

BEFORE THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA STATE BOARD OF)	Electronically Filed
ARCHITECTURE, INTERIOR DESIGN)	Oct 10 2018 04:17 p.m.
AND RESIDENTIAL DESIGN,)	Elizabeth A. Brown
)	Clerk of Supreme Court
Petitioner,)	
)	Case No. 76792
vs.)	
)	8 th Judicial District Court
EIGHTH JUDICIAL DISTRICT COURT)	Case No. A-17-764562-J
OF THE STATE OF NEVADA,)	
DEPARTMENT 25, HONORABLE)	
KATHLEEN DELANEY,)	
)	
Respondent)	
)	
and)	
)	
DENNIS RUSK,)	
)	
Real Party in Interest.)	
_____)	

RESPONDENT'S REPLY TO RESPONSE TO
EMERGENCY MOTION UNDER NRAP 27(e) TO STAY THE DISTRICT
COURT'S OCTOBER 5, 2018 ORDER PENDING DECISION ON
PETITIONER'S PETITION FOR WRIT OF PROHIBITION

RELIEF REQUESTED BY OCTOBER 12, 2018

Submitted by:
Louis Ling, Nevada Bar No. 3101
933 Gear Street
Reno, Nevada 89503
(775) 233-9099
Attorney for Petitioner

Petitioner Nevada State Board of Architecture, Interior Design and Residential Design (hereinafter “Board”), by and through its attorney Louis Ling, replies to Respondent’s response to the Board’s Emergency Motion to Stay. This reply is made and based the pleadings and papers on file herein, and the following points and authorities.

I. POINTS AND AUTHORITIES

Because time and pages are at a premium, the Board will address various arguments made in response by Mr. Rusk on a point-by-point basis. As the various of Mr. Rusk’s arguments are refuted, it will become plain that the emergency stay requested must be granted.

A. THE SIX CASES CITED BY THE BOARD ARE CONTROLLING

The provisions of NRS 233B.130(2) are *mandatory* and *jurisdictional*. *Liberty Mutual v. Thomasson*, 130 Nev. ____, ____, 317 P.3d 831, 833 (2014); *Washoe County v. Otto*, 128 Nev. 424, 434-5, 282 P.3d 719, 727 (2012). *Accord, Board of Review v. Second Judicial District Court of Nevada*, 133 Nev. ____, ____, 396 P.3d 795, 797 (2017); *Kame v. Employment Security Department*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989) (strict compliance with statutory requisites “is a precondition by the court of judicial review”); *Caruso v. Nevada Employment Security Department*, 103 Nev. 75,

76, 734 P.2d 224, 225 (1987); *Scott v. Nevada Employment Security Department*, 70 Nev. 555, 559, 278 P.2d 602, 604 (1954).

In NRS 233B.130(2)(d), the Legislature could not have been clearer about the timing of the filing of a petition for judicial review: a petition for judicial review must “be filed within 30 days *after service of the final decision of the agency.*” (Emphasis supplied.) “After” means after, not three weeks *before* service of the final decision. In the instant case, the Board issued its Order on Remand on December 1, 2018, and Mr. Rusk did not file a petition for judicial review within 30 days *after* that date. The above six cases from this Court teach that a failure to strictly comply with any single statutory requisite results in a failure to confer subject matter jurisdiction. The six cases from this Court control, and Mr. Rusk has presented no contrary authority.

B. THE *HYT* CASE IS CONTROLLING

Mr. Rusk cannot escape the control or reach of *Hyt*. In *Hyt*, this Court framed the issue simply: “We must determine what constitutes a decision by the Commission from which a licensee has ten days to appeal under NRS 645.760. Respondent argues that the oral pronouncement was the decision while appellant claims the written findings constituted the decision.” *Hyt*, 96 Nev. at 496, 611 P.2d at 1097. This Court answered the question it raised by holding: “**An**

administrative agency should not be penalized for announcing its conclusion at the end of a hearing by requiring the agency to compile a complete transcript within thirty days of that date. *The written findings of fact and conclusions of law constitute the final decision.* (Emphasis supplied.) *Hyt*, 96 Nev. at 497, 611 P.2d at 1097. Mr. Hyt made the same argument Mr. Rusk presently makes, namely that the oral pronouncement of the administrative agency triggered the requirement to file the record of proceedings. This Court said Mr. Hyt was wrong, and similarly Mr. Rusk is now wrong. In *Hyt*, subject matter jurisdiction was not at issue because Mr. Hyt filed a second petition after the written decision was served, something Mr. Rusk did **not** do in the instant matter. Mr. Rusk's present claim that he is seeking judicial review of Mr. Waugh's oral pronouncement is inexplicable and seems to work as an admission that he did not comply with NRS 233B.130(2)(d) in view of the clear holding in *Hyt*.

C. THE BOARD'S 2011 ORDER CANNOT SERVE AS THE WRITTEN ORDER IN THIS MATTER

Mr. Rusk argues that the Board's original order issued September 27, 2011 provides the findings of fact, conclusions of law, and order that could be reviewed by the District Court in the instant matter. This is wrong for two reasons: (1) the Board's proceeding on October 25, 2017 was to determine Mr. Rusk's Petition/Motion (See Mr. Rusk's Appendix, Document 1 and the Board's Appendix,

APPX5-APPX11) by which Mr. Rusk sought to vacate the Board's original order, so Mr. Waugh's oral pronouncement and the Board's subsequent written Order on Remand were the ruling upon Mr. Rusk's Petition/Motion, thus necessitating findings of fact, conclusions of law, and an order related thereto; and (2) the Board's original September 27, 2011 order has already been upheld by this Court through its dismissal of Mr. Rusk's appeal related thereto (Case No. 61844), so the September 27, 2011 order is not and cannot be the subject of the instant petition for judicial review.

D. FRITZ IS SUBSTANTIVELY DISTINGUISHABLE

In *Fritz Hansen A/S v. Eighth Jud'l Dist. Ct.*, 116 Nev. 650, 657-8, 6 P.3d 982, 987 (2000), this Court denied the requested stay based, in part, upon a finding that any error related to the determination of personal jurisdiction could be corrected on appeal. Such is not the case in the instant matter because a defense of lack of subject matter defense is non-waivable per NRCP 12(h)(3) and is not fact dependent, whereas a defense of lack of personal jurisdiction (as was at issue in *Fritz*) is waivable and fact dependent. In other words, a district court's deferral of ruling upon a defense of lack of personal jurisdiction until trial, such as was done in *Fritz*, and eventual ruling thereon, could be corrected on appeal and would not void all of the district court's proceedings; whereas, per *Board of Review* and *Landreth v. Malik*, 127

Nev. 175, 180, 251 P.3d 163, 166 (2011), any ruling beyond the present point in the instant case would be **void** if the instant District Court lacks subject matter jurisdiction in this matter as the Board contends. The difference is ultimately meaningful because in *Fritz* the district court could lawfully and authoritatively proceed with the matter because it had subject matter jurisdiction so to do; in the instant case, the subject matter jurisdiction of the District Court has not been invoked, so any further proceedings in this matter are a void enterprise. A subsequent appeal in this matter will **not** correct the harm occasioned by the parties' proceeding through a substantive, expensive, and time-consuming litigation that, as a matter of law, does not exist and should not proceed. Only a stay will prevent this harm, and the lack of a stay will utterly defeat the cause by which the Board is pursuing its Petition for Writ of Prohibition.

II. CONCLUSION AND REQUEST FOR RELIEF

For the reasons shown in the Board's motion and this reply, the requested emergency stay is necessary to prevent the District Court's taking any further substantive acts in the instant matter where it lacks the subject matter so to do. Per NRAP 27(e), an emergency stay should issue no later than October 12, 2018.

///

///

Signed this 10th day of October, 2018.

Louis Ling

LOUIS LING
Nevada Bar No. 3101
933 Gear Street
Reno, Nevada 89503
T: (775) 233-9099
Attorney for Petitioner Nevada State Board
of Architecture, Interior Design and
Residential Design

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this RESPONDENT'S REPLY TO RESPONSE TO EMERGENCY MOTION UNDER NRAP 27(e) TO STAY THE DISTRICT COURT'S OCTOBER 5, 2018 ORDER PENDING DECISION ON PETITIONER'S PETITION FOR WRIT OF PROHIBITION 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 for Macintosh 2008, Version 12.3.6 in Goudy Old Style 14 Point type.

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 40 or 40A because it is:

☒ Proportionately spaced, has a typeface of 14 points or more, and contains 1,185 words.

3. Finally, I hereby certify that I have read this reply, 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 petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 10th day of October, 2018.

Louis Ling

LOUIS LING
Nevada Bar No. 3101
933 Gear Street
Reno, Nevada 89503
T: (775) 233-9099

CERTIFICATE OF SERVICE

I certify that I served on the below date a copy of the attached
RESPONDENT'S REPLY TO RESPONSE TO EMERGENCY MOTION UNDER
NRAP 27(e) TO STAY THE DISTRICT COURT'S OCTOBER 6, 2018 ORDER
PENDING DECISION ON PETITIONER'S PETITION FOR WRIT OF
PROHIBITION filed herewith upon the following:

By U.S. Mail to the Respondent:

Judge Kathleen Delaney, Department 25
Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

By the Court's e-filing and e-service system to the Real Party in Interest:

Robert Nersesian
Nersesian & Sankiewicz
528 S. Eighth Street
Las Vegas, Nevada 89128

Counsel for Real Party in Interest Dennis Rusk

Dated this 10th day of October, 2018.

Louis Ling

LOUIS LING
Nevada Bar No. 3101
933 Gear Street
Reno, Nevada 89503
T: (775) 233-9099