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

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.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Respondent bases all of its arguments on the assertion that Appellants had actual notice but completely ignores the fact that Appellants were a readily ascertainable creditor but were never provided the required written notice by the company or the estate pursuant to NRS 155.020.

Respondent totally disregard the letters and numerous phone calls from Appellant —which were attempts to make contact with her to discuss his claim. As demonstrated by regardless of Respondent's protestations, the 90-day notice period for creditors which began on July 25, 2018 had expired on October 22, 2018. The Respondent stalled and failed to respond in order for the time to "run out the clock" on the 90-day filing of creditor's notice.

Respondent's argument that 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 is without merit.

ARGUMENT

A. RESPONDENT TOTALLY IGNORES THE QUESTION OF WHETHER APPELLANTS WERE READILY ASCERTAINABLE CREDITORS, BY WHICH THEY CONFESS THE ERROR

NRS 155.020 requires mailing of notice to readily ascertainable creditors. The first argument presented in Appellants' Opening Brief is "[w]hether

Appellants were in fact known or readily ascertainable creditors that were entitled to written notice from the estate pursuant to NRS 155.020 and *Tulsa Prof'l Collection Servs., Inc. v. Pope,* 485 U.S. 478, 108 S. Ct. 1340 (1988)." App. Op. Br. at 2. Respondent totally ignores the question of whether Appellants were reasonably and readily ascertainable creditors.

In fact, Respondent's Answering Brief fails to even once mention the issue. They do not dispute the fact that Appellants were readily ascertainable in light of its many communications with the Estate. Further, even assuming, arguendo, that there was any question about Appellants' status as a readily ascertainable creditor, there is ample support to show that *any* reasonable and diligent search would prove this to be the case.

The Nevada Supreme Court has held that a party confesses error when its answering brief "effectively fail[s] to address a significant issue on appeal." *Polk v. State,* 233 P.3d 357, 360 (Nev. 2010), citing *Bates v. Chronister,* 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984) (treating the respondent's failure to respond to the appellant's argument as a confession of error); *A Minor v. Mineral Co. Juv. Dep't*, 95 Nev. 248, 249, 592 P.2d 172, 173 (1979) (determining that the answering brief was silent on the issue in question, resulting in a confession of error); *Moore v. State*, 93 Nev. 645, 647, 572 P.2d 216, 217 (1977) (concluding that even though the State acknowledged the issue on appeal, it failed to supply any analysis, legal

or otherwise, to support its position and "effect[ively] filed no brief at all," which constituted confession of error), *overruled on other grounds by Miller v. State*, 121 Nev. 92, 95-96, 110 P.3d 53, 56 (2005). As a result, Respondent's failure to address Appellants' argument that they are readily ascertainable creditors must be construed as a confession of error. See *Michael Hohl Carson Valley v. Hellwinkel Family Ltd. P'ship*, 442 P.3d 151 n.2 (Nev. 2019).

B. RESPONDENT'S ARGUMENT THAT NOTICE WAS PROPER BASED ON STATUTES AND CASELAW IS ILLOGICAL

Respondent argues that Appellants are incorrect in stating "the only way that Colonial could have learned of the Estate administration was to receive notice by mailing." Resp. Br. at 7. Respondent's support for determining this fact is Nevada Supreme Court precedent and the probate statutes. *Id.* Respondent argues that a question of fact is determined by Supreme Court precedent and the probate statutes. This makes no sense. "[W]hether a party was properly mailed notice is a question of fact." *Jones v. Urbanski,* 474 P.3d 335 (Nev. 2020), citing *Zugel v. Miller,* 99 Nev. 100, 101, 659 P.2d 296, 297 (1983).

Appellants have asked this Court to determine whether they were in fact known or readily ascertainable creditors that were entitled to written notice from the estate pursuant to NRS 155.020 and *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340 (1988). Respondent boldly states that this question is answered by "[t]he probate statutes [which] 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." *Id.* Such a response defies logic. Further, Respondent claims that "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." *Id.* Respondent cites *Bell Brand Ranches, Inc. v. First Nat. Bank of Nevada,* 91 Nev. 88, 92, (1975) for this assertion. However, that decision also holds that "[l]ate filing is permitted if the creditor had no notice of the appointment of the administratrix." *Id*., at 92 n.3, 531 P.2d at 473.

Respondent declares that "Colonial had actual notice of the Estate administration" throughout its brief, but never truly endeavors to explain to that Court how that occurred. Resp. Br. at 7, 8, 9, 10, 14, 17 (twice), 18, and 22. Respondent states that "Colonial cannot dispute that it had actual notice of the administration of the Estate…" This is the way that Respondent can circumvent its obligation to give Appellants— reasonably and readily ascertainable creditors— written notice pursuant to NRS 155.020. Respondent claims that Appellant had actual notice because they:

> [R]etained 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.

Resp. Br. at 14-15 (emphasis added). However, the record shows that Appellants

contacted the special administrator Morgan who misrepresented to Appellants' counsel that the probating of the Estate of Carver *was already complete*, and it was too late to take any action. In fact, the Estate in California remains open, and Morgan's representation was inaccurate. Nonetheless, this is not actual notice, and it does not absolve Respondent of its obligation to provide written notice under the statute.

Despite its obligation, Morgan totally disregard the letters and numerous phone calls from Appellant —which were attempts to make contact with her to discuss his claim.[1] Regardless of Respondent's protestations, the 90-day notice period for creditors which began on July 25, 2018 had expired on October 22, 2018. Thus, by the time Appellant retained counsel the time period for a creditor to file a claim in Nevada had expired. In fact, the time period for a creditor to file a claim in Nevada had expired prior to Appellant himself sending a letter on October 26, 2018.[2]

C. RESPONDENT'S DEFENSE THAT THERE ARE NO LONGER ASSETS TO DISTRIBUTE IS UNAVAILING

Respondent argues that the Probate Court correctly determined that Colonial was not entitled to file a late creditor's claim because it failed make a claim by the "final drop-dead deadline for any creditor to file a creditor's claim" pursuant to

[1] ROA000174-176.
[2] ROA000193.

NRS 147.040(3). Resp. Br. at 6. Respondent states that "[t]he policy of this outer-limit deadline is practical…" because "[a]fter the estate is closed, assets are generally distributed, and the estate has no assets from which to satisfy any creditor claims." *Id*. Respondent argues that because Appellant had actual notice of the estate administration, its claim is moot." *Id.* However, Respondent makes this assertion without any support. In effect, Respondent says that as the administrator of an estate, she may *sua sponte* violate the statutes and provide no notice—then simply close the estate without any inventory or accounting—ignoring Appellant's letters and numerous phone calls trying to discuss his claim. Respondent can "run out the clock" and, as a result, get away with her deliberate indifference and preclude the rights of a clearly readily ascertainable creditor. Such a result is incongruous and contrary to the clear intent of the notice statute.

D. RESPONDENT'S CLAIM CONCERNING THE REOPENING OF THE ESTATE IS WITHOUT MERIT

Respondent argues that 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 because NRS 151.240(1) lists only three 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. Respondent states that Appellants do not seek to reopen the Estate for any of these purposes.

1. Rationale for reopening the Estate

Respondent argues that Appellants' request to reopen the estate does not fit within any of the categories in NRS 151.240. However, it is well-settled that an estate may be reopened when fraud exists. See *Hubbard v. Urton,* 67 F. 419, 425, 1895 U.S. App. LEXIS 3409, *17-18 (9th Cir. 1895), quoting *Griffith v. Godey,* 113 U.S. 89, 93, 5 Sup. Ct. 383 (1885) (emphasis added) ("a fraudulent concealment of property or a fraudulent disposition of it is a general and always existing ground for the interposition of equity.").

2. The argument that the Estate was never actually closed because certain conditions or contingencies were not satisfied is not raised for the first time on appeal

Respondent's claim that this argument was raised for the first time on appeal is false and may show how lightly it takes its responsibilities as an estate administrator. This argument was raised in Petitioner's [Appellants] Response to Defendant's Objection to Petition Order to Show Cause Why Estate Should Not Be Reopened for Creditors to Submit Proof of Claims and Accounting of the Estate Assets, Document 24, March 6, 2020, hereafter "Pet. Resp." ("The probating of this estate in California has not closed.").

Further, Respondent complains that "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." Resp. Br. at 26. This disingenuous claim only shows how improper it was for Administrator Morgan to inform the District Court that there were no outstanding claims and moved in Nevada to close probate, waiving inventory and accounting. Appellants argued in March of 2020 that "[n]o accounting of the estate and the business was ever conducted, and the California court continues to demand this from both the former administrator and Morgan." Pet. Resp. It is duplicitous on the part of Respondent to raise such a response.

Finally, Respondent argues that the Estate assets have already been distributed and, as a result, there are no Estate assets from which to satisfy Colonial's creditor's claim. Respondent claims that Appellants have not identified any statute or potential claim that would permit it to seek additional recovery against the Estate. But again, it is well-settled that an estate may be reopened when fraud exists. See *Hubbard v. Urton,* supra.

E. RESPONDENT'S CLAIM THAT APPELLANTS' DUE PROCESS WAS NOT VIOLATED IS WITHOUT MERIT

Respondent argues that the Probate Court correctly determined that Colonial's due process rights were not violated. Again, Respondent's only Response to this is that Appellant "had actual knowledge of the Estate administration." Actual knowledge is not the issue. Instead, the issue is Respondent's failure to provide written notice to a readily ascertainable creditor.

Respondent argues *Cont'l Ins. Co. v. Moseley,* 100 Nev. 338 (1984) because

that the creditor in that case was "a *known creditor that did not have notice of the estate administration*… Resp. Br. at 18. Respondent sidesteps the obligation of written notice in the statute and contains her discussion to notice by publication. Incredulously, Respondent writes, "[t]he only issue on appeal before the Nevada Supreme Court was whether notice by publication was enough to bar the creditor's claim." *Id.* That is the ***precise issue*** in this case, and Respondent clumsily attempts to distinguish this decision where "[t]he 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." *Id.*

Respondent simply avoids the fact that written notice was required to a readily ascertainable creditor, perhaps thinking that if it is not discussed, the question will go away. The argument that *Moseley* is not applicable because the nonclaim statute there is substantively different from the statute here makes little sense. Respondent asserts that the difference here is that NRS 155.020 requires mailing of notice to reasonably ascertainable creditors and, for all other creditors, notice by publication. That is correct, and Respondent never addresses any reason why Appellant was not a readily ascertainable creditor entitled to the required written notice of NRS 155.020.

Likewise, Respondent asserts that the *Pope* decision does not change the

result in this case because the statute there required notice to creditors by publication only and cites to decisions from Illinois and California as support for its argument, which are neither binding nor persuasive.

An argument for due process is easy to dismiss if the issue of due process is disregarded.

F. APPELLANTS' FRAUD ARGUMENT WAS RAISED BELOW

Respondent claims that Appellants' fraud argument on appeal is different from its argument before the Probate Court and should be rejected. This assertion is false and without merit. Respondent writes:

> 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.

Resp. Br. at 8.

Simply reading this argument, the Court can see how the two statements are corollary and entirely dependent upon each other. Nonetheless, this is not a new argument or a new claim and was again raised in the district court proceedings. Pet. Resp. ("Petitioner now asks this Court to reopen the estate probate and/or at the very minimum to order an *evidentiary hearing*.") (emphasis added). As a result, Respondent's argument is false and must be disregarded

G. APPELLANT WAS NOT AWARE OF DECEDENT'S DEATH AND THE ESTATE ADMINISTRATION IN NEVADA AND THUS DID NOT FILE A CREDITOR'S CLAIM UNTIL AFTER THE ESTATE HAD CLOSED

Again, this argument fails because it fails to address whether Appellants were a readily ascertainable creditor and avoids the required written notice in NRS 155.020.

H. RESPONDENT INCORRECTLY PLACES THE BURDEN ON APPELLANT

Respondent claims that "[u]nder 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. Again, Respondent bases this claim on its assertion that Appellants had actual notice but ignores that fact that Appellants were a readily ascertainable creditor but were never provided the required written notice by the company or the estate pursuant to NRS 155.020.

Respondent's claim of Appellants' actual notice conveniently bypasses its obligation to provide written notice to all readily ascertainable creditors. The fact that Respondent could have and should have known of Appellants' claim places the onus on Appellants to make a claim—despite Respondent's protestations—is not the appropriate standard under the statute. This ill-conceived notion imputes a burden on Appellants and allows Respondents to skirt due process requirements and compliance with Nevada Statutes.

Respondent's argument completely avoids the central issue of this case and as such, misinterprets and misapplies NRS 155.010. See Resp. Br. at 11 ("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."). And while a creditor may become aware and file a claim without first receiving notice by mail, that is not what happens here. Respondent ignores any argument that Appellants were readily ascertainable creditors.

Respondent cites cases for the proposition that "creditors cannot solely rely on receiving formal notice by mail" and explains that "a creditor has a duty to act when the creditor becomes aware of the estate administration regardless of how that knowledge came about" and that "the creditor must act swiftly in order preserve claims." Resp. Br at 12-13. Again this argument ignores the question of whether Appellants were reasonably and readily ascertainable creditors.

Further, Respondent's argument that Appellant did not file a claim within any possible deadline under NRS 147.040 again totally side-steps the question at the heart of this matter: whether Appellants were entitled to written notice from the estate pursuant to NRS 155.020 and *Tulsa Prof'l Collection Servs., Inc. v. Pope,* 485 U.S. 478, 108 S. Ct. 1340 (1988)." It was Respondent who totally disregard the letters and numerous phone calls from Appellant to discuss his claim.[3] As

[3] ROA000174-176, ROA000193.

demonstrated by the table below, the 90-day notice period for creditors which began on July 25, 2018 had expired on October 22, 2018.

Date	Event
October 16, 2017	Carver Dies
December 1, 2017	California Probate Opened
June 28, 2018	Nevada Probate Opened
July 25, 2018	Nevada Letters Issued / 90-Day Notice Sent to Creditors
August 10, 2018	Estate receives and files Affidavit of Publication of Notice to Creditors in NV
September 2018	Appellant Learns of Carver's Death
	Appellant calls Respondent and leaves voice mail
	Appellant receives no response from Administrator
	Appellant calls Respondent and leaves message with secretary
	Appellant receives no response from Administrator
September 21, 2018	Appellant sends letter to Robert McKenzie asking for equipment installation of return of money
	Appellant receives no response from Administrator
October 22, 2018	90-Day Notice Period Expires in Nevada
October 26, 2018	Appellant sends letter to Respondent re Claim
	Appellant receives no response from Administrator
November 15, 2018	Appellant retains counsel and attorney sends letter to Respondent re Claim

Thus, the administrator of the estate pursued a strategic effort not to send a notice to a reasonably and readily ascertainable creditor and when the creditor who finds out accidentally that Mr. Carver passed, attempts to contact the administrator, the administrator purposely does not respond in order to strategically have the 90-

day period expire. The Respondent now responds in support of its position that the appeal should be denied because the Appellant did not file timely which based on the record was due to Respondent's actions and omissions.

Respondent totally ignores the question of whether Appellants were reasonably and readily ascertainable creditors. Without refuting this, all of Respondent's arguments are unavailing.

I. RESPONDENT FAILS TO COMPLY WITH NRAP 32

NRAP 32(a)(5)(A) states that "[a] proportionally spaced typeface (e.g., Century Schoolbook, CG Times, Times New Roman, and New Century) must be 14-point or larger." *Id.* Respondent's brief is 12.5 font in Minion Pro-3971. See *Carroll v. State,* 130 Nev. 1161 n.2 (2014) ("[D]espite appellant's certification that the brief utilizes 14-point Times New Roman font, the font in the brief appears to be smaller."). As a result, Respondent must be returned and not filed. See NRAP 32(e) ("If a brief, petition, motion or other paper is not prepared in accordance with this Rule, the clerk will not file the document, but shall return it to be properly prepared.").

CONCLUSION

Based on the foregoing— principally the fact that Respondent totally ignores the question of whether Appellants were reasonably ascertainable creditors—the order of the District Court must be reversed.

DATED: January 10, 2022.

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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 Times New Roman 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: January 10, 2022.

I

/s/ Leo P. Flangas
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on January 10, 2022.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, for delivery within 3 calendar days to the following non-CM/ECF participants:

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