

FILED

SEP 21 2015

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13 **COURT OF APPEALS**
14 **OF THE STATE OF NEVADA**

15 RICHARD A. HUNTER, an individual,

CASE NO. 59691

16 Appellant,

17 v.

18 WILLIAM GANG, an individual,

19 Respondent.

20 **MOTION TO STRIKE**
21 **RESPONDENT'S NOTICES OF**
22 **SUPPLEMENTAL AUTHORITIES**

23 Appellant Richard A. Hunter, by and through his counsel, Greenberg Traurig,
24 LLP, hereby moves to strike the Notice of Supplemental Authorities, filed by
25 Respondent on September 14, 2015 and the Second Notice of Supplemental
26 Authorities, filed by Respondent on September 15, 2015, as such notices fail to
27 comply with the requirements of NRAP 31(e).

28 In this latest example of gamesmanship by this employee of the Nevada
Judiciary,¹ Respondent William Gang hopes to use the rule that is generally used to

¹ As this Court no doubt recalls, Mr. Gang filed a motion to dismiss for failure to prosecute, when the next action due in the case was his own answer to the Complaint, and after he had asked for, and been given, time to respond to that complaint. Moreover, he later asked the district court to award him attorneys' fees for the time his attorneys spent drafting the answer that was never filed.

1 inform the Court of legal opinions or changes in statutes or rules that occur
2 subsequent to the completion of the parties' briefing, to submit what is essentially a
3 sur-reply. Significantly, none of the "supplemental authority" cited by Mr. Gang is
4 of recent origin, yet there is no explanation for why such authority is being raised
5 only now, more than a year after the Answering brief was filed, and a mere seven
6 days (and fewer days for the Second Notice) prior to oral argument. Indeed, given
7 that Mr. Gang had more than six months to prepare that Answering Brief, he
8 certainly had sufficient time to locate court rules and cases that are as much as sixty
9 years old. However, as shown below, not only are the cited authorities inapposite to
10 the issues raised by Mr. Hunter in this appeal, but they raise new points and
11 arguments not previously raised by Mr. Gang, and therefore, violate NRAP 31(e).
12 Accordingly, the two Notices should be stricken.

13 **FACTS RELEVANT TO THIS MOTION**

14 Mr. Hunter filed his Opening Brief on August 14, 2013. After requesting and
15 receiving numerous extensions of time to file his Answering Brief, Mr. Gang finally
16 filed that brief on March 31, 2014. Mr. Hunter submitted his Reply Brief on May
17 22, 2014, and it was deemed filed (pursuant to ruling on the motion to consolidate)
18 on June 13, 2014. The case was transferred to this Court in January 2015, and oral
19 argument was set for September 24, 2015.

20 On September 16, 2015, the undersigned received an email from Mr. Gang's
21 counsel, attaching two documents purportedly filed with this Court: *Respondent's*
22 *Notice of Supplemental Authorities*, dated September 14, 2015 and *Respondent's*
23 *Second Notice of Supplemental Authorities*, dated September 15, 2015.² The former
24 asks the court to consider EDCR 1.90, and NRCP 15, and three cases: *Baughman v.*
25 *Turner and Jory*, 102 Nev. 582, 729 P.2d 488 (1986); *Schmidt v. Sadri*, 95 Nev.
26 702, 601 P.2d 713 (1979) and *Schwartz v. Schwartz*, 95 Nev. 202, 591 P.2d 1137

27
28 ² See Exhibit 1, Email from Tye Hanseen to (sans attachments).

(1979). The latter cites *Scapecchi v. Harold's Club*, 78 Nev. 290, 297, 371 P.2d 815, 818-19 (1962) *Johnson v. Johnson*, 90 Nev. 270, 271-72, 524P.2d 544,545 (1974); *Grouse Cr. Ranches v. Budget Fin. Corn.* 87 Nev. 419,425, 488 P.2d 917, 921 (1971); *City of Boulder City v. Boulder Excavating. Inc.*, 124 Nev. 749, 191 P.3d 1175 (2008), plus numerous cases from other jurisdictions.

Upon telephone inquiry to the Court, the undersigned was informed that Mr. Gang's Notice of Supplemental Authorities was received by the Court on September 16, and was deemed filed on September 17. The undersigned was also informed that the Court's docketing system did not show that the Second Notice of Supplemental Authorities has been received by the Court.³

Gang's Supplemental Notices of Authorities Raise New Issues for the First Time and should Therefore Be Stricken.

Mr. Gang's Notices should be stricken as they fail to comply with the requirements of NRAP 31(e). As relevant here, the rules provide:

When pertinent and significant authorities come to a party's attention after the party's brief has been filed, but before a decision, a party may promptly advise the Supreme Court or Court of Appeals by filing and serving a notice of supplemental authorities, setting forth the citations. The notice shall provide references to the page(s) of the brief that is being supplemented. The notice shall further state concisely and without argument the legal proposition for which each supplemental authority is cited. ***The notice may not raise any new points or issues.*** Any response must be made promptly and must be similarly limited. If filed less than 10 days before oral argument, a notice of supplemental authorities shall not be assured of consideration by the court at oral argument; provided, however, that no notice of supplemental authorities shall be rejected for filing on the ground that it was filed less than 10 days before oral argument.

NRAP 31(e)(emphasis added).

Mr. Gang asks this Court to consider EDCR 1.90, claiming this rule is relevant to Gang's argument that the District Court was not bound to comply with the provisions of NRCP 41 in dismissing for failure to prosecute. The cited rule EDCR 1.90, concerns a District Court's duties with respect to its docket. In citing

³ Although the Second Notice has not yet been filed, because Appellant will not receive a notice from the Court if the document is subsequently received and filed by the Court, this Motion addresses that Notice as well.

1 the rule, Mr. Gang raises a new issue, *i.e.*, the concept that the District Court was
2 merely complying with its court duties when it granted Mr. Gang's Motion to
3 Dismiss. This argument is wholly discredited by the record here, which makes
4 clear that the District Court was complying with the request contained in a motion
5 including making a host of evidentiary rulings based entirely on statements of
6 counsel. Moreover, the argument is raised for the first time, and thus, violates the
7 requirements of NRAP 31(e).

8 Similarly, Mr. Gang's citation to NRCPP 15, and to *Baughman, Schmidt*, and
9 *Schwartz* raises a new argument for the first time, *i.e.*, the notice that Mr. Gang
10 somehow amended a pleading (presumably, the never filed answer to the
11 complaint) in conformity with evidence presented. The argument itself is ludicrous,
12 because, 1) Mr. Gang never filed an answer, 2) Mr. Gang never presented *any*
13 evidence, and 3) no issues were actually "tried" in this case. Accordingly, any
14 argument that a pleading was amended due to issues purportedly being tried by
15 assent is absurd. And while Mr. Gang contends it relates to the argument contained
16 in pp. 27-44 of his Answering Brief, this is simply false; there is no argument
17 relating to amendment to pleadings in conformity with evidence in those pages.
18 What is significant here, however, is that this argument is raised for the first time in
19 the Notice, and therefore, such notices violates NRAP 31(e), and should, therefore,
20 be stricken.

21 Mr. Gang's Second Notice of Supplemental Authorities also violates NRAP
22 31(e) by raising arguments not previously raised. These authorities all appear to
23 address situations where a party has failed to preserve an argument for appellate
24 review, or has failed to object to an argument made below. None of these
25 authorities reflect the situation here. In this instance, the District Court granted a
26 motion for failure to prosecute in violation of the protections contained in NRCPP 41
27 without making any oral factual findings at the hearing. The Court then made
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1 written factual findings on the merits of the claim based upon nothing more than the
2 oral statements of counsel in support of the failure to prosecute, and then granted
3 attorneys' fees based on evidence that actually contradicted the statements relating
4 to the failure to prosecute. Thus, the cited authorities do not relate to any issues in
5 this appeal. However, Mr. Gang's raising of such new arguments for the first time
6 in his Second Supplemental Notice violates the requirements of NRAP 31(e).

7 Because the two Notices violate NRAP 31(e) by raising arguments for the
8 first time, the Notices should be stricken.

9 Respectfully submitted this 18th day of September 2015.
10

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EXHIBIT 1

Rosehill, Andrea (Secy-LV-LT)

From: Tye S. Hanseen <thanseen@maclaw.com>
Sent: Wednesday, September 16, 2015 7:41 AM
To: Ferrario, Mark E. (Shld-LV-LT); Cowden, Tami D. (OfCnsl-LV-LT)
Subject: Hunter/Gang [IWOV-iManage.FID739929]
Attachments: Respondent_s Second Notice of Supplemental Authorities.PDF; Respondent_s Notice of Supplemental Authorities.PDF

Good morning. Hope you are both well and had a great summer.

Attached are courtesy copies of supplemental authorities Gang submitted to the Court, which were also mailed to your attention.



**MARQUIS AURBACH
COFFING**

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