

IN THE SUPREME COURT OF NEVADA

Supreme Court Case No. 81447

Appeal from the Eighth Judicial District Court, Clark County
District Court Case No. P-18-095892-E

Electronically Filed
Nov 30 2021 06:06 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE MATTER OF THE ESTATE OF
DENNIS JOHN CARVER, DECEASED

COLONIAL REAL ESTATE PARTNERSHIP, LTD.; AND JOHN HOULIHAN

Appellants,

vs.

RHONDA MORGAN, PERSONAL REPRESENTATIVE OF THE ESTATE
OF DENNIS JOHN CARVER

Respondent.

RESPONDENT'S ANSWERING BRIEF

David T. Blake, Esq.
Nevada Bar No. 11059
CLEAR COUNSEL LAW GROUP
1671 W. Horizon Ridge Pkwy., Suite 200
Henderson, NV 89012
Telephone: (702) 476-5900
Facsimile: (702) 924-0709
dave@clearcounsel.com
Counsel for Respondent

NRAP 26.1 disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Rhonda Morgan, Esq. and the Estate of Dennis John Carver
2. David T. Blake, Esq. of Clear Counsel Law Group represented the Estate in the proceedings below.
3. Donna Stidham, Esq. of Law Office of Donna Stidham, LLC also represented the Estate in the proceedings below.

CLEAR COUNSEL LAW GROUP

/s/ David T. Blake

David T. Blake, Esq. (# 11059)
1671 W. Horizon Ridge Pkwy. Ste. 200
Henderson, Nevada 89012
Counsel for Appellant

Table of contents

NRAP 26.1 disclosure.....	ii
Table of contents.....	iii
Table of Authorities	v
Statement of the Case	1
Statement of facts	2
Summary of the Argument	6
Argument.....	9
I. The Probate Court’s decision should be affirmed because the court correctly held that (a) Colonial was aware of decedent’s death, (b) Colonial was aware of the actual Estate administration in Nevada, and (c) Colonial did not file a creditor’s claim until after the Estate had closed.	9
A. Under Nevada’s probate statutes and Nevada caselaw, a creditor that learns of an estate administration must act by filing a claim regardless of whether the Estate mailed the creditor a notice.	10
B. Colonial did not file a claim within any possible deadline under NRS 147.040.	13
II. The Probate Court correctly determined that it was statutorily prohibited from reopening the Estate.....	16
III. This Court should affirm and reject Colonial’s due process arguments because (a) Nevada’s nonclaim statute does not violate due process and (b) Colonial was not denied due process because it had actual knowledge Estate’s administration and failed to act.....	17
A. Moseley does not apply to Colonial because the creditor in Moseley did not have knowledge of the estate administration whereas Colonial had actual notice of the administration and did not take appropriate action until more than 490 days later.	18
B. Moseley is not applicable because the nonclaim statute there is substantively different from the statute here, and other courts have held that nonclaim statutes like Nevada’s statute were constitutional.	20

C.	The United States Supreme Court’s Pope decision does not change the result.	21
IV.	The Probate Court was correct in denying Colonial and evidentiary hearing on Colonial’s wholly speculative, nonspecific, and unsupported fraud-on-the-court allegations.....	23
V.	Colonial’s argument that the Estate was never actually closed because certain conditions or contingencies were not satisfied is raised for the first time on appeal and should be rejected.	26
VI.	Reopening the Estate would be futile because all assets have been distributed to heirs.	27
	Conclusion.....	27
	Certificate of Compliance	29

Table of Authorities

Cases

<u>Bell Brand Ranches, Inc. v. First Nat. Bank of Nevada</u> , 91 Nev. 88 (1975).....	7, 11, 12
<u>Bergeron v. Loeb</u> , 100 Nev. 54 (1984).....	10
<u>Cont’l Ins. Co. v. Moseley</u> , 100 Nev. 338 (1984).....	8, 17, 18, 19
<u>Gardner Hotel Supply of Houston v. Clark’s Estate</u> , 83 Nev. 388 (1967).....	11, 12
<u>Interinsurance Exch. v. Narula</u> , 39 Cal. Rptr. 2d 752 (1995)	21
<u>NC-DSH, Inc. v. Garner</u> , 125 Nev. 647 (2009).....	25
<u>Old Aztec Mine, Inc. v. Brown</u> , 97 Nev. 49 (1981)	23
<u>Profl Collection Servs., Inc. v. Pope</u> , 485 U.S. 478 (1988)	8, 21

Statutes

NRS 145.050	20, 22
NRS 147.010	11
NRS 147.040	2, 12, 15
NRS 147.130	11
NRS 151.240	7, 16, 25
NRS 155.010	11
NRS 155.020	13, 20

Statement of the Case

This is an appeal of an order (the “Order”) by the Honorable Trevor Atkin, Eight Judicial District Court Dept. 8 (the “Probate Court”), holding that Colonial could not reopen the Estate of Dennis John Carter (the “Estate”) and generally denying the relief requested by John Houlihan and Colonial Real Estate Partnership, Ltd. (collectively “Colonial”). This matter commenced on June 28, 2018, with Estate administrator Rhonda Morgan’s Petition for Probate of Will and Issuance of Letters. 1 ROA 1.¹ Notice to creditors was filed on July 27, 2018. 1 ROA 67. The deadline for creditor claims ended on October 25, 2018. The Estate was closed on May 10, 2019, with all the heirs waiving a right to receive an accounting. 1 ROA 93. All Estate assets have been distributed to heirs and the Estate has no assets. 2 ROA 279.

The evidence that Colonial presented to the Probate Court demonstrated that it was aware of Decedent’s death sometime in September of 2018 and was aware of Nevada Case administration before the Estate closed. See 1 ROA 175 ¶¶ 10-20; 186; 193; 195. Colonial filed a Petition for an Order to Show Cause Why Estate Should not be Reopened for Creditors to Submit Proof of Claims and Accounting of the Estate Assets (the “Petition”) on February 2, 2020. This was at least 489 days after Colonial

¹ Appellant’s Appendix contains bates stamped page numbering with the prefix ROA followed by a 6-digit page number including leading zeros. For clarity and brevity, this Answering Brief will cite to that appendix with the following format: [volume] ROA [page number] with leading zeros omitted. For example, ROA000338 found in Vol. 2 of the appendix will be cited to as 2 ROA 338.

learned of Decedent's death. 1 ROA 107. The parties briefed various issues and a hearing was held on May 15, 2020. As far as respondent is aware, Colonial has not denied that it was aware of Estate administration.

The Probate Court issued an Order on June 23, 2020, finding that Colonial was aware of the Estate while it was being administered and did not file a creditor's claim within any of the times specified by NRS 147.040. 2 ROA 362-363. The Probate Court denied the Petition in its entirety. 2 ROA 364. This appeal followed.

Statement of facts

In this appeal the Court must decide whether an estate that has already distributed its assets to a beneficiary must be reopened solely for the purpose of allowing a creditor to file a late creditor's claim where the creditor (a) knew of the decedent's death, (b) filed an untimely creditor's claim in related California estate proceedings but did not attempt to do so in Nevada, (c) knew of the Estate administration in Nevada and (d) did not attempt to file a creditor's claim in Nevada until after the Estate was administered and closed. As set forth below, such a late creditor's claim should not be permitted.

Dennis Carver ("Decedent") died on October 16, 2017. See 1 ROA 7. There are two related estate proceedings for the Decedent that are relevant to this appeal. Decedent was a California resident, and most of his assets are being administered in a

California proceeding (the “California Case”). The Nevada probate proceeding (the “Nevada Case”) is ancillary to the California Case.

The California Case

Nicholas Alfano was originally appointed as administrator for the California Estate and Letters Testamentary were issued on January 10, 2018. 1 ROA 159:6-8. On May 29, 2018, Alfano voluntarily resigned as executor of the California estate. 1 ROA 159:9-10. Thereafter, Rhonda Morgan became the successor personal representative of the California Estate. 1 ROA 159:10-12.²

Colonial did not file a creditor’s claim in the California proceeding until April 12, 2019. 2 ROA 338. The Claim was untimely and rejected. Colonial did not file a petition, appeal, or take any other action to challenge rejection of the Creditor’s claim in California.

The Nevada Case

The only property subject to administration in Nevada was real estate. See 1 ROA 96-105; 2 ROA 294-295 ¶¶ 17, 26. This ancillary probate proceeding commenced on June 28, 2018. Notice to creditors was electronically filed on July 25, 2018. See 1 ROA 145:22-23. The notice to creditor’s was first published on July 27, 2018. 1 ROA 66. The 90-day period for creditor’s claims ended on October 25, 2018.

² The docket for the California Case is at 1 ROA 203-226.

See NRS 147.040(1). Colonial acknowledges that the creditor's claim period ended on October 25, 2018. 1 ROA 145 at ¶ 22.

Colonial became aware of Decedent's death in September of 2018. 1 ROA 175 ¶ 10. Both the California and Nevada probate proceedings were in active administration in September of 2018. Upon first learning of the death, Colonial sent letters to Robert McKenchnie, who was not involved in the Estate administration. See 1 ROA 186-188. More than a month later, Colonial sent a letter to the Estate demanding payment on October 26, 2018. 1 ROA 193. The letter was received after the claims filing period had expired in both the Nevada and California probate proceedings. Colonial's current attorney then sent a letter on November 15, 2018. 1 ROA 195.

Although Colonial filed a creditor's claim in the California proceeding on April 12, 2019, it failed to file a creditor's claim in the Nevada proceeding. 2 ROA 338. Colonial's creditor's claim in the California Case was untimely.

The Nevada Estate administration ended on May 10, 2019. 1 ROA 93. Colonial then filed a complaint against the Nevada Estate, but waited nearly a month, until June 7, 2019 to do so. 2 ROA 387:18-19. After demand by the Estate, Colonial voluntarily dismissed its Complaint without prejudice. Id. Nearly 8 months after filing its complaint, Colonial filed its Petition in Probate Court on February 2, 2020, more than 489 days after Colonial became aware of Decedent's death.

Facts related to misconduct by the California Administrator

Although Alfano administered probate in Decedent's home state of California, he did not take any actions related to probate proceedings in Nevada. The Estate beneficiaries discovered unexplained withdrawals from the probate bank account, and Alfano agreed to resign as administrator. 2 ROA 293 ¶¶ 7-8. The principal assets of the carver Estate were in Decedent's home state of California and, as far as Morgan is currently aware, Alfano's fraud touched only assets that were administered in the California proceeding. 2 ROA 294 ¶¶ 17-20. Morgan is aggressively pursuing claims against Alfano in California. See 2 ROA 293-294 at ¶¶ 9-20; 2 ROA 298-336.

Morgan has filed papers in the California proceeding to compel an accounting against Alfano at least twice. Morgan initially requested an accounting in her petition to be appointed as personal representative of the Estate. See 2 ROA 293 at ¶ 9; 1 ROA 178-184. Morgan also filed a petition against Alfano in California seeking the accounting, together with 13 other claims for relief. See 2 ROA 298-336. Obtaining a full accounting of Alfano's estate administration will be extremely difficult if not impossible because Alfano's agent has represented to Morgan that records related to the Estate that were in his possession were destroyed. See 2 ROA 294 at ¶ 12.

If Colonial's Complaint had been a creditor's claim against the Estate (which it was not), it would have been 225 days late. After the Estate sent Colonial a letter demanding that it dismiss its Complaint, Colonial dismissed its Complaint without

prejudice. Colonial then waited another 240 days to file its Petition. Viewed in comparison to any deadline for creditor's claims, Colonial's Petition is inexcusably and egregiously untimely—especially considering Colonial's admitted knowledge of the Nevada Estate proceedings. The Petition was filed more than a year (465 days) after the October 25, 2018 deadline to file creditor's claims and more than 8 months (268 days) after the Estate was closed.

Summary of the Argument

The Probate Court's Order denying Colonial's Petition should be affirmed because Colonial knew of Decedent's death and knew of the Estate administration and did not file a creditor's claim until after the Estate had closed. These three key undisputed facts support the Probate Court's order on the various issues that Colonial raised below and now raises on appeal.

First, the Probate Court correctly determined that Colonial was not entitled to file a late creditor's claim. Nevada's probate statutes provide for a final drop-dead deadline for any creditor to file a creditor's claim. That deadline is the closing of the estate. NRS 147.040(3). The policy of this outer-limit deadline is practical. After the estate is closed, assets are generally distributed, and the estate has no assets from which to satisfy any creditor claims. A creditor claim after that would be moot. Colonial did not file by this deadline. And even if Colonial did file by this date, a creditor can only rely on the special extended deadline of NRS 147.040(3) if the

creditor did not have actual notice of the estate administration. As noted, Colonial had actual notice of the Estate administration and is barred from filing a late creditor's claim.

Colonial's argument incorrectly assumes (without explicitly stating) that the only way that Colonial could have learned of the Estate administration was to receive notice by mailing. This is contradicted by this Court's precedent and the probate statutes themselves. The probate statutes contain provisions clearly anticipating that a creditor would learn of an estate administration and file a creditor's claim without ever receiving a creditor's notice in the mail. And this court has held that a creditor who learns of a debtor's death is placed on notice of actual estate administration and must take action. See Bell Brand Ranches, Inc. v. First Nat. Bank of Nevada, 91 Nev. 88, 92, (1975).

Second, the Probate Court correctly decided that Nevada's probate statutes do not permit an estate to be reopened for the purpose of filing a creditor's claim as Colonial has requested. NRS 151.240(1) lists only 3 reasons for which an estate may be reopened: (1) to administer newly discovered property, (2) to correct errors in property descriptions, and (3) for any purpose requiring new letters to issue. Colonial does not seek to reopen the Estate for any of these 3 purposes.

Third, the Probate Court correctly determined that Colonial's due process rights were not violated. Colonial claims that it did not receive mailed notice to

creditors, but ignores the fact that Colonial had actual knowledge of the Estate administration. This is not a case where the creditor did not have notice. Colonial's notice and awareness of the Estate administration wholly undermines its due process arguments. The Estate did not prevent Colonial from filing a claim. Colonial chose to take other actions instead of filing a creditor claim.

Additionally, the due process cases are not applicable here. In both due process cases that Colonial relies on, Cont'l Ins. Co. v. Moseley, 100 Nev. 338 (1984) and Profl Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988), the questioned probate statute required notice to creditors by publication only. The statute here requires mailed notice and contains the safe harbor/extended deadline for creditors who did not receive notice.

Fourth, the Probate Court's Order rejecting Colonial's fraud allegations should be affirmed. Colonial's fraud argument on appeal is different from its argument before the Probate Court and should be rejected on this basis alone. In the proceedings below, Colonial argued that Morgan committed fraud on the court by failing to disclose certain misconduct by Alfano to the Nevada Probate Court. On Appeal, Colonial argues that it is entitled to an evidentiary hearing as to whether Alfano's fraud touched assets of the Nevada estate. The new argument, raised for the first time on appeal should be rejected.

Colonial's argument is also speculative, nonspecific, and unsupported. The argument that Alfano's misconduct affected the Nevada estate is one of guilt-by-association considering that Alfano did not open the Nevada Case. And Colonial provides no authority that the Probate Court, who never appointed Alfano as a personal representative, would have authority or jurisdiction to address any Alfano's misconduct. Colonial most certainly does not identify any specific conduct of Alfano that affected anything regarding the Nevada Estate. Colonial's argument is a transparent effort to reopen the Estate based on speculation and conjecture so that Colonial may file a late creditor's claim.

The Probate Court correctly interpreted and applied Nevada law and this court should affirm the Probate Court's Order.

Argument

- I. The Probate Court's decision should be affirmed because the court correctly held that (a) Colonial was aware of decedent's death, (b) Colonial was aware of the actual Estate administration in Nevada, and (c) Colonial did not file a creditor's claim until after the Estate had closed.**

Resolution of this case requires the Court to interpret and apply Nevada's probate statute governing creditor's claims (the "nonclaim statute") found in NRS chapter 147.³ One of the primary flaws of Colonial's argument on appeal and before

³ On appeal, Nevada appellate courts defer to a district court's findings of fact and will only reverse if the findings are not supported by substantial evidence. Legal issues, including statutory interpretation are reviewed de novo. See Waldman v. Maini, 124 Nev. 1121, 1129-30 (2008).

the Probate Court is that Colonial assumes that receiving a creditor's notice by mail was the only way to trigger Colonial's duty to act and file a creditor's claim. Colonial's entire case rests on the premise that the Estate's failure to mail Colonial had no duty to file a claim until after the Estate mailed it a creditor's notice despite that Colonial indisputably knew of the Estate administration.⁴ As demonstrated below, this key premise of Colonial's case is rejected by the probate statutes and has been rejected by this Court. Based on the facts before the Probate Court, it is not a lack of notice that prevented Colonial from filing a creditor's claim. Colonial failed to file a creditor's claim during the Estate administration despite its clear knowledge that the Estate was being administered in Nevada.

A. Under Nevada's probate statutes and Nevada caselaw, a creditor that learns of an estate administration must act by filing a claim regardless of whether the Estate mailed the creditor a notice.

The nonclaim statute outlines the process for creditors and estates to resolve the debts of a decedent. "The entire statutory scheme set out in [Nevada's probate statutes] demonstrates an intention on the part of the legislature to ensure the speedy and certain distribution of decedents' estates." Bergeron v. Loeb, 100 Nev. 54, 57 (1984). This Court has enforced the deadlines found in the nonclaim statute on

⁴ See, e.g., Opening Brief at 25 ("Respondent was required and failed to send written notice") ("without notice, a court may order a claim filed"), 26 ("in this case, the required notice is stipulated by statute"), 27-31 (citing amendments to probate statute requiring notice to be mailed to ascertainable creditors and arguing that the Estate had a duty to mail notice to Colonial but failing to note that Colonial had actual knowledge of estate administration).

multiple occasions and the district court does not have authority to ignore the probate statutes. See Bell Brand Ranches, Inc. v. First Nat. Bank of Nevada, 91 Nev. 88, 92, (1975); Gardner Hotel Supply of Houston v. Clark's Estate, 83 Nev. 388, 392, (1967).

Filing a timely creditor's claim is important because any claims that are not presented pursuant to the statute are forever barred. See NRS 147.040(3); NRS 147.130(1). In other words, a creditor cannot file a civil action against the estate before filing a creditor's claim. NRS 147.130.

The nonclaim statute places responsibility on both the estate administrator and the creditor to notify creditors and present claims in a timely manner. The administrator must mail notice of estate administration to creditors pursuant to NRS 155.010. NRS 147.010. The administrator must publish notice to creditors and mail the notice to "those creditors whose names and addresses are readily ascertainable as of the date of first publication of the notice and who have not already filed a claim." (emphasis added). NRS 155.010. ⁵ The statute clearly contemplates that a creditor may become aware of estate administration and file a claim without first receiving notice by mail from the administrator.

This Court's precedent confirms that creditors cannot solely rely on receiving formal notice by mail. A creditor who knows of a debtor's death has actual notice of

⁵ If an administrator learns of a creditor during the claims period, notice to creditors must be mailed to that creditor. NRS 155.010.

estate administration and has a responsibility to inquire further. See Bell Brand Ranches, Inc. v. First Nat'l Bank of Nev., 91 Nev. 88, 91 n. 3 (holding that knowledge of the death of the decedent charges a creditor with a duty of further inquiry); Gardner Hotel Supply of Houston v. Clark's Estate, 83 Nev. 388, 392, (1967) ("Knowledge of death is sufficient to put the claimant on notice that probate proceedings will follow, and charges him with the responsibility of further inquiry.").

The timing for creditor's claims is specified in NRS 147.040. This section also demonstrates the legislature's expectation that a creditor may become aware of estate administration without receiving a notice to creditors by mail. The statute provides:

1. A person having a claim, due or to become due, against the decedent must file the claim with the clerk within 90 days after the mailing for those required to be mailed, or 90 days after the first publication of the notice to creditors pursuant to NRS 155.020.
2. A creditor who receives a notice to creditors by mail pursuant to subsection 5 of NRS 155.020 must file a claim with the clerk within 30 days after the mailing or 90 days after the first publication of notice to creditors pursuant to NRS 155.020, whichever is later.
3. If a claim is not filed with the clerk within the time allowed by subsection 1 or 2, the claim is forever barred, but if it is made to appear, by the affidavit of the claimant or by other proof to the satisfaction of the court, that the claimant did not have notice as provided in NRS 155.020 or actual notice of the administration of the estate, the claim may be filed at any time before the filing of the final account.

NRS 147.040 (emphasis added).

Two clear principles emerge from these statutes and authority. First, a creditor has a duty to act when the creditor becomes aware of the estate administration

regardless of how that knowledge came about. Second, the creditor must act swiftly in order preserve claims.

Regarding the first principle, this statutory scheme reveals the legislature's clear intent to prevent creditors with actual knowledge of the estate administration to file late claims. NRS 147.010 contemplates that a creditor may file a claim without waiting for the administrator to mail a creditor's notice. This Court's authority confirms the creditor's affirmative duty to act. And subsection 3 of NRS 147.040 permits a creditor to file at any time before the estate closes, but only if the creditor did not have actual notice of the estate administration.

Accordingly, the statutory scheme, in connection with this Court's precedent, squarely reject the key premise of Colonial's case. This authority demonstrates that the Probate Court correctly held that a creditor with actual knowledge of estate administration can be barred from filing a late creditor's claim even if that creditor was entitled to but did not receive mailed notice from the administrator.

B. Colonial did not file a claim within any possible deadline under NRS 147.040.

As noted above, subsections (1) and (2) of NRS 147.040 provide two possible deadlines for a creditor to file a creditor's claim. Under NRS 147.040(1), Colonial must file within "90 days after the mailing for those required to be mailed, or 90 days after the first publication of the notice to creditors pursuant to NRS 155.020." Under NRS 147.040(2), a creditor, who is discovered or becomes readily ascertainable during the

claims period of the Estate must file within the later of (a) 30 days after receiving a mailed notice to creditors or (b) 90 days after publication. Colonial does not dispute that it did not file a claim within any of these periods.

NRS 147.040(3) contains an extended deadline or safe harbor provision for creditors who (a) do not receive notice by mail under NRS 155.020 **and** (b) do not have actual notice of the administration of the Estate. Specifically, the statute provides:

If a claim is not filed with the clerk within the time allowed by subsection 1 or 2, the claim is forever barred, but if it is made to appear, by the affidavit of the claimant or by other proof to the satisfaction of the court, that the claimant did not have notice as provided in NRS 155.020 or **actual notice of the administration of the estate**, the claim may be filed at any time before the filing of the final account.

The statute has 3 clear elements for a creditor to utilize the extended deadline. First, the creditor must not have received notice by mail (as provided in NRS 155.020). Second, the creditor must not have had actual notice of the administration of the estate. And third, the creditor must file the creditor's claim before the filing of the final account (i.e., before the estate closes).

As to the first element, Colonial did not receive notice by mail, which satisfies the first requirement. However, the Probate Court correctly determined that Colonial did not establish the other two elements.

As to the second element, Colonial cannot dispute that it had actual notice of the administration of the Estate. Colonial retained Nevada counsel who sent a letter and directly contacted the Estate administrator before the Estate had closed. Colonial

filed a creditor's claim in the California Estate while the Nevada estate was being administered. The administrator did not prevent Colonial from filing a claim before the Nevada administration ended. Colonial fails to provide any reasoning, argument, or explanation why it did not file a creditor's claim or seek permission to do so under NRS 147.040(3) prior to the Estate being closed. Colonial knew the identity of the Estate administrator and knew of the Nevada Case because it hired Nevada counsel and filed a lawsuit against the Nevada estate. A creditor's notice would not have informed Colonial of anything that it did not already know.

As to the third element, it is also undisputed that Colonial did not file its creditor's claim before the filing of the final account. Thus, even if Colonial did not have actual knowledge of the Estate administration (which it did), Colonial's efforts to file a late creditor's claim were already too late. The Estate had been administered and closed. Filing a creditor's claim would serve no purpose because there are no estate assets left to administer.

Accordingly, Colonial's attempt to assert a late creditor's claim in this matter is unquestionably and indisputably untimely. Colonial has not filed within any of the applicable deadlines found in NRS 147.040 and has failed to establish two of the three required elements to rely on the extended deadline found in NRS 147.040(3).

II. The Probate Court correctly determined that it was statutorily prohibited from reopening the Estate.

One of the reasons the Probate Court denied Colonial's Petition was that the court was statutorily prohibited from reopening the Estate for the purpose of filing a late creditor's claim. See 2 ROI 364 ¶ 25. NRS 151.240(1) allows the Court to reopen an estate for only three purposes:

- (1) To administer newly discovered property,
- (2) To correct errors in property descriptions,
- (3) For any purpose requiring new letters to be issue.

NRS 151.240(1).

This statute provides an independent reason to affirm the Probate Court's decision in addition to the timing issues discussed above. Tellingly, Colonial does not cite to or address the statute. The omission is fatal to Colonial's appeal. To reopen the Estate, Colonial must identify some statute or other authority authorizing the requested action. Colonial's failure to address this key issue creates an easy decision to affirm the Probate Court decision. In the proceedings below, Colonial did not identify newly discovered property, identify errors in property descriptions, or request that new letters be issued.⁶ On appeal, Colonial does not identify any of these situations.

⁶ This fact is easily demonstrated by the title of Colonial's Petition. Colonial's seeks to (1) reopen the Estate, (2) file a creditor's claim, and (3) receive an accounting of Estate assets. The requested relief does not fit within any of the categories in NRS 151.240.

Colonial's Petition to reopen the Estate was not authorized by statute and the Probate Court correctly interpreted and enforced the probate statute. This court should affirm that decision on this basis.

III. This Court should affirm and reject Colonial's due process arguments because (a) Nevada's nonclaim statute does not violate due process and (b) Colonial was not denied due process because it had actual knowledge Estate's administration and failed to act.

As a hail-Mary effort to salvage its claim against the Estate, Colonial argues that its due process rights have been violated. It should be noted that Colonial's framing of the issue as a lack of notice is not accurate. Colonial did not receive mailed notice, but this is not a case where the creditor did not have actual notice of the Estate administration. As demonstrated at length above, Colonial knew the Estate was being administered, knew who was administering the Nevada Estate, hired local counsel, filed a lawsuit against the Estate, and took other actions other than filing a creditor's claim. In short, Colonials' lack-of-notice-due-process-violation argument falls flat because Colonial had actual notice of the Estate administration.

Setting aside this fact, Colonial's due process analysis is nonetheless flawed. Colonial relies primarily on Cont'l Ins. Co. v. Moseley, in support of its due process argument.⁷ 100 Nev. 337, 338 (1984). Colonial's reliance on Moseley and other due process cases is misplaced.

⁷ Colonial also cites to Tulsa Professional Collection Services v. Pope, 485 U.S. 478 (1988), but Pope is inapplicable for the same reasons, discussed below, that Moseley is inapplicable.

A. Moseley does not apply to Colonial because the creditor in Moseley did not have knowledge of the estate administration whereas Colonial had actual notice of the administration and did not take appropriate action until more than 490 days later.

The first and most critical reason that Colonial cannot rely on Moseley is that the same facts that protected the Moseley creditor do not exist here. The creditor in Moseley was a known creditor that did not have notice of the estate administration until the last day of the creditors period. See Cont'l Ins. Co. v. Moseley, 98 Nev. 476, 477, 653 P.2d 158, 159 (1982).⁸ The estate administrator served notice of the administration by publication only. After the creditor received notice, it acted promptly, filing the claim **two days** after the claims period ended (3 days after receiving notice of the death). See id. The estate argued that, though the timing was unfortunate, the creditor was given at least constructive notice by publication and that the creditor's claim was barred by the statute. The only issue on appeal before the Nevada Supreme Court was whether notice by publication was enough to bar the creditor's claim. Cont'l Ins. Co. v. Moseley, 100 Nev. 337, 338 (1984). The court held that the known creditor who had no knowledge of the estate administration was entitled to more than notice by publication. Id. In ruling in favor of the creditor, Moseley protected a known creditor that did not have actual notice of the estate

⁸ The Moseley case reached the Nevada Supreme Court twice: once in 1982 and again in 1984 after remand from the U. S. Supreme Court. The underlying facts are specifically detailed in the 1982 Moseley decision, but not the 1984 decision. The citation to the 1982 decision is: Cont'l Ins. Co. v. Moseley, 98 Nev. 476 (1982). The 1984 decision is Cont'l Ins. Co. v. Moseley, 100 Nev. 337, 338 (1984).

administration and who acted promptly. On the other hand, the ruling in Moseley did not create a loophole to be exploited by creditors that have actual notice of the estate and who delay filing a creditor's claim.

Here, Colonial stands in direct contrast to that of the creditor in Moseley. The creditor in Moseley (1) was readily ascertainable, (2) did not have actual notice of the Estate administration, (3) received notice of the estate administration through service by publication only, and (4) acted promptly after receiving notice. Colonial admits that it (1) received notice of the Estate administration in September of 2018, (2) sent letters to the Estate for the purpose of resolving its claims while the Nevada Estate was being administered instead of filing a creditor's claim (See Reply at 3:23-4:4:22-5:12, Reply Ex. 2 ¶¶ 11-19), (3) did not file a creditor's claim against the Estate prior to the close of the Estate, (4) filed a late creditor's claim against the California Estate on April 12, 2019, (5) did not file a claim in the Nevada Estate proceeding, and (6) made no attempt to file a creditor's claim in the Nevada Estate until February 2, 2020, which is more than 490 days after Colonial is charged with knowledge of the Estate administration.

The ruling in Moseley is wholly inapplicable here. Due process requires notice and an opportunity to present a defense. Colonial had knowledge of the Estate administration in Nevada and the opportunity to follow the correct procedure. Colonial cannot blame its incorrect action on a lack of notice or the conduct of the

Estate. The Illinois Court of Appeals has held that an estate administrator does not deprive due process by failing to serve notice to a known creditor if the known creditor has actual notice of estate administration. See Matter of Estate of Sutherland, 593 N.E.2d 955, 960 (1992). The court indicated “petitioner’s failure to timely file is not the result of insufficiency of actual notice; it is the result of failure to timely act on the notice received.” See id. (internal citations and quotations omitted). Here, under the same logic, the Court cannot conclude that Colonial was deprived of due process under Moseley.

B. Moseley is not applicable because the nonclaim statute there is substantively different from the statute here, and other courts have held that nonclaim statutes like Nevada’s statute were constitutional.

The nonclaim statute at issue in Moseley was NRS 145.050, which has since been repealed. As this statute existed in 1982, the only form of notice required was publication. See Moseley, 98 Nev. at 477. After publication, creditors had to file a claim within 60 days or be barred forever—no exceptions. The nonclaim statute here is different and requires more than just publication of notice. NRS 155.020 requires mailing of notice to reasonably ascertainable creditors and, for all other creditors, notice by publication. Additionally, the statute contains a procedural safeguard found in NRS 147.040(3). Any creditor who did not (a) receive notice under NRS 155.020 or (b) have actual notice of the administration of the estate, can file a claim “at any time before the filing of a final account.” These additional protections for known creditors

and creditors that may not have received actual notice of the estate administration remedy the constitutional deficiency in Moseley. Colonial makes no argument that these additional protections are constitutionally deficient.⁹ The substantive difference between the challenged statutes compels a different result.

C. The United States Supreme Court's Pope decision does not change the result.

Colonial also indirectly relies on the United State Supreme Court decision Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988) in its due process argument. The Pope decision does not change the result in this case because, like Moseley, the statute in question required notice to creditors by publication only. See 485 U.S. at 479. The issue of whether the creditor had actual notice was neither addressed nor resolved. And, in fact, the Pope court cited to Nevada's nonclaim statute as a good (i.e., non-due-process-violating) example. See id. at 490. This court has never relied on or cited Pope as questioning Nevada's nonclaim statute.

The California Court of Appeals rejected an argument very similar to the argument that Colonial raises in this case, i.e., that California's creditor's notice statute violated due process under Tulsa Professional Collection Services v. Pope, 485 U.S. 478 (1988). See Interinsurance Exch. v. Narula, 39 Cal. Rptr. 2d 752, 756 (1995).

⁹ These additional due process protections highlight Colonial's failure to act despite its knowledge of the Estate's administration. If Colonial had filed its motion or sought to file a creditor's claim in the Nevada Case when it first became aware of Decedent's death, Colonial's rights are more likely to have been preserved.

California's probate nonclaim statute is like Nevada's in requiring estate representatives to notice known creditors and publish notice. See id. The statute also permits creditors without knowledge of the estate administration to file late claims in certain circumstances. See id. The California Court noted that California had revised its probate statutes in response to the ruling in Pope and created numerous procedural protections for creditors that did not have actual notice of the estate administration. Id. The Court ruled that the statute as applied to the creditor was constitutional.

Additionally, Pope does not stand for the proposition that a creditor can sit on its rights and do nothing. Pope was primarily concerned with providing actual notice to potential creditors. Where it is undisputed here that Colonial had actual notice, then the constitutional concerns addressed in Pope are moot.

The Court should follow the California Court of Appeals and rule that Nevada's nonclaim statute did not deprive Colonial of due process rights. NRS 145.050 has been repealed in its entirety. Nevada's probate statutes were substantively amended since the Moseley decision and are constitutional, as confirmed in Pope. After these amendments, Nevada's probate notice statutory scheme is vastly different from the statute that was held unconstitutional in Moseley and the statute at issue in Pope, where the only form of required notice was by publication.

The Probate Court correctly recognized that Colonial was not deprived of due process and its Order should be affirmed.

IV. The Probate Court was correct in denying Colonial and evidentiary hearing on Colonial's wholly speculative, nonspecific, and unsupported fraud-on-the-court allegations.

Colonial's also raises the flawed and unsupported argument that it is entitled to an evidentiary hearing to address its allegation that Estate administrator Morgan failed to disclose relevant facts in the Nevada case. Colonial's contentions on this point should be rejected for various reasons.

First, Colonial fails to present a plausible fraud argument. Colonial's entire argument appears to be that because the former administrator in California, Alfano, engaged in misconduct in California, he must have also done so in Nevada. See Opening Brief at 35. The clear error in this logic is that Colonial does not allege, even on information and belief, that Alfano's misconduct affected any Nevada assets. Colonial's exaggerated assertions of "clandestine and surreptitious maneuvering" (Opening Brief 35) is simple mudslinging.

Second, Colonial's argument that it is entitled to an evidentiary hearing is different from the argument before the Probate Court. As noted, Colonial asserts (without support) on appeal that Alfano's fraud must have touched Nevada assets and that a hearing should be held. However, colonial argued to the Probate Court that it was Morgan who committed fraud on the court by failing to disclose Alfano's fraud in Nevada. See 1 ROA 163-164. This Court will not consider an argument raised for the first time on appeal. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52 (1981). The Court

it should decline to consider Colonial's new guilt-by-association argument that Alfano's misconduct affected Nevada assets.

The third flaw in Colonial's argument is that Alfano's misconduct should be and is being litigated and resolved by the California probate court. Colonial has presented no evidence that Alfano's misconduct affected Nevada's assets. It has not *alleged* that Alfano's misconduct affected Nevada's assets. Morgan is not aware of any Nevada assets other than the real estate assets, which were appropriately administered here. 2 ROA 294 ¶¶ 17-20. Alfano was not appointed administrator by any Nevada court. There is evidentiary basis or reason for the Probate Court to address these issues. Colonial does not cite to any authority that would suggest the Probate Court would have the duty or the ability resolve any known issues related to Alfano's conduct. The issue, as alleged by Colonial, is totally outside the jurisdiction of the Probate Court.

Fourth, the Probate Court correctly rejected Colonial's allegation that Morgan committed fraud on the court by failing to disclose Alfano's misconduct in the Nevada Case. Fraud is "a knowing misrepresentation or knowing concealment of a *material* fact made to induce another to act to his or her detriment. See Black's Law Dictionary, Fraud (11th ed. 2019) (emphasis added). The Nevada Supreme Court defines fraud on the court as:

that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that

the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases ... and relief should be denied in the absence of such conduct.

NC-DSH, Inc. v. Garner, 125 Nev. 647, 654 (2009). To prove fraud on the court, Colonial would have to prove (1) misrepresentation of (2) a material fact (3) intended to induce reliance and (4) that the misrepresentation prevented judicial machinery from performing in a usual manner. See id. Colonial did not cite to or argue these elements before the Probate Court (1 ROA 63-64).

Fifth, and finally, reopening the Estate to address Colonial's meritless fraud allegations is not permitted under Nevada's probate statutes. NRS 151.240(1) allows the Court to reopen an estate for one of only three purposes:

- (4) To administer newly discovered property,
- (5) To correct errors in property descriptions,
- (6) For any purpose requiring new letters to be issue.

NRS 151.240(1). Colonial does not identify newly discovered property, identify errors in property descriptions, or request that new letters be issued. Thus, the request is not authorized by statute and should be rejected.

Accordingly, Colonial's request for an evidentiary hearing is unsupported and meritless. The Probate Court's decision on this point should be affirmed.

V. Colonial’s argument that the Estate was never actually closed because certain conditions or contingencies were not satisfied is raised for the first time on appeal and should be rejected.

Colonial’s final argument is that its creditor’s claim¹⁰ should be deemed timely because Morgan did not comply with certain conditions of closing the Estate and the Estate, therefore, remains open. Opening Brief at 36. Specifically, Colonial cites to the language in the order stating that Morgan will be discharged from responsibilities “on the filing of appropriate receipts” and that Morgan has not filed these unspecified receipts.

This argument is raised for the first time on appeal and should be rejected on that basis alone. Substantively, the argument lacks merit. Colonial does identify which receipts should have been filed, how it was damaged because the receipts were not filed, which statute requires the receipts to be filed, or provide any authority that it would have standing to raise an issue at all. More practically, allowing an instance of boilerplate to indefinitely extend the time for a creditor to file a creditor’s claim would lead to absurd results. Colonial’s argument is entirely devoid of support, citations to authority, or reasoning that would explain why these unspecified receipts should permit a late creditor’s claim. The argument must be rejected.

¹⁰ Colonial argues that it’s claim should be deemed timely (Opening Brief at 36), but it has never filed a creditor’s claim.

VI. Reopening the Estate would be futile because all assets have been distributed to heirs.

Colonial's Opening Brief also fails to acknowledge that granting the relief that Colonial is requesting would result in needless and futile litigation. Estate assets have already been distributed and, as a result, there are no Estate assets from which to satisfy Colonial's creditor's claim. The Estate raised this argument before the Probate Court and Colonial has not responded to it or addressed it. See 2 ROA 279-280. Colonial has not identified any statute or potential claim that would permit it to seek additional recovery against the Estate. As a practical matter, there are no Estate assets to satisfy any judgment that Colonial could potentially obtain against the Estate.

Viewed in this light, imposing the last and final deadline for creditor claims to be no later than the date the estate is closed is highly practical. After the estate is closed, all assets are presumably distributed and there would be no assets to satisfy creditors. Colonial would ignore that practical and reasonable deadline and asks this Court to authorize future wasteful litigation. It makes little sense to grant Colonial's appeal. Adhering to the law outlined above is both legally and practically sound. The Court should affirm the Probate Court's Order.

Conclusion

The Probate Court's Order in this case carefully analyzed and correctly applied Nevada's probate statutes and this Court's precedent. The Probate Court was correct to deny Colonial's Petition. It is indisputable that Colonial knew of Decedent's death

and of the Nevada Estate administration but chose to take other action instead of filing a creditor's claim. It is not the lack of notice that delayed Colonial's creditor's claim. Colonial was armed with knowledge that the Estate was being administered and could have filed a claim at any reasonable time before the Estate closed. It was Colonial's failure to take timely and correct action that resulted in an untimely creditor's claim. The Probate Court's Order denying Colonial's Petition should be affirmed.

Dated: November 30, 2021.

Clear Counsel Law Group

/s/ David Blake
David T. Blake (#11059)

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in Garamond 14 pt. font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

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.

Dated: November 30, 2021.

Clear Counsel Law Group

/s/ David Blake
David T. Blake (#11059)