 the Petition, despite untimely service of the Petition; that NRCP 4(i) prevails over
8 NRS 233B.039(5) and NRS 233B.130(5) regarding the service deadline; and that
9 dismissal was unwarranted under *Domino v. Gaughin*, 103 Nev. 583, 747 P.2d 236
10 (1987). (JA, 33-40)

11 ESD's Reply to Opposition to Motion to Dismiss Petition for Judicial
12 Review was filed August 4, 2018. (JA, 42) In the reply, ESD argued that subject
13 matter jurisdiction was absent as the statutory requirements necessary to confer
14 jurisdiction were not satisfied; the Petition must be served upon ESD's
15 Administrator within 45 days of filing, among other statutory requirements which
16 are necessary to establish jurisdiction. NRS 612.530 §§ (1)&(2); *and see*, NRS
17 233B.130(5). (JA, 42-60)

18 A hearing on the Motion to Dismiss was held on October 10, 2018
19 before the Hon. Rob Bare. (JA, 149; 165) The Court invited counsel for Appellant
20 to provide a good cause basis for extending the NRS 233B.130(5) 45-day service
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1 deadline. (JA, 151-52; 159) The undersigned argued that NRS 233B.130(5)
2 prevails over NRCP 4(i) in this special statutory proceeding, and that Appellant has
3 failed to provide a justifiable excuse to establish good cause to extend the time for
4 service in this case. (JA, 153-54) According to *Whale*, 792 F.2d 951 (9th Cir.
5 1986), which is cited by *Domino, supra*, a counsel's mistaken interpretation of the
6 service statute is not a justifiable excuse or good cause for untimely service.
7 Appellant was represented by out-of-state counsel, Thomas Vollbrecht, Esq., at the
8 hearing, who erroneously argued that the District Court was vested with subject
9 matter jurisdiction once the Petition was timely filed, because NRS 612.530 is
10 silent as to the service deadline; thus NRCP 4 controls concerning the 120-day
11 service deadline. (JA, 156-58) Mr. Vollbrecht responded to Judge Bare's
12 invitation to show cause by arguing that "NRS 233B.130(5) does not apply at all."
13 (JA, 159) The undersigned reminded the Court that NRCP 4 cannot control
14 because NRCP 81(a) and 82 provide that the general rules cannot apply when in
15 conflict with statute, and cannot apply to extend jurisdiction. (JA, 153; 161)

16 The District Court appropriately found that the Petition for Judicial
17 Review was untimely served upon ESD, that the deadline for service was June 29,
18 2018. (JA, 142) The Court found that service of the Petition was not effectuated
19 until July 14, 2018, and that Appellant failed to make a showing of good cause for
20 effectuating service of the Petition for Judicial Review after the statutory deadline
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1 in this case. (JA, 142) The Court noted that “[w]hen the legislature creates a
2 specific procedure for review of administrative agency decisions, such procedure is
3 controlling.” *Crane v. Cont’l Tel. Co. of California*, 105 Nev. 399, 401, 775 P.2d
4 705, 706 (1989). “When a party seeks judicial review of an administrative
5 decision, strict compliance with the statutory requirements for such review is a
6 precondition to jurisdiction by the court of judicial review, and [n]oncompliance
7 with the requirements is grounds for dismissal.” *Kame v. Emp’t Sec. Dep’t*, 105
8 Nev. 22, 25, 769 P.2d 66, 68 (1989). The Court appropriately dismissed the
9 Petition for Judicial Review, without prejudice, for lack of subject matter
10 jurisdiction. (JA, 140-142)

11 The District Court’s Order noted Appellant’s *purported* good cause
12 argument contained in Appellant’s opposition and repeated at oral argument: that
13 NRCP 4(i) prevails over NRS 233B.130(5) and that the deadline for service of the
14 Petition should be interpreted as 120 days after the filing of the Petition for Judicial
15 Review. (JA, 39-37; 39, 1. 13-15;141; 158-159) The Court appropriately found
16 Appellant’s reliance upon NRCP 4(i) for a 120-day deadline misplaced. (JA, 70)
17 The Court also made the factual finding that Petitioner did not ask Respondent to
18 stipulate to an extension of time or move the Court for an extension of time for
19 service before the service deadline on June 29, 2018. (JA, 71) Accordingly, the
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1 Court aptly found that Appellant failed to establish good cause for untimely service
2 of the Petition for Judicial Review.

3 Appellant inappropriately infers in the Statement of the Case that the
4 District Court failed decide whether or not Appellant made showing of good cause
5 for the delay in service. (OB, 2) To the contrary, the District Court Order
6 specifically referenced Appellant's arguments and found that "Petitioner failed to
7 make a showing of good cause for effectuating service of the Petition for Judicial
8 Review after the statutory deadline in this case." (JA, 121-122)

9 Appellant also incorrectly inferred in the Statement of the Case that in
10 special statutory proceedings, such as this administrative case, Nevada law
11 expressly favors matters to be heard on the merits, but failed to cite any legal
12 citation supporting this legal proposition. (OB, 2)

13 On April 30, 2018, Appellant filed the Notice of Appeal in the District
14 Court, appealing the Order Granting Motion to Dismiss Petition for Judicial
15 Review and the Order Denying Motion for Reconsideration entered April 11, 2018.
16 (JA, 133-34)

17 **STATEMENT OF THE FACTS**

18 The Eighth Judicial District Court, Dept. XXXII, Hon. Rob Bare,
19 appropriately dismissed, without prejudice, Appellant's Petition for Judicial
20 Review for lack of subject matter jurisdiction. (JA, 68-71) Appellant failed to
21

1 timely serve the Petition for Judicial Review within the 45-day statutory deadline.

2 (JA, 71)

3 Appellant, Spar Business Services (formerly Spar Marketing Services,
4 LLC), a Florida Limited Liability Company, appealed the decision of the referee
5 which was affirmed by Board of Review by filing a Petition for Judicial Review on
6 May 15, 2017, finding that its Nevada merchandisers were indeed employees and
7 therefore their wages are subject to unemployment tax, *inter alia*. (JA, 55-60; SA,
8 001-012) At the agency administrative hearing below, Appellant asserted that its
9 Nevada merchandisers were not employees and thus not entitled to unemployment
10 insurance benefits. (SA, 008-009)

11 The Summons was electronically issued on the same day as the filing
12 of the Petition for Judicial Review, May 15, 2017. (JA, 1) The Clark County
13 District Court's Register of Actions confirms same. (JA, 165)

14 After the statutory service deadline had expired by fourteen (14) days,
15 it is undisputed that the undersigned received a voicemail message from Gina
16 Bongiovi, Esq., on July 13, 2017, requesting that the undersigned accept service of
17 the Petition for Judicial Review, without offering any good faith reason (or any
18 reason at all) for the service delay. (JA, 29-30) Since Appellant's counsel made
19 no attempt to request that the undersigned stipulate to extend time for service of
20 the Petition for Judicial Review before expiration of the statutory deadline, and no
21

1 reasons were provided to justify the delay, ESD declined to stipulate to Appellant's
2 request. (JA 29-30)

3 It is undisputed that on January 11, 2012, in the Eighth Judicial
4 District Court Case No. A652992, a similar Petition for Judicial Review was
5 timely served upon the ESD Administrator on behalf of Spar Marketing Services,
6 Inc. (Appellant's former name), in which Gina Bongiovi, Esq. was also counsel of
7 record and Thomas Vollbrecht, Esq. was also out-of-state associate counsel. (SA,
8 013, Register of Actions) Given their previous compliance with the same service
9 requirements in Case No. A652992, Ms. Bongiovi and Mr. Vollbrecht are very
10 familiar with such requirements. Appellant cannot show good cause for failure to
11 timely serve the Petition for Judicial review based upon a "good faith" mistake or
12 misapprehension since Appellant's counsel has previously served the ESD
13 Administrator successfully.

14 Under NRS 612.530(2), the Petition must be served upon ESD's
15 Administrator. Under the provisions of NRS 233B.130(5), the Petition must be
16 served within 45 days of filing in the District Court. Appellant, admittedly, did not
17 serve the Administrator of ESD with a copy of the Petition for Judicial Review
18 until July 14, 2017. (JA, 34) Service upon the ESD Administrator must have been
19 accomplished by Thursday, June 29, 2017, pursuant to NRS 612.530(2) and NRS
20 233B.130(5) and thus the Petition was served fifteen (15) days *after* the statutory
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1 deadline. The District Court was therefore deprived of subject matter jurisdiction
2 to hear the Petition for Judicial Review.

3 The District Court appropriately found that the Petition for Judicial
4 Review was untimely served upon ESD, that the deadline for service was June 29,
5 2017. (JA, 142) The Court found that service of the Petition was not effectuated
6 until July 14, 2017, and that Appellant *failed* to make a *showing of good cause* for
7 effectuating service of the Petition for Judicial Review after the statutory deadline
8 in this case. (JA, 142) The Court appropriately dismissed the Petition for Judicial
9 Review, without prejudice, for lack of subject matter jurisdiction. (JA, 140-142)

10 The Court's Order appropriately noted that it considered Appellant's
11 purported good cause arguments contained in Appellant's opposition and at oral
12 argument: that NRCP 4(i) prevails over NRS 233B.130(5) and that the deadline
13 for service of the Petition should be interpreted as 120-days after the filing of the
14 Petition for Judicial Review. (JA, 39-37; 39, ll. 13-15; 141; 158-159) The Court
15 appropriately found Appellant's reliance upon NRCP 4(i) for a 120-day deadline
16 misplaced. (JA, 70) The Court made a factual finding that Petitioner did not
17 request that Respondent stipulate to an extension or move the Court for an
18 extension of time for service before the service deadline on June 29, 2017. (JA,
19 70-71) Accordingly, the Court aptly found that Appellant failed to establish good
20 cause for untimely service of the Petition for Judicial Review. (JA, 68-71)

1 Appellant inaccurately informs this Court in the Statement Of Facts
2 that ESD “omitted” any reference to the “good cause” exception to NRS
3 233B.130(5) in its briefing, in a purported attempt to misguide the District Court.
4 (OB, 5) ESD mentioned “good cause” as it relates to NRS 233B.130(5) fifteen
5 (15) times in its Motion to Dismiss, the attached Affidavit, Reply, and at oral
6 argument. (JA, 26-32, 42-52; 154) As such, Appellant’s argument that ESD
7 repeatedly attempted to misguide the District Court regarding the good cause
8 exception in NRS 233B.130(5) is belied by the record. (OB, 5) Most importantly,
9 the District Court was not misguided – in fact, the Court invited Appellant at oral
10 argument to present a good cause justification for the service delay; the Court
11 specifically concluded that Appellant failed to show good cause in its Order
12 Granting Motion to Dismiss. (JA, 151)

13 Appellant incorrectly argues in the Statement Of Facts, and **for the**
14 ***first time on appeal***, that the NRS 233B.130(5) service requirement, standing
15 alone, is sufficient to invoke subject matter jurisdiction.³ (See, OB, 5) Appellant
16 argued: “if service itself established the court’s jurisdiction, the district court could
17 never enlarge the time for service, rendering this provision for service worthless.”
18 (OB, 5) Not only does this circular argument lack legal merit, this Court must
19 decline to consider this argument since it was raised for the first time on appeal.
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1 *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 436, 245 P.3d
2 542 (2010)(“[p]arties ‘may not raise a new theory for the first time on appeal,
3 which is inconsistent or different from the one raised below.’”) (internal citations
4 omitted).

5 In the Statement Of Facts, Appellant incorrectly attempts to shift
6 Appellant’s burden to demonstrate a justifiable excuse for untimely service of the
7 Petition for Judicial Review to Respondents. (OB 7) The issue is not whether
8 Respondents suffered prejudice from the 15-day delay. *See*, NRS 233B.130(5);
9 *see also, Whale v. United States*, 792 F.2d 951 (9th Cir. 1986)(“defect in service in
10 the case at bar was due solely to the failure of Whale’s counsel to pay attention to
11 the requirements of Rule 4(d)(4).” “The district court did not abuse its discretion
12 when it concluded that *Whale* had failed to demonstrate justifiable excuse” for
13 defective service.) This Court must refuse to shift the burden of proof; it is
14 Appellant’s burden to prove good cause for the delay. It would be legally
15 inappropriate to analyze whether Respondents were prejudiced by the delay in
16 special statutory proceedings such as this, when the Appellant failed to properly
17 invoke the jurisdiction of the District Court.

18 Appellant inaccurately asserts in the Statement Of Facts that dismissal
19 of the Petition for Judicial Review robbed Spar an opportunity to be heard and
20

21 ³ ESD has never argued that the sole act of serving the Petition for Judicial

1 represented an error of law (OB, 7), but fails to provide any legal citation for this
2 conclusion. Despite Appellant's incorrect representation in the Statement Of Facts
3 (OB, 7), Respondents corrected the record to reflect that although Appellant did
4 not pay any unemployment insurance taxes from at least 2004 – 2011 for its
5 Nevada-based merchandisers, Appellant reported two employees through 2012,
6 one employee through 2014, and (under a new business name) began reporting
7 Nevada-based merchandiser wages for at least 50 employees in 2017. (JA, 94)
8 Appellant did not dispute such facts in Petitioner's Reply in Support of Motion to
9 Reconsider Pursuant to NRCP 59(e) and NRCP 60(b) and Appellant did not make
10 a record of any objection to these facts at oral argument. (JA, 103-112; 155-161)
11 Contrary to Appellant's assertion (OB, 7), at no time did Respondent mention
12 during oral argument whether or not Appellant was paying unemployment taxes in
13 Nevada. (JA, 152-55; 161-62)

14 Lastly, in the Statement Of Facts, Appellant mistakenly argues that
15 *Fitzpatrick v. State ex rel. Dep't of Commerce, Ins. Div.*, 107 Nev. 486, 487, 813
16 P.2d 1004 (1991) applies to support the specious proposition that once a Petition is
17 timely filed, the District Court is vested with jurisdiction. (JA, 7-8) As indicated
18 in ESD's Opposition to Motion for Reconsideration, *Fitzpatrick* lends no relevant
19 legal support and is distinguishable from this case as it does not analyze NRS
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Review is sufficient to vest the district court with subject matter jurisdiction.

1 612.530(2) or NRS 233B.130(5), which are the statutory requirements for timely
2 service of a Petition for Judicial Review. (JA, 92-93) *Fitzpatrick* only explains
3 that a court may consider the late filing of a Points and Authorities (or Opening
4 Brief) under NRS 233B.133, which is an entirely different statutory reference.
5 *See, Fitzpatrick, supra; see also, JA, 93.* Here, Appellant did not attempt to file
6 Points and Authorities (or Opening Brief) in this case. (JA, 165-166) The District
7 Court properly denied reconsideration. (JA, 119-122)

8 On April 30, 2018, Appellant filed the Notice of Appeal in the District
9 Court, appealing the Order Granting Motion to Dismiss Petition for Judicial
10 Review and the Order Denying Motion for Reconsideration entered April 11, 2018.
11 (JA, 133-34)

12 **STATEMENT OF THE STANDARD OF REVIEW**

13 “Courts have no inherent appellate jurisdiction over official acts of
14 administrative agencies except where the [L]egislature has made some statutory
15 provision for judicial review.” *K-Kel, Inc. v. State, Dep’t of Taxation*, 134
16 Nev.Adv.Op. 10, 412 P.3d 15 (2018) citing, *Crane v. Cont’l Tel. Co. of Cal.*, 105
17 Nev. 399, 401 P.2d 705, 706 (1989). “Statutory construction is a matter for de
18 novo review. *J.D. Constr., Inc. v. IBEX Int’l Grp., LLC*, 126 Nev. 366, 375, 240
19 P.3d 1033, 1039 (2010). If a statute is clear and unambiguous, this court gives
20 effect to the plain and ordinary meaning of its language without examining the
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1 other rules of construction. *Id.* at 375, 240 P.3d at 1039–40.” *Board of Review,*
2 *Nev. Dep’t of Emp’t, Training & Rehab., Emp’t Sec. Div. v. Second Jud. Dist. Ct.*
3 *in and for Cty. of Washoe*, 133 Nev.Adv.Op. 35, 396 P.3d 795, 797 (2017).

4 ARGUMENT

5 **1. THE DISTRICT COURT DID NOT ERR WHEN IT** 6 **GRANTED RESPONDENT’S MOTION TO DISMISS** 7 **PETITION FOR JUDICIAL REVIEW FOR LACK OF** 8 **SUBJECT MATTER JURISDICTION, WITHOUT** 9 **PREJUDICE, FOR UNTIMELY SERVICE OF THE** 10 **PETITION.**

11 This special statutory proceeding was appropriately dismissed, as the
12 District Court was divested of subject matter jurisdiction. Petitioner failed to meet
13 the mandatory statutory requirements necessary to confer jurisdiction upon the
14 District Court. Appellant is incorrect in its contention that upon timely filing the
15 Petition for Judicial Review, alone, the District Court acquired subject matter
16 jurisdiction over this administrative case. (OB, 8) Appellant’s jurisdictional
17 responsibilities did not end after the Petition for Judicial Review was merely filed.

18 In order to obtain judicial review of a decision issued by ESD’s Board
19 of Review, as in any other special statutory proceeding under Chapter 612 of NRS,
20 a petitioner must take several steps before jurisdiction is conferred upon the district
21 court. *See*, “**NRS 612.530 – Judicial review of decision of Board of Review:**
Commencement of action in district court; parties; service of petition;” *see*

1 *also*, NRS Chapter 233B. For example, petitioner must timely file the petition for
2 judicial review, the petition must be filed in the appropriate district court, the
3 petition must name all parties to the proceedings below, and the petition must be
4 *served* upon the Administrator, *inter alia*. NRS 612.530 §§ (1)&(2).⁴

5 Because this is a special statutory proceeding and not a general civil
6 action, *timely service* of the *petition for judicial review* is a mandatory
7 precondition to the District Court's jurisdiction for judicial review. NRS
8 612.530(2); NRS 233B.130(5); *See, Washoe Cty. v. Otto*, 128 Nev.Adv.Op. 40,
9 282 P.3d 719, 725 (2012)(noncompliance with statutory requirements necessitates
10 dismissal; "[c]ourts have no inherent appellate jurisdiction over official acts of
11 administrative agencies except where the legislature has made some statutory
12 provision for judicial review.' Thus, [w]hen the legislature creates a specific
13 procedure for review of administrative agency decisions, such procedure is
14 controlling.")(internal citations omitted); *see also, Bd. of Review, Nev. Dep't of*
15 *Emp't, Training & Rehab., Emp't Sec. Div. v. Second Judicial Dist. Court of State*
16 *in & for Cty. of Washoe*, 396 P.3d 795, 797 (Nev. 2017)(reversing the denial of
17 ESD's motion to dismiss because petitioner failed to properly name a party as

18 ⁴ Provisions of Nevada's Administrative Procedure Act (Ch. 233B of NRS) apply
19 absent special provisions in Chapter 612 of NRS to the contrary. NRS
20 233B.039(3)(a). NRS 612.530(2) is silent as to when the Petition must be served
21 upon ESD's Administrator. Accordingly, Chapter 233B of NRS requires it to be
served within 45 days of filing.

1 required by NRS 612.530(1), holding that “[w]e have consistently held that the
2 requirements of the statute [NRS 612.530] are jurisdictional and mandatory”); *see*
3 *also, Scott v. Nev. Emp’t Sec. Dep’t*, 70 Nev. 555, 559, 278 P.2d 602, 604
4 (1954)(affirming dismissal of a petition for judicial review where petitioner had
5 failed to file petition in the proper district court); *Caruso v. Nevada Emp. Sec.*
6 *Dept.*, 103 Nev. 75, 76, 734 P.2d 224, 225 (1987)(affirming the dismissal of
7 petition for lack of subject matter jurisdiction for failing to file in the appropriate
8 district court; holding that “[t]he legislature has, by explicit language, directed
9 claimants to file their petitions for judicial review in the county wherein the
10 appealed claim was filed. While this legislative mandate may occasionally result
11 in hardship, it is not the function of this court to substitute its judgment for that of
12 the legislature.”).

13 The relevant statutes⁵ are clear and unambiguous; the rules of
14 construction need not be examined under these circumstances. *Board of Review,*
15 *Nev. Dep’t of Emp’t, Training & Rehab., Emp’t Sec. Div., supra*. A district court is
16 deprived of subject matter jurisdiction when a petition for judicial review is not
17 properly *served* within 45-days. *See*, NRS 612.530(3); NRS 233B.130(5). An
18 examination of NRS 612.530(2) provides that “a petition ... must be served upon
19 the Administrator.” NRS 233B.130(5) provides that a “petition for judicial review
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1 ... must be served upon the agency ... within 45 days after the filing of the petition.”
2 Appellant’s failure to timely *serve* ESD’s Administrator with the Petition within
3 the 45-day statutory deadline divested the District Court of subject matter
4 jurisdiction to hear this administrative appeal. The District Court had no other
5 option than to dismiss the Petition for Judicial Review. *See, Scott, supra* (“if the
6 court did not have jurisdiction it could not have made an effective order of any
7 kind except the order of dismissal”). The District Court appropriately granted the
8 motion to dismiss because the Court lacked subject matter jurisdiction to hear the
9 case.

10 NRCP 4(i) cannot work to extend jurisdiction in this administrative
11 proceeding. NRS 233B.039(3) and NRS 233B.130(5) control
concerning the 45-day deadline to serve the Petition for Judicial Review.

12 Since the instant matter is a special statutory proceeding, NRS
13 233B.039(3) and NRS 233B.130(5) prevail over NRCP 4(i) concerning the 45-day
14 statutory deadline for service of the Petition for Judicial Review upon ESD’s
15 Administrator. *See also*, NRCP 81(a). Petitioner’s reliance upon NRCP 4(i) for
16 the service deadline is misplaced and not supported by Nevada law. NRCP 81(a)
17 explains that the Nevada Rules of Civil Procedure “do not govern procedure and
18 practice in any special statutory proceeding insofar as they are inconsistent or in
19 conflict with the procedure and practice provided by applicable statute.” As such,

20 ⁵ NRS 612.530(2), NRS 233B.039(3)(a) and NRS 233B.130(5) are the relevant
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1 because NRS 233B.130(5) contains a specific statutory provision regarding the 45-
2 day deadline for service of a petition for judicial review, NRS 233B.130 clearly
3 prevails over NRCP 4(i). *See* fn 1, *supra*; *see also*, *Crane v. Continental Tel. Co.*
4 *of Ca.*, 105 Nev. 399, 401, 775 P.2d 705, 707 (1989)(holding that “when the
5 legislature creates a specific procedure for review of administrative agency
6 decisions, such procedure is controlling.”).

7 The provisions of NRS Chapter 233B apply to the review of
8 unemployment insurance cases except where specific provisions of NRS Chapter
9 612 regarding judicial review conflict with NRS Chapter 233B. NRS
10 233B.039(3)(a) provides, in pertinent part: “[t]he special provisions of Chapter
11 612 of NRS for the distribution of regulations by and the judicial review of
12 decisions of the Employment Security Division of the Department of Employment,
13 Training and Rehabilitation . . . prevail over the general provisions of this chapter.”
14 The statutory provisions contained in NRS Chapter 612.530(2) and NRS Chapter
15 233B.130(5) control, as they are in conflict with NRCP 4(i).

16 Moreover, NRCP 4(i) has no application to this case because NRCP
17 4(i) only applies to the service of a *summons* and *complaint* in a civil action.
18 Petitioner untimely served its *Petition for Judicial Review* in this administrative
19 matter. *See, Crane, supra* (holding that the district court had no jurisdiction over a
20 statutes.
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1 complaint, when a complainant should have filed a petition for judicial review).

2 It would have been reversible error for the District Court to find that
3 NRCP 4(i) may work to *extend jurisdiction* in this special statutory proceeding.
4 NRCP 82 provides that “[t]hese rules shall not be construed to extend ... [the]
5 jurisdiction of the district courts.” The District Court properly granted the
6 Respondent’s Motion To Dismiss.

7 Appellant cited to *Domino v. Gaughin, supra*, in its Opposition to
8 Motion to Dismiss, in support of its theory that dismissal constitutes error. (JA,
9 36) *Domino* provided the District Court with no authority to extend jurisdiction in
10 this matter after defective service of the Petition for Judicial Review. It would
11 have been reversible error for the District Court to deny Respondent’s Motion to
12 Dismiss and consider the merits of this administrative proceeding. The facts and
13 law in *Domino* are clearly distinguished from this case. *Domino* involved a
14 personal injury action. *Domino v. Gaughin*, 103 Nev. at 583, 747 P.2d. at 237.
15 The appellant in *Domino* failed to effect service of a summons and a *complaint*
16 within 120 days. *Id.* Because *Domino* involved a personal injury action and not an
17 administrative proceeding, the Supreme Court’s analysis regarding the extension of
18 time for service of a *complaint* under NRCP 4(i) has no application to this case. A
19 civil complaint is radically different from a petition for judicial review of an
20 administrative decision; the two pleadings are not interchangeable. As the
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1 Supreme Court held in *Crane, supra*, “Instead of filing a *petition* for judicial
2 review . . [the appellant] filed a new *complaint*. Therefore, the district court lacked
3 jurisdiction and properly dismissed . . . the complaint.” The *Crane* Court went on
4 to explain that “[t]he time for taking an administrative appeal, as prescribed by
5 statute, is jurisdictional and delay beyond the statutory time is fatal.” (internal
6 citations omitted)(emphasis added). Here, Appellant’s misguided attempt to apply
7 NRCP 4(i) and *Domino* to this case obviously fails, as *Domino* and NRCP 4(i) only
8 apply to a civil action, rather than an administrative action; a plaintiff has different
9 legal responsibilities than a petitioner. The District Court would have acted
10 contrary to Nevada law if it were to apply NRCP 4(i), as in *Domino*, to extend
11 jurisdiction in this case. The District Court correctly declined to consider NRCP 4
12 (i) and *Domino*, as they have no relevance whatsoever to the facts and law in this
13 case.

14 The evidence in the record clearly supports the District Court’s
15 decision that Appellant’s failure to timely serve the Petition for Judicial Review
16 deprived the Court of jurisdiction.

17 **2. THE DISTRICT COURT APPROPRIATELY FOUND**
18 **THAT APPELLANT FAILED TO SHOW GOOD CAUSE**
19 **FOR UNTIMLEY SERVING THE PETITION FOR**
20 **JUDICIAL REVIEW.**

21 Since Appellant failed to serve the Petition for Judicial Review prior

1 to expiration of the 45-day deadline, Petitioner has the burden to show it has good
2 cause for serving the Petition 15 days *after* the statutory deadline. *See*, NRS
3 233B.130(5). Appellant did not meet its burden to show good cause for its failure.
4 The only purported good cause justification the Appellant gave the District Court
5 for serving the Petition late is that Appellant's counsel failed to properly comply
6 with NRS 233B.130(5) because counsel mistakenly relied upon NRCP 4(i). (*See*,
7 JA 35-37; 39) NRCP 4(i) only applies to service of a *complaint*, not a Petition for
8 Judicial Review. NRCP 4(i) provides no relevant authority in this special statutory
9 proceeding.

10 The only justification that Appellant offered to the District Court
11 concerning good cause was that NRCP 4(i) controls because the service deadline
12 and NRS 233B.130(5) do not apply, and counsel's purported misapprehension of
13 same. Respondent must accordingly repeat this analysis in order to review whether
14 Appellant had good cause. Unfortunately, the argument becomes repetitive
15 because it is the only "good cause" lodged by Appellant.

16 NRCP 4(i) and *Domino* provide no authority to extend the service
17 deadline to cure this jurisdictional defect, it is worth noting that *Domino* cites to
18 only one case: *Whale v. United States*, 792 F.2d 951 (9th Cir. 1986). The *Whale*
19 Court held that the "*defect in service* in the case at bar was *due solely* to the failure
20 of *Whale's* counsel *to pay attention* to the requirements of Rule 4(d)(4)." *Id.*
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1 (Emphasis added) “The district court did not abuse its discretion when it concluded
2 that Whale had failed to demonstrate justifiable excuse” for defective service. *Id.*
3 Just as in *Whale*, Appellant’s counsel cannot demonstrate good cause for untimely
4 service based solely on the failure to pay attention to the statutory deadlines for
5 service. (JA, 37) Appellant’s alleged “justification” for defective service is
6 especially unreasonable since Petitioner’s counsel had timely effectuated service of
7 a Petition for Judicial Review upon ESD’s Administrator in Case No. A652992 on
8 January 11, 2012. *See*, Register of Actions for *Spar v. Zicarelli*, A-11-652992-J,
9 Dept. 18 (SA, 013).

10 Appellant’s counsel asked the District Court to examine the definition
11 of good cause based upon the analysis in *Domino, supra*. The District Court
12 appropriately refrained from considering the “good cause analysis” in *Domino*, as
13 it only relates to the failure to timely serve a *complaint* in a personal injury action.
14 The circumstances of serving a complaint in a civil action are dissimilar to the
15 service of a Petition for Judicial Review in an NRS Chapter 612 administrative
16 case: In an administrative case, the parties are known, the contact information for
17 the parties have been known for some time as the parties most likely participated in
18 the administrative proceedings before the Administrative Tribunal and the Board
19 of Review. Hence, it is logical that the legislature would set a 45-day statutory
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1 deadline for service of a petition in an administrative matter. *See*, NRS 612.530(2)
2 and NRS 233B.130(5).

3 Appellant Inappropriately Asked the District Court to Shift the Burden
4 of Proof and Require Respondent's to Demonstrate Prejudice.

5 The District Court properly rejected the invitation by Appellants to
6 incorrectly shift the burden of proof to Respondents, and to reject the *Domino*
7 analysis concerning whether the delay in service occasioned prejudice to
8 Respondents. *See*, NRS 233B.130(5). Whether Respondents suffered prejudice
9 was not dispositive in *Whale*. Indeed, in light of the forgoing, the appropriate issue
10 is whether Appellant demonstrated a justifiable excuse for failure to timely serve
11 the Petition, not whether Respondents suffered prejudice from the 15-day delay.
12 *See, Whale, supra.*

13 The analysis in *Arnold v. Kip* is persuasive and supports the
14 contention that the moving party is not required to show prejudice for the delay in
15 service, given that Appellant carries the burden of showing good cause for the
16 delay. *Arnold v. Kip*, 123 Nev. 410, 168 P.3d 1050 (2007). The *Arnold* Court held
17 that the district court did not abuse its discretion by failing to consider whether Dr.
18 Kip had been prejudiced by appellant's delay in filing the NRCP 16.1 case
19 conference report. The *Arnold* Court held that "a party moving for dismissal under
20 NRCP 16.1(e)(2) is not required to demonstrate prejudice, and the district court is
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1 not required to consider whether the defendant has suffered prejudice because of
2 the delay in filing the case conference report.” *Id.*, 123 Nev. at 415, 168 P.3d at
3 1053.

4 NRS 233B.130(5) is similarly absent any language which requires that
5 the party seeking dismissal show prejudice. NRS 233B.130(5) states, “[a] petition
6 for judicial review . . . **must** be served upon the agency . . . within 45 days after
7 filing of the petition, unless, upon *showing of good cause*, the district court extends
8 the time for such service.” *Arnold*, too, explains that “[n]othing in the language of
9 NRCp 16.1 (e)(2). . . requires the defendant to demonstrate prejudice or the district
10 court to determine whether the defendant has suffered prejudice as a condition to
11 granting a dismissal . . . To hold otherwise would largely eviscerate the rule
12 because it would allow plaintiffs to exceed the deadline for filing a case conference
13 report so long as the defendant could not demonstrate prejudice.” *Id.*

14 That being said, while Respondents carry no burden of proof to show
15 prejudice for defective service, Appellant incorrectly argues that Respondents were
16 not prejudiced from the delay in service of the Petition in this case. Respondents,
17 as any other party, have an interest in finality of actions.

18 Appellant inappropriately suggested that it is “the only party that can
19 legitimately complain about delay in this matter – which originated with
20 Petitioner’s filing of a Petition for Readjustment in 2007.” (JA, 37) Any alleged
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1 delay in this matter is attributable to Appellant. January 23, 2007, Appellant
2 withdrew its administrative appeal of the determination issued on October 20,
3 2006, finding that Michael DeBoard, and other similarly situated individuals
4 working for Appellant were employees and therefore Appellant was subject to pay
5 unemployment tax for its merchandisers. (JA, 57) The October 20, 2006,
6 determination was upheld by the Appeal Tribunal (referee) and affirmed by the
7 Board of Review. (JA, 55-60) Appellant petitioned the District Court for review
8 of the Board's decision. (JA, 1)

9 The good-cause analysis in *Domino* is not relevant to the facts of this
10 case; but even if the District Court had held that *Domino* applies (it does not),
11 Appellant nonetheless failed to show good cause for its delay in serving the
12 Petition. The following facts in *Domino* are clearly distinguished from this case:
13 plaintiff's out-of-state counsel was unable to arrange for substitution of counsel,
14 counsel was an inexperienced attorney with only two years of experience,
15 plaintiff's counsel suffered difficulty with the summons and difficulty in
16 communication with co-counsel, counsel was absent from the office due to illness,
17 service of the complaint was repeatedly attempted within the NRCP 4(i) timeline,
18 counsel continued to attempt service until service was effectuated after the
19 deadline. It is undisputed that none of the foregoing factors was present in the
20 instant case.

1 Most importantly, no attempt was made to serve ESD's Administrator
2 within the statutory deadline. No request to stipulate to an extension of time to
3 serve ESD's Administrator was presented to Respondent ESD before the
4 expiration of the statutory deadline. Appellant was not proceeding in *pro per*, was
5 not misled by a court official, and cannot attribute the delay in service to anyone
6 but Petitioner's counsel. *See, Whale, supra*. Even assuming, *arguendo*, the
7 District Court should have considered the *Domino* analysis (it could not) Appellant
8 nonetheless failed to show good cause (under the *Domino* factors) for failing to
9 serve the Petition within the statutory deadline.

10 **3. NEVADA LAW CONFERS NO AUTHORITY FOR**
11 **JUDICIAL REVIEW WHEN JURISDICTION IS**
12 **ABSENT, AND WHEN THE COURT HAS FOUND THAT**
13 **APPELLANT FAILED TO SHOW GOOD CAUSE;**
14 **APPELLANT'S VARIOUS ARGUMENTS TO THE**
15 **CONTRARY ARE UNAVAILING.**

16 Appellant inaccurately argues for the first time on appeal that ESD
17 attempted to misdirect the District Court in its Motion to Dismiss that "NRS
18 233B.130(5) divested the district court of jurisdiction to address whether the
19 failure of Petitioner herein to timely serve was done so with good cause."⁶ (OB, 9)
20 This nonsensical argument is clearly belied by the record.

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1 In ESD's Motion to Dismiss, Respondent analyzed whether Appellant
2 could show good cause for the service delay, given that Appellant had successfully
3 and timely served the ESD Administrator once before in 2012, in a predecessor
4 case handled by the same two attorneys as the instant case; therefore, Appellant's
5 argument cannot stand. (OB, 9) Respondent would not have entered into a
6 detailed good cause analysis if Respondent had also argued that the District Court
7 must refrain from considering good cause. The two arguments are patently
8 illogical and inconsistent. As part of the good cause factual analysis, Respondent
9 points to the following facts which show Appellant's absence of good cause for the
10 delay in service: the Summons was issued the same day the Petition was filed (JA,
11 165); the belated voicemail message from Appellant's counsel requesting
12 Respondent accept service was devoid of any factual reason which might establish
13 good cause for Respondent to overlook Appellant's belated request after the
14 statutory deadline had run (JA, 30); that Appellant's current counsel, Gina
15 Bongiovi, Esq., and Thomas Vollbrecht, Esq., had successfully effectuated service
16 on the ESD Administrator in a predecessor proceeding in 2012, in which Appellant
17 (under a previous business name) successfully and timely served the Petition for
18 Judicial Review, therefore, counsel clearly do understand the law concerning
19 service. (SA, 013, Register of Actions 2011-12)

20 ⁶ This Court must decline to consider this new argument, as it is raised for the
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1 Next, Appellant incorrectly argues that the Nevada Supreme Court has
2 held that “failure to timely serve” a Petition is “not jurisdictionally fatal under NRS
3 233B.130(5),” citing to *Fitzpatrick, supra*. (JA, 10) This argument directly
4 contradicts the argument proposed by Appellant’s counsel at oral argument, in
5 which he contended, “NRS 233B.130 does not apply at all.” (JA, 159, l. 10) For
6 this reason alone, Appellant’s argument must fail.

7 Moreover, Appellant erroneously relies on *Fitzpatrick, supra*, which
8 is absent any law or analysis regarding NRS 612.530(2) and NRS 233B.130(5), the
9 statutory requirement for timely service of a Petition for Judicial Review. (JA, 10)
10 *Fitzpatrick* is clearly distinguished because it only holds that a court may consider
11 the late filing of *Points and Authorities* (or Opening Brief), pursuant to NRS
12 233B.133 (a different statutory reference). *Fitzpatrick* is clearly distinguished
13 from the circumstances of this case as it does not consider untimely service of a
14 Petition for Judicial Review; further, no *Points and Authorities* (or Opening Brief)
15 have been filed by Appellant in this matter. As such, *Fitzpatrick* provides this
16 Court no legal support whatsoever;⁷ Respondent had no duty to inform the District
17 Court of the *Fitzpatrick* case since it has no factual or legal relevance to this case.

18
19 first time on appeal. *Schuck, supra*.

20 ⁷ At no time did the District Court hold “that Spar was required to file a motion
21 for leave to serve late in advance of service,” as Appellant incorrectly contends.
(JA, 11; *and see*, JA, 68-70)

1 Appellant inaccurately suggests that “[o]nce Spar timely and strictly
2 complied with the filing requirements of NRS 612.530(1), this Court obtained and
3 maintained jurisdiction to consider Spar’s good cause for delayed service and was,
4 in fact, required to consider good cause.” (OB, 11) This argument directly
5 conflicts with the oral argument presented by counsel for Appellant in which he
6 argued that the Petition for Judicial Review “must be served” (JA, 158, l. 7), and
7 there must be a “time limit on service” of the Petition. (JA, 158, l. 11)

8 That being said, the District Court appropriately considered whether
9 Appellant demonstrated good cause for untimely service, and concluded that good
10 cause was not shown. (JA, 119-122) The District Court aptly considered
11 Appellant’s good cause argument that NRCP 4(i) prevails over NRS 233B.130(5),
12 and found Appellant’s reliance upon NRCP 4(i) misplaced. (JA, 121-122) The
13 Court also went through a chronological analysis of the facts of this case, and
14 concluded that Appellant failed to make a showing of good cause. (JA, 122, ll. 6-
15 12) Appellant’s argument that “[t]here was absolutely no consideration of good
16 cause,” is patently false. (OB, 12)

17 Appellant invites this Court to consider a new case (not presented in
18 District Court) which purportedly holds that the “Supreme Court requires the
19 weighing of ten factors in determining if good cause exists for delayed service of a
20 complaint.” (OB, 12) Appellant’s argument immediately fails without review of
21

1 this case as the rule concerning service of a *complaint* is clearly irrelevant; the
2 applicable service statute only concerns a Petition for Judicial Review, under NRS
3 233B.130(5). Furthermore, the case which Appellant cites, *Saavedra-Sandoval v.*
4 *Wal-Mart Stores, Inc.*, 126 Nev. 592, 245 P.3d 1198 (2010), is clearly
5 distinguished from the facts of this case for multiple reasons.

6 First, *Wal-Mart, supra.* considered NRCP 4(i) regarding the service of
7 a complaint, which clearly does not apply to the service of a Petition, as explained
8 in detail above. Next, *Wal-Mart, supra.* provides that “[i]f a party fails to move to
9 enlarge the time for service within the 120 day period, ‘the court shall take that
10 failure into consideration in determining good cause for an extension of time.’” *Id.*
11 Even if, *arguendo*, *Wal-Mart* did apply under the circumstances of this case (it
12 does not), Appellant *never filed* a Motion for Extension of Time to serve the
13 Petition for Judicial Review. As such, based on the holding in *Wal-Mart*, the
14 Petition for Judicial Review was appropriately dismissed for Appellant’s failure to
15 move the court for an extension of time for service. The District Court therefore
16 fittingly refrained from weighing any of the factors found in *Wal-Mart, supra.*

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1 **4. NO RELEVANT NEVADA LAW REQUIRES A HEARING**
2 **ON THE MERITS WHEN SUBJECT MATTER**
3 **JURISDICTION IS ABSENT DUE TO FAILURE TO**
4 **FOLLOW THE STATUTORY PROCEDURE.**

5 Nevada law does not require “that cases be heard on the merits” when
6 the mandates of statute are not satisfied in special statutory proceedings such as
7 this, as explained more fully below. *See*, OB, 13; *and see*, *Kame, supra*; *Otto,*
8 *supra*; *Bd. of Review, Nev. Dep't of Emp't, Training & Rehab., Emp. Sec. Div.,*
9 *supra*. Appellant inaccurately infers that the District Court erred for denying its
10 Motion to Reconsider, citing to *AA Primo Builders, LLC v. Washington*, 126 Nev.
11 578, 245 P.3d 1190 (2010). (*See*, OB, 13) It was not an abuse of discretion for the
12 District Court to deny Appellant’s Motion to Reconsider. (*See*, OB, 13) The
13 reasons, set forth in *Washington*, to grant such motion have no application here:
14 there was no manifest injustice, no change of controlling law, no excusable
15 neglect, or need to correct manifest errors of law or fact. *See, Id.* The District
16 Court committed no error of law or fact. Moreover, *Washington* has no relevance
17 here, as it interpreted an unrelated statute regarding the reinstatement of a revoked
18 charter. *Id.*

19 The thrust of Appellant’s argument in its Motion to Reconsider was
20 that the Appellant had failed to bring the *Fitzpatrick* case to the attention of the
21 District Court, and that such case allegedly provides that if a Petition for Judicial

1 Review is timely filed, subject matter jurisdiction is conferred as long as Appellant
2 can establish good cause. (JA, 131-32) The District Court correctly found that
3 Appellant had failed to establish that the District Court's decision was "clearly
4 erroneous"; and found the *Fitzpatrick* decision not on-point because it addresses
5 the deadline for the points and authorities under NRS 233B.133, which is
6 distinguished from service of a Petition as set forth in NRS 612.530(2) and NRS
7 233B.130(5). (JA, 131-32) The Court also found that such case should have been
8 raised in briefing or at the hearing on the Motion to Dismiss, and was not. (JA,
9 132) The fact that counsel for Appellant conducted additional research *after* the
10 hearing on the Motion to Dismiss and belatedly found a case that is *not* relevant
11 clearly cannot amount to good cause.

12 Appellant next incorrectly proposes that this High Court has
13 announced that in administrative proceedings such as this, which are governed by
14 statute and *not* the Nevada Rules of Civil Procedure, Nevada policy dictates
15 matters be heard on their merits. (OB, 13) Appellant erroneously cites to *Kahn v.*
16 *Orme*, which does not support this contention. 108, Nev. 510, 835 P.2d 790 (1992).
17 *Kahn* concerned a civil action (not an administrative proceeding) for battery,
18 defamation, and malicious prosecution in which a default judgment was entered.
19 *Id.* *Kahn* renders Appellant no relevant support for this argument because it does
20 not interpret NRS 612.530(2), NRS 233B.130(5), nor any other special statutory
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1 procedures which are necessary to vest the court with subject matter jurisdiction.
2 Assuming, *arguendo*, that *Kahn* applies here (it does not) Appellant cannot satisfy
3 the *Kahn* requirement that Appellant's counsel lacked knowledge of the procedural
4 requirements. Here, like in *Kahn, supra*, counsel for Appellant "had sufficient
5 knowledge" of the procedural requirements for service of the Petition for Judicial
6 Review because Appellant timely served a Petition for Judicial Review upon
7 ESD's Administrator in 2012 in the predecessor proceeding, *Spar v. Zicarelli; et*
8 *al.*, A-11-652992-J, on behalf of Appellant, as referenced above. Spar's delay,
9 therefore, cannot be considered a good faith effort to promptly comply, as
10 counsel's previous successful compliance with the relevant statutory procedure
11 demonstrates counsel's knowledge and understanding of same. *See also, Whale,*
12 *supra*. As such, Appellant is unable to show "excusable neglect" as described in
13 *Kahn* for untimely service for failure to follow the procedural requirements set
14 forth in statute.

15 The argument that dismissal was unwarranted because the District
16 Court dismissed the case with prejudice is futile. (OB, 14) The District Court's
17 Order contains no language that the matter was dismissed with prejudice.
18 Nonetheless, the Petition could not be refiled, in any event, because the 11-day

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1 statutory deadline had long since passed. *See*, NRS 612.530(1); *and see, e.g.*,
2 *Liberty Mut. v. Thomasson*, 130 Nev. Adv. Op 4, 317 P.3d 831, 836 (2014). The
3 delay is attributable to Appellant, alone.

4 Turning to Appellant's citation to *Hotel Las Frontier Corp. v.*
5 *Frontier Properties*, 79 Nev. 150, 380 P.2d 293 (1963) and *Banks v. Heater*, 95
6 Nev. 610, 600 P.2d 245 (1979), both cases involve civil actions and not
7 administrative proceedings, and they lend no support for the proposition that cases
8 should be decided on their merits when subject matter jurisdiction is lacking for
9 failure to follow the mandatory statutory procedure in administrative matters. In
10 fact, earlier this year, this Court held that "pro se litigants cannot use . . . alleged
11 ignorance as a shield to protect . . . from the consequences of failing to comply
12 with basic procedural requirements." *Rodriguez v. Fiesta Palms, LLC*, 134 Nev.
13 Adv.Op.78, ___ P.3d ___ (2018). In the case at bar, Appellant was represented by
14 two attorneys; these attorneys, like pro se litigants, cannot use alleged ignorance as
15 a shield against the consequences for failure to comply with statutory mandates, in
16 light of the circumstances of this case.

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1 **CONCLUSION**

2 Therefore, Respondent ESD respectfully requests that this appeal be
3 denied and that the Court affirm the decision of the Eighth Judicial District Court
4 dismissing the Petitioner's Petition for Judicial Review.

5 **AFFIRMATION Pursuant to NRS 239B.030:**

6 The undersigned does hereby affirm that the preceding document does
7 not contain confidential information; including, but not limited to: the Social
8 Security number or employer identification number of any person or party.

9 **DATED** this 6th day of November, 2018.

10 

11 LAURIE L. TROTTER, ESQ.
12 *Attorney for Respondent ESD*
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1 **ATTORNEY'S CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this Answering Brief complies with the
3 formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP
4 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Answering
5 Brief has been prepared in a proportionally spaced typeface using Microsoft Word
6 2010 in 14-point Times New Roman.

7 2. I further certify that this Answering Brief complies with the
8 page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of
9 the Answering Brief exempted by NRAP 32(a)(7)(C), it contains 7,988 words.

10 3. Finally, I hereby certify that I have read this appellate brief, and
11 to the best of my knowledge, information, and belief, it is not frivolous or
12 interposed for any improper purpose. I further certify that this Answering Brief
13 complies with all applicable Nevada Rules of Appellate Procedure, in particular
14 NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the
15 record to be supported by a reference to the page and volume number, if any, of the
16 transcript or appendix where the matter relied on is to be found.

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18 ///

19 ///

20 ///

1 I understand that I may be subject to sanctions in the event that the
2 accompanying Answering Brief is not in conformity with the requirements of the
3 Nevada Rules of Appellate Procedure.

4 **DATED** this 6th day of November, 2018.

5 

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRAP 25(d)(1)(B), I hereby certify that I am an employee
3 of the State of Nevada, over the age of 18 years; and that on the date hereinbelow
4 set forth, I electronically filed the foregoing RESPONDENT ESD'S
5 ANSWERING BRIEF with the Clerk of the Nevada Supreme Court; and, as a
6 consequence thereof, electronic service was made in accordance with the Master
7 List as follows:

8 GINA BONGIOVI, ESQ.
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12 And by mailing within an envelope which was deposited with the State of Nevada
13 Mail for postage and mailing from Carson City, Nevada, addressed as follows:

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19 DATED this 7th day of November, 2018.

20 
21 SHERI C. IHLER