IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA STATE BOARD OF ARCHITECTURE, INTERIOR DESIGN AND RESIDENTIAL DESIGN, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, DEPARTMENT 25, HONORABLE KATHLEEN DELANEY, and DENNIS RUSK, and Dennis E. Rusk, Architect, LLC Real Parties in Interest.	Supreme Court Case No.: 76792 District Court Case No.: A764962

Real Parties in Interest's Request for Reconsideration of Opinion of October 3, 2019 Granting Writ of Prohibition

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I. PETITION

Real Parties in Interest, Dennis E. Rusk and Dennis E. Rusk and Dennis E. Rusk Architect, LLC (collectively, "Rusk") herewith petitions pursuant to NRAP 40 for reconsideration of the Opinion entered in this matter on October 3, 2019.

II. POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED IN THE OPINION OF OCTOBER 3, 2019 ("OPINION)

1. Rusk was forced into a position where the oral decision of October 25, 2017, must be the decision triggering the time for filing a Petition for Judicial Review.

2. The Opinion failed to properly apply the rules of construction applicable to a Petition for Judicial Review (and appeal).

3. The decision in Las Vegas Fetish and Fantasy Halloween Ball, Inc. v. Ahern, 124 Nev. 272 (2008), was based solely upon the rules of construction, and the distinction made is unwarranted. Further, for this Court to apply the same rule of construction (plain meaning) in two different cases using identical language, and state that the plain meaning in each is materially different, presents an error of law and fact.

4. The error below was the Board's error in issuing its decision, not Rusk's error in construing the Board's decision.

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II. ANALYSIS AND BRIEF IN SUPPORT OF RECONSIDERATION

A. AT LEAST AS TO THIS CASE, THE DECISION SETS A TRAP FOR AN APPELLANT FORECLOSING ANY MEANINGFUL REVIEW OF A DECISION UNDER THE ADMINISTRATIVE PROCEDURES ACT

The Opinion fails to appreciate the position into which the Board placed Rusk. A verbal decision denying the relief sought with an express adoption of a prior order containing expansive findings of facts and conclusions of law was given at a hearing on Rusk's petition. See This determination was verbal, and the applicable statute expressly states that the final, appealable determination of Rusk's petition could be verbal and subject to a Petition for Judicial Review. NRS 233B.125. Rusk believed the decision is in error, and in reliance upon NRS, filed his Petition for Judicial Review within thirty days of October 25, 2017, the date of the oral determination.

More than thirty days after this decision made verbally and on the record, the Board issued a written decision. If this written decision is the sole effective appealable decision, then Rusk must file a Petition for Judicial Review within thirty days of its rendition. NRS 233B.130(2)(d). Obviously, if he files this Petition, then his original Petition for Judicial Review becomes ineffective and arguably a nullity. And if he amends his original Petition, this also does not meet the deadline requirements of NRS 233B.130. Washoe Cty. v. Otto, 128 Nev. 424, 435, 282 P.3d 719, 727 (2012)("Washoe County's original petition failed to invoke the district court's jurisdiction, it could not properly be amended outside of the

filing deadline.").[1] Thus, if the original verbal decision is effective, Rusk is left with no opportunity under any circumstances to address the second (written) decision without losing his right to judicial review,[2] and if he does address the second (written) decision, he loses his right to judicial review if he is correct, and the oral decision is the effective decision.

This was also the position taken in Commission on Human Rights & Opportunities nv. Windsor Hall Rest Home, 653 A.2d 181 (Conn. 1995), cited in the Answering Brief. The Opinion's attempted distinction of Windsor Hall, is no meaningful distinction as the question which was addressed in the briefing was the Board's contention that only written orders were effective, and the fact that once a concluding order is made, if it is not the effective order for purposes of appeal, then an untenable result follows.

As stated in Windsor Hall, "concluding that the oral decision in this case was a nullity for purposes of an appeal under the UAPA, as the commission suggests, would lead to bizarre results." The bizarre results were that "the appeal period would have extended indefinitely." Id at 187. That was the position that

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[1] In the Opinion, this Court suggests that the proper course for Rusk to follow was to have "supplemented his petition." Opinion, p. 4, line 3. Clearly, under the direct authority of Otto, had Rusk done so, the only possible conclusion is that there was no, and is no, effective notice of appeal. The Opinion misapprehended the scope of that which Rusk could, and could not, do in reference to his filed Petition for Judicial Review.

Rusk found himself, and had the Petition for Judicial Review not prompted a written decision and the trap set by the Board, everyone would be here two years later with no judicial review and Rusk not having his day in court. Despite the alleged distinction, Windsor Hall raises a critical issue and critical consequences not considered in the opinion.[3]

If the extant authority provides that should Rusk file anything in response to the written decision or failed to appeal the verbal decision, he will lose his right to appeal, the only logical conclusion is that he must file and rely on a notice of appeal from the verbal decision, and will likely lose all rights to appeal should he undertake anything other than the action he did take here. That is, if Rusk attempted to file an appeal to the written decision, either through a new notice of appeal or through amendment, and this Court hold as the Connecticut Supreme Court determined in Windsor Hall, failing to rely on the verbal decision as the final order would result in the loss of all appeal rights.

As noted in the title to this section, the Board placed Rusk in a trap, and had he awaited the written decision or sought to amend the original Notice of Appeal,

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[2] Note that this trap was completely and effectively set upon the Board, without excuse or reason, not issuing the written decision until the time to file a notice of appeal on the first (verbal) decision had entirely elapsed.

[3] And note, having waited past the period when a Petition for Judicial Review was required from the oral determination, had Rusk "bit" on the written decision dangled before him, there is every possibility that he would have been without any right to judicial review whatsoever.

the Board would be before this Court arguing, with support, that Rusk failed to timely appeal the verbal decision, and Rusk risked this being so held here.

B. THE OPINION PRESENTS THE WRONG CONSTRUCTION CONCERNING JURISDICTION

Jurisdictional statutes and court rules are to be construed liberally towards finding jurisdiction. Am. Express Tax & Bus. Servs. v. Tex. State Bd. of Pub. Accountancy, NO. 03-97-00533-CV, 1998 Tex. App. LEXIS 3213, at *8 (Tex. App. May 29, 1998); Wells v. State, No. M2002-01958-COA-R3-CV, 2003 Tenn. App. LEXIS 559, at *3 (Ct. App. Aug. 8, 2003) (In so far as "the particular grant of jurisdiction is ambiguous and admits of several constructions, and (2) the "most favorable view in support of the petitioner's claim" is not clearly contrary to the statutory language used . . .."); Stuckey v. Stuckey, 434 So. 2d 513, 515 (La. Ct. App. 1983); accord NRDC v. Abraham, 355 F.3d 179, 193 (2d Cir. 2004)("[W]hen there is a specific statutory grant of jurisdiction to the court of appeals, it should be construed in favor of review by the court of appeals.");) Mitchell v. Scott Wetzel Servs., 227 Cal. App. 3d 1474, 1480, 278 Cal. Rptr. 474, 477 (1991) ("[A]ll doubt should be resolved in favor of finding jurisdiction," said in the context of a worker's compensation claim).

In contradistinction to this line of authority, the Opinion goes out of its way to strictly construe the facts and the law against finding jurisdiction in this case. For example, the Board verbally adopted its prior Order. Despite this Decision containing expansive findings of fact and conclusions of law, the Opinion merely

jettisons these findings as irrelevant as outside NRS 233B.125. See Board Order of Discipline, pp. 1-7 and Opinion, p. 6. The construction applied is strictly against providing jurisdiction.

And when faced with historic precedent stating that the plain language of a statute means the opposite of what this Court says the same language means, the Opinion seeks to claim that there is not even an ambiguity. That is, it severely construes the facts applying the functionally identical law against finding jurisdiction over Rusk's Petition for Judicial Review. Proper construction mandates a finding of proper jurisdiction in the District Court.

C. THE OPINION MISAPPREHENDS THE LAW IN FINDING THAT THE RULING IN FETISH AND FANTASY v. AHERN IS DISTINGUISHABLE DUE TO THE CURRENT MATTER BEING JURISDICTIONAL

The Opinion, n. 2, attempts to distinguish the present matter from the ruling in Las Vegas Fetish and Fantasy Halloween Ball, Inc. v. Ahern, 124 Nev. 272 (2008), on the alleged distinctions that unlike the decision in Fetish, the current decision turns on a jurisdictional question and the District Court in Fetish had the authority to extend the deadline. Dealing with this second factor, there is nothing in Fetish to indicate that the District Court in any way extended the deadline, but rather, found that the costs petition was timely.

And the Court did this under a plain meaning of the statute's construction. As held,

> "Under NRS 18.110, a party who claims costs must file a memorandum with the district court "within 5 days after the entry of judgment." According to LVFF, NRS 18.110 requires that all

> memoranda of costs be filed *after* the entry of judgment, and because Ahern filed its cost motion before the district court entered its judgment, Ahern's motion was improper.
>
> LVFF's interpretation of NRS 18.110 is too narrow. That **statute plainly sets a deadline** for an application of costs--*i.e.*, five days after the entry of judgment. The statute does not, as LVFF contends, establish a short, five-day window during which a prevailing party may file its memorandum. Although some parties may wait to file a memorandum of costs until after the district court enters judgment, waiting is not a requirement.

Id at 278. (Emphasis added). If statutory construction is the issue, then, in accord with Fetish, NRAP 4(a)(1) also sets a deadline. Neither the ability to extend the date to file (it never occurred), nor a statutory/court rule distinction, nor a jurisdictional/ non-jurisdictional distinction existed in the analysis in Fetish, and the entire analysis turned on statutory construction and the plain meaning of the language. Here, the Opinion creates an irreconcilable conflict in Nevada law, and consistence and rules of appellate review require that Fetish either be reversed[4] or that Rusk be found to have filed a timely notice of appeal.

It is indeed incongruous for the functionally identical language to mean two very different things under the rubric of applying the "plain language" of the statute. Compare Las Vegas Fetish and Fantasy Halloween Ball, Inc. v. Ahern, 124 Nev. 272 (2008)("That **statute plainly sets a deadline** . . . not a . . . window . . .."), with Opinion, p. 8 (Establishing that the language creates a window, not a

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[4] And if Fetish is reversed, Rusk's notice of appeal remains effective because the law at the time of filing was complied with. A change in the law by the Supreme

deadline.). The attempted distinction at Opinion, n.2, is no distinction whatsoever, and for purposes of protecting stare decisis, as well as the integrity of this Court's opinions, this matter should be reheard, and Rusk found to have timely filed his notice of appeal.

D. IF ANYTHING, THE BOARD ERRED IN ISSUING A FINAL DECISION WITHOUT FULLY EXPRESSING ITS RATIONALE, AND THE NOTICE OF APPEAL WAS FROM A FINAL DECISION

Instructive here is the case of Poremba v. S. Nev. Paving, 388 P.3d 232, 238 (Nev. 2017), also cited in the Opinion. Simply, if the rules applied in Poremba were applied here, then Rusk filed a timely notice of appeal.

In Poremba, the appellant filed his notice of appeal off of the verbal order given at the administrative hearing. This Court took jurisdiction over the appeal, and remanded the matter for findings of fact and conclusions of law. What this Court did not do is state that it had no jurisdiction because the filing of the notice of appeal was premature. Following Poremba, only two courses were available to this Court. It either could have accepted the written decision of the Board as correcting the Board's failure to provide appropriate findings following its final verbal decision, or it could have accepted the original ruling of the Board as the findings rendered at the verbal decision denying Rusk's Petition. Instead, the

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Court only operates prospectively from the time of its announcement. See e.g. Woosley v. State Farm Ins. Co., 117 Nev. 182, 191(2001).

Opinion jettison's the ruling in Poremba, decides the Court does not have jurisdiction, and forecloses review of the Board's actions.

The question might be asked why this is not the failure of the Board in issuing a final decision sans required elements rather than a failure of Rusk to file a timely notice of appeal? That was the approach in Poremba, from which this Court departs in the opinion. Instead, for the entire thirty days following the decision, and more, the Board leaves the Plaintiff in the dark, and for the first thirty days, provides Rusk no alternative but to file his Notice of Appeal. Certainly, fairness to litigants, especially those whose rights are being compromised by the state, presents a hallmark for any proper system of justice. Instead, here, the Opinion goes out of its way to ratify the denial of Rusk's licensure without the ability to have the Board's determination judicially reviewed. The Opinion should be reheard and rewritten to note the primacy of the due process owed to litigants challenging state action within the system.

To restate this in a clearer manner, the verbal decision told Rusk, 'you lose.' That's the decision Rusk must live with, and it is a final decision in any respect. The error or failure here was the error of the Board in making a final decision without findings (unless the adoption of the prior order is accepted as findings). It is a Decision by the Board and has all effects of finality. The subsequent findings do not upset its finality, and it is not Rusk that should be sanctioned for this failure, but rather, the Board for issuing a final decision which fails in its statutory charge.

It is, regardless, impossible to look at the language at the hearing concluding that Rusk's motion is denied and the prior order stands as anything other than "[a] decision or order adverse to a party in a contested case . . . stated in the record." The fact that this occurred is what triggered Rusk's appeal time, and the added requirements are unfollowed mandates to the Board following the "decision" binding on Rusk.

E. OTHER CONSIDERATIONS

The Opinion improperly creates after-the-fact excuses to deny Rusk appellate review. The Opinion refers to the fact that the Board issued written findings as indicia that the express adoption of the Board's prior decision did not suffice. The reasons discussed all relate to the differences in the findings, but Rusk had no way to know of any differences. Had the Board restated its incorporated findings, even under the Opinion this would have been a sufficient set of findings under NRS .

And in this case, there is also the confirmation of findings of fact from the original order giving every impression to Rusk that every element of NRS 233B.125 was fulfilled by the Board's action on October 25, 2017, as indicated in App. p. 85, at p. 67: 21-24. Rusk had no way of supplementing this Notice of Appeal (as the Opinion suggests) without having his appeal dismissed under the on-point authority in Washoe County v. Otto, 128 Nev. 424 (2012).

Perhaps most telling here is that every time Rusk attempts to have this matter determined, the Board will attack the proceeding in an attempt to have the position of Rusk actually reviewed. As noted in the opening brief, this is the fifth such attempt at circumventing due process for Rusk. Opposition to Petition, Rusk's Opening Brief, pp. 5-6. District Court Judges Jones, and Delaney, confirming Jones, all exercised jurisdiction in over the Petition for Judicial Review being met following the oral decision. This Court is reversing these two District Court Judges analyzing the same events. The set-up is now complete, and the Board has foreclosed Rusk from having his matter determined.

Finally, review of the findings of fact in the Board's initial decision shows that these facts, as stated and without modification, would provide findings of fact supporting the verbal decision of October 25, 2017, as stated on the record by the Board. The fact that, after the time of the adoption and the time the Petition for Judicial Review was filed, the Board issued new findings of fact cannot supplant the adequacy of the adopted facts to support the current decision. As Judge Jones and Judge Delaney held, Rusk was properly before the District Court with jurisdiction based off of the October 25, 2017 verbal decision. The Petition for Judicial Review filed in this matter did, in fact, properly enlist the jurisdiction of the District Court, and this Court should rehear the matter and remand the case to the District Court to determine the legitimacy or illegitimacy of the Decision verbally made on October 25, 2017.

III. CONCLUSION

For the reasons set forth above, Rusk requests that the Opinion be reconsidered and on reconsideration this Court order remand of the matter to the District Court for determination of Rusk's Petition for Judicial Review of the October 25, 2017 Decision.

Dated this 21st day of October, 2019

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IV. 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 requirement of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced type face using Word 2010 in fourteen-point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 because it is proportionally spaced, has a typeface of 14 points or more and contains 2985 words.

3. Finally, I hereby certify that I have read this 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.

Dated this 21st day of October, 2019

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V. PROOF OF SERVICE

On October 21, 2019, the undersigned did serve **Real Parties in Interest's Request for Reconsideration of Opinion of October 3, 2019 Granting Writ of Prohibition** upon the following counsel through the electronic filing system maintained by this court:

Louis Ling
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/S/ Rachel Stein
An employee of Nersesian & Sankiewicz