

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

APPELLANT'S REPLY 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. There 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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I. INTRODUCTION

In order to adopt the Respondents' position, this Court must set aside cemented Nevada Supreme Court law articulated in *Fitzpatrick*, as well as trample public policy and ample precedent requiring matters be heard on their merits. This Court would be upholding the unlawful dismissal, effectively *with prejudice*¹, of a case that was timely filed and therefore met all statute of limitations jurisdictional requirements. Such a result flies in the face of unshakable jurisprudence and is fundamentally unjust.

To summarize and correct misstatements contained within Respondents' brief: Spar did not simply ignore deadlines; its counsel was honestly and in good faith confused by the statutory scheme. NRS 233B is Nevada's Administrative Procedure Act. NRS 233B.039(3)(a) refers litigants to NRS 612 for matters arising out of the Employment Security Division. As NRS 612 is silent regarding service, Spar looked to NRCP 4(i) and its 120-day service deadline, rather than referring back to NRS 233B. Spar wished to associate co-counsel prior to serving the Respondents, and believed in good faith that a 120-day window for service remained. *JA00074-JA00076*. Though Respondents maintain that Spar "made no attempt whatsoever to serve the Administrator of ESD with a copy of the Petition

¹ The 11-day deadline for filing a petition for judicial review per NRS 612.530 had long expired at the time of the order.

for Judicial Review before July 14, 2017,” Respondent conveniently omits reference to the receipt of an email of July 6, 2017 wherein Spar’s counsel’s request that Ms. Trotter accept service of process. This fact is not in dispute. Following its receipt of a July 11, 2017 minute order granting its May 31, 2017 Motion to Associate Counsel, on July 13, 2017 Spar called to again request Respondents’ counsel accept service and, rejected, properly effectuated service on all parties on July 14, 2017.

While Respondents’ brief is thirty-six pages in length, it can be summed up as substantively void inasmuch as Respondent has not cited a single case or statute supporting its position that untimely *service* divested the district court of jurisdiction. Nothing contained therein alters the fact that the Petition for Judicial Review herein was, without dispute, timely *filed* - conferring subject matter jurisdiction - and Nevada law therefore requires it proceed.

II. ARGUMENT

A. The District Court Erroneously Concluded that Untimely Service Divested it of Jurisdiction.

Respondents offer nothing but a litany of cases that support dismissals for untimely *filing* – not service. [See Respondents’ Answering Brief p. 15 ll9-15; p16-19]. It is undisputed that Spar timely filed its petition for judicial review; good faith-delayed service should in no way serve as an absolute bar to having the matter heard on the merits. 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.

Contrary to Respondents' assertions, Spar properly preserved all issues on appeal. Specifically, and contrary to Respondents' position, in its Opposition to Respondents' Motion to Dismiss, and its Motion to Reconsider, Spar argued that timely filing was sufficient to confer subject matter jurisdiction. *JA00036-00038*, *JA00077*, *JA00079*, *JA00081-JA00083*. If service within the 45-day deadline was also required to confer jurisdiction, no judge would ever have jurisdiction to consider any request to enlarge the time for service as contemplated in NRS 233B.130(5).

In a case directly on point, relied upon in Spar's Motion to Reconsider, the Nevada Supreme Court reversed a dismissal based on the district court's assumed lack of jurisdiction and subsequent refusal to analyze good cause for the late filing of a memorandum of points and authorities. *Fitzpatrick v. State ex rel. Dep't of Commerce, Ins. Div.*, 107 Nev. 486, 487, 813 P.2d 1004 (1991). *JA00072-JA00086*. In *Fitzpatrick*, the Petitioner filed its memorandum of points and authorities outside the deadline articulated at NRS 233B.133 which required filing and service within 40 days. *Id.*; *see also* NRS 233B.133. 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).

As with *Fitzpatrick*, Spar timely filed the Petition for Judicial Review, vesting the district court with jurisdiction. The finding otherwise by the district court is reversible error. 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).

The *only* reading of *Fitzpatrick* is that the jurisdictional lynchpin is the *filing* of the Petition for Judicial review, not what happens later in the case. As to the timeliness of procedural filings which occur after the Petition is filed, the district court *mandate* is to review mistakes or error. Here, again, the district court failed to review Spar's good cause arguments because it erroneously believed it had no jurisdiction to do so.

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. Without any oral argument, on April 3, 2018 the district court issued an order denying Respondents’ Motion for Reconsideration. *JA00130-JA00132*. The Court’s Order constitutes reversible error as *Fitzpatrick* is dispositive and confirms that the district court did, indeed, have subject matter jurisdiction and was then required to consider good cause for the untimely filing.

B. The 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 to Petitioner in opposition to well-settled Nevada policy dictating that cases be heard on their 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). Respondents’ insistence that this line of authority does not apply lacks support.

Respondents’ reliance on 9th Circuit case law is misplaced in the face of clear Nevada Supreme Court authority. 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 district court's granting of the Respondents' motion to dismiss falls squarely outside this principle. 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 "blatant disregard." *JA00039, JA00074-JA00076*. Respondents have in no way countered this position except to cling to the logical fallacy that Spar's service within the 45-day window in a similar matter back in 2012 is undeniable proof that Spar knew of, and blatantly disregarded, the deadline in this matter. In fact, the sole reason for the delay in service was a change to the pro hac vice form used by the State Bar of Nevada. As it required an original signature, Spar's out-of-state counsel was required to mail his original signature for inclusion in the application packet and submission to the bar. Indeed, Spar effectuated service on all parties within three days of the minute order granting association of its co-counsel, showing no intent to delay or disregard for the rules. A dismissal, effectively with prejudice, of a timely-filed petition for judicial review of an eight-year old administrative matter, has denied Spar its opportunity to be heard and is a grossly disproportionate consequence of a good faith mistake by counsel.

Additionally, Respondents incorrectly argue that Spar attempted to shift the burden to Respondents to show prejudice. Rather, Spar noted that Respondents were not prejudiced – which is the truth. In sharp contrast to the prejudice sustained by

Spar whose case has been dismissed, effectively with prejudice, in spite of the fact that the case was timely filed and in spite of the overwhelming good cause for delayed service.

III. CONCLUSION

Notably, the Respondents in this case are representatives of the State of Nevada. The State should be seeking to uphold justice and yield to all results that favor fairness. The exact opposite has occurred herein. The enthusiasm with which the Respondents have pursued this unjust dismissal borders arbitrary. For these reasons, and because Nevada Supreme Court precedent mandates it, Spar respectfully requests that the district court's order dismissing its Petition for Judicial Review be reversed.

Dated this 10th day of December, 2018.

Respectfully submitted by:

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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 1,582 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 10th day of December, 2018.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of BONGIOVI LAW FIRM, LLC P.C. and that on the 10th day of December, 2018, a true and correct copy of the foregoing Appellants' Reply 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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