

IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER GARDNER AND CHRISTIAN)
GARDNER, INDIVIDUALLY AND ON)
BEHALF OF THEIR MINOR CHILD,)
LELAND GARDNER,)

Appellants,)

v.)

R & O CONSTRUCTION, INC.,)

RESPONDENT.)

Case No.: 77261

Electronically Filed
Jan 07 2019 04:11 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**RESPONDENT'S UNOPPOSED MOTION FOR LEAVE TO FILE
LATE OPENING RESPONSE BRIEF**

Respondent R & O Construction, Inc. ("R&O"), through its undersigned counsel, hereby submit the following Unopposed Motion for Leave to File Late Opening Response Brief ("Motion"):

STATEMENT OF CONFERRAL

Undersigned counsel for R&O conferred with counsel for Appellants, Philip Erwin, who states that Appellants do not oppose the relief requested herein.

I. INTRODUCTION

R&O's Opening Response Brief ("Response Brief") was due January 3, 2019. Inadvertently, R&O's undersigned counsel mistakenly believed the due date was actually January 4, 2019, and attempted to file the Response Brief on that date. *See* 1/7/19 Email, *attached hereto as Exhibit A*. Accordingly, on January 7, 2019, the brief was rejected electronically, along with a note from the Clerk stating "[d]ue date was 1/3/19 so we cannot file without a motion. If/when you resubmit, please be sure to put motion in one submission and brief in separate submission."

Id. R&O now submits this Motion, along with a contemporary and separate submission of the Response Brief it previously attempted to file on January 4th, 2019, and respectfully requests this Court permit the late filing of the Response Brief.

II. ARGUMENT

NRAP 31 requires that a Respondent's opening brief be filed within 30 days after the filing of Appellants' opening brief. In this case, R&O's Response Brief was due January 3, 2019. Because Respondent's counsel inadvertently and mistakenly believed the brief was due January 4, 2019, it was filed on that date, and was accordingly rejected by the Clerk for being filed one day late. As outlined below, because this one-day mistake constituted excusable neglect, because permitting the filing of Respondent's Response Brief at this time will not prejudice Appellants, and because the circumstances here do not warrant this Court electing to find this delay constitutes a confession of error, the Court should grant the Motion and accept the late filing of the Response Brief.

A. Respondent's One-Day Delay In Filing Its Response Brief Constitutes Excusable Neglect

While case law on excusable neglect in Nevada is not binding on this Court in ruling on the instant Motion, it is a reasonable framework for considering whether R&O should be granted the relief requested. Factors this Court could consider as relevant to this analysis include (1) whether there was a prompt application to resolve the mistake; (2) whether there is an absence of an intent to delay the proceedings; (3) good faith by the moving party; and (4) Nevada's underlying basic policy of deciding a case on the merits whenever possible. *See Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271 (1993), 849 P.2d 305, 307.

Here, R&O has made a prompt application to address its belated filing by filing the instant Motion and a separate submission of the Response Brief the same day it learned of the rejection. *See Exhibit A.* Additionally, the one-day delay in R&O's initial filing was a genuine mistake by

R&O's counsel, who sincerely believed the Response Brief to be due January 4th, and was in no way intended to delay the proceedings. *See* Affidavit of Jeffrey Vail at ¶¶ 3-4, *attached hereto as Exhibit B*. Indeed, R&O's counsel intended in good faith to file the Response Brief on time, and believed in good faith he had in fact done so at the time it was initially filed—it was not until the electronic rejection of the filing on January 7th that he learned of his mistake. *Id.* This is the definition of excusable neglect, and this error by R&O's counsel should not prevent this Court from adhering to Nevada's basic policy of deciding cases on the merits whenever possible. *Stoecklein*, 109 Nev. at 271.

B. Appellants Will Not Be Prejudiced By This Belated Filing

This short delay in the filing of R&O's Response Brief will not prejudice Appellants. To ensure that Appellants have a copy of R&O's arguments as early as possible to maximize their time to respond, a courtesy-copy of the Response Brief was emailed to Appellants the morning of January 7, 2019 (the same day R&O learned its filing had been rejected). *See Exhibit B* at ¶ 5. At most, this delay will result in Appellants' counsel receiving R&O's arguments as contained in the Response Brief one-and-a-half business days later than had the brief been filed on January 3rd.

C. The Circumstances Here Do Not Warrant A Finding Of Confession Of Error

While the Supreme Court *may* treat a failure to file a responsive brief by its due date as a confession of error, under these circumstances the Court should not elect to do so here. *See, e.g., Knapp v. Lemieux*, 97 Nev. 450 (1981), 634 P.2d 454. Indeed, in the past when this Court *has* elected to consider a late filing to constitute a confession of error, it has generally been when the filing is egregiously late (*viz.*, more than 5 months late and no motion for relief was sought), *Kitchen Factors, Inc. v. Brown*, 91 Nev. 308 (1975), 535 P.2d 677, or where this Court had issued an order to show cause why no response brief had been filed to which no response itself was ever filed. *Hansen Plumbing and Heating of Nevada, Inc. v. Gilbert Development Corp.*, 97 Nev. 642

(1981), 233 P.3d 357. The circumstances here do not come close to these examples where it may be appropriate to find a confession of error, and accordingly this Court should grant the Motion and consider this appeal.

III. CONCLUSION

Based on the foregoing, Respondent R&O respectfully requests that the Court grant its Motion and accept the late filing of the contemporaneously filed Response Brief.

Dated: January 7, 2019

GODFREY JOHNSON, P.C.

By: /s/ Jeffrey Vail

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 7th day of January 2019, I caused true and correct copies of the foregoing Motion for Leave to File Late Opening Response Brief to be delivered to the following counsel and parties:

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