

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUPERPUMPER, INC., an Arizona corporation; EDWARD BAYUK, individually and as Trustee of the EDWARD BAYUK LIVING TRUST; SALVATORE MORABITO, an individual; and SNOWSHOE PETROLEUM, INC., a New York corporation,

Petitioners,

vs.

THE SECOND JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOW, AND THE HONORABLE CONNIE J. STEINHEIMER,

Respondents,

and

WILLIAM A. LEONARD, Trustee for the Bankruptcy Estate of Paul Anthony Morabito,

Real Party in Interest.

Case No. 82157
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Clerk of Supreme Court

**PETITION FOR EN BANC
RECONSIDERATION**

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I. INTRODUCTION

Petitioners, Superpumper, Inc.; Edward Bayuk, individually and as Trustee of the Edward Bayuk Living Trust (“Bayuk Trust”); Salvatore Morabito; and Snowshoe Petroleum, Inc. (collectively “Defendants”), seek en banc reconsideration pursuant to NRAP 40A from the Panel’s January 15, 2021 order denying their petition for writ of mandamus or prohibition.¹ Since the Panel’s denial order does not identify a substantive reason for electing not to intervene in this matter, Defendants will demonstrate in this petition that the Court’s intervention is of statewide importance.

First, the District Court erred by refusing to recognize the validity of spendthrift trusts under NRS Chapter 166 by adding extra-statutory conditions. The interpretation of the presented statutory provisions is a hallmark function of writ petitions. *See Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000) (“One such instance is when a writ petition offers this court a unique opportunity to define the precise parameters of . . . a statute that this court has never interpreted.”).

¹ The Panel’s January 15, 2021 order denying petition for writ of mandamus or prohibition is attached as **Exhibit 1**. The Panel consists of Justices Parraguirre, Stiglich, and Silver.

Second, the District Court also erred by refusing to apply the plain language of the limitations period in NRS 166.170. The District Court concluded that there was a tolling agreement that allowed for the filing of a complaint until June 18, 2013. 53 Petitioners' Appendix ("PA") 9359. But, the District Court's order simultaneously acknowledged that the complaint was not filed until December 2013. *Id.* Thus, Defendants ask this Court to enforce the plain language of NRS 166.170, due to the untimely complaint.

Third, a transfer between two spendthrift trusts is protected from fraudulent transfer claims. This precise issue was previously accepted by the En Banc Panel of this Court in *Magliarditi v. TransFirst Grp., Inc.*, Order Answering Questions and Remanding, 2019 WL 5390470, Dkt. No. 73889 (Oct. 21, 2019) (unpublished). However, the Court did not answer this particular certified question among the others that were presented. The Court should now take this opportunity to grant en banc reconsideration and resolve this question.

Finally, the District Court lacked subject matter jurisdiction over the Bayuk Trust since no *in rem* action was filed against it. *See In re Aboud Inter Vivos Tr.*, 129 Nev. 915, 922, 314 P.3d 941, 945–946 (2013). To the extent that the Court does

not resolve this issue of subject matter jurisdiction in the related Case No. 79355,² the Court should provide a vehicle for Defendants to have this issue reviewed.

Additionally, the issues presented in this petition are not moot because the issues presented are not only live, but they are also capable of repetition, yet evading review. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (“Even when an appeal is moot, however, we may consider it if it involves a matter of widespread importance that is capable of repetition, yet evading review.”) (citations omitted). Therefore, Defendants urge this Court to grant en banc reconsideration and order an answer from Real Party in Interest, William A. Leonard, Trustee for the Bankruptcy Estate of Paul Anthony Morabito (“Trustee”). If the Court orders the Trustee to answer this petition for en banc reconsideration, the Court should also grant leave for Defendants to file a reply.

II. LEGAL ARGUMENT

A. STANDARD FOR EN BANC RECONSIDERATION.

NRAP 40A(a) provides that this Court will reconsider a panel decision when (1) “reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals” or (2) “the proceeding involves a substantial precedential, constitutional or public policy issue.”

² Supreme Court Case No. 79355 has been screened and is assigned to the En Banc Panel of this Court.

B. THE ISSUES PRESENTED IN THIS WRIT PETITION ARE OF STATEWIDE IMPORTANCE.

1. The District Court Erred by Refusing to Recognize the Validity of Spendthrift Trusts Under NRS Chapter 166 by Adding Extra-Statutory Conditions.

The District Court erred by refusing to recognize the validity of spendthrift trusts under NRS Chapter 166 by adding extra-statutory conditions. In ruling on claims of exemption and a third-party claim, the District Court erroneously concluded that the Bayuk Trust would not be treated as a Nevada spendthrift trust because it “was not disclosed prior to the Claim of Exemption.” 53 PA 9358. But, this Court has recognized that trusts can be converted into valid SSSTs. *See Klabacka v. Nelson*, 394 P.3d 940, 943 (Nev. 2017). Despite the controlling nature of *Klabacka*, the District Court’s order did not mention *Klabacka*, let alone attempt to apply it to this case. 53 PA 9357–9360.

2. The District Court Also Erred by Refusing to Apply the Plain Language of the Limitations Period in NRS 166.170.

The District Court also erred by refusing to apply the plain language of the limitations period in NRS 166.170. The District Court improperly determined that the Trustee was not untimely in seeking relief against the Bayuk Trust because he had allegedly complied with the limitation periods of transfers, as outlined in NRS 166.170. 53 PA 9359. To reach this determination, the District Court concluded that there was a tolling agreement that allowed for the filing of a complaint until

June 18, 2013. *Id.* But, the District Court’s order simultaneously acknowledged that the complaint was not filed until December 2013. *Id.* Thus, the District Court’s own order constitutes a judicial admission that the Trustee’s complaint was untimely. *Cf. Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 343, 255 P.3d 268, 276 (2011) (“Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party’s knowledge.”) (citation omitted). Statutes outlining “time and manner” requirements must be strictly construed. *See Leven v. Frey*, 123 Nev. 399, 407–408, 168 P.3d 712, 717–719 (2007). Thus, the Trustee’s entire action against the Bayuk Trust should have been barred by the limitations period in NRS 166.170.

3. A Transfer Between Two Spendthrift Trusts Is Protected From Fraudulent Transfer Claims.

A transfer between two spendthrift trusts is protected from fraudulent transfer claims. This precise issue was previously accepted by the En Banc Panel of this Court in *Magliarditi v. TransFirst Grp., Inc.*, Order Answering Questions and Remanding, 2019 WL 5390470, Dkt. No. 73889 (Oct. 21, 2019) (unpublished). However, the Court did not answer this particular certified question among the others that were presented. According to NRS 166.050, “[n]o specific language is necessary for the creation of a spendthrift trust. It is sufficient if by the terms of the writing (construed in the light of this chapter if necessary) the creator manifests an

intention to create such a trust.” The District Court’s order enforcing the writs of execution runs contrary to *Klabacka* as it is “such a court order [that] would require the trustee to make a distribution outside the scope of the trust agreement and, perhaps more importantly, would run afoul of NRS 166.120(2), which prohibits payments made pursuant to or by virtue of any legal process.” *Id.* at 950 (citing NRS 163.417(1)(c)(1)). Further, “[t]he legislative history of SSSTs in Nevada supports this conclusion. It appears that the Legislature enacted the statutory framework allowing SSSTs to make Nevada an attractive place for wealthy individuals to invest their assets, which, in turn, provides Nevada increased estate and inheritance tax revenues. *See* Hearing on A.B. 469 Before the Assembly Judiciary Comm., 70th Leg. (Nev., Mar. 26, 1999) (statement of Assemblyman David Goldwater). When crafting the language to allow SSSTs, the Legislature contemplated a statutory framework that protected trust assets from unknown, future creditors, as opposed to debts known to the settlor at the time the trust was created.” *See id.* at 951. “This rigid scheme makes Nevada’s self-settled spendthrift framework unique; indeed, the “key difference” among Nevada’s self-settled spendthrift statutes and statutes of other states with SSSTs, including Florida, South Dakota, and Wyoming, is that Nevada abandoned the interests of child-support and spousal-support creditors, as well as involuntary tort creditors, seemingly in an effort to attract the trust business of those individuals seeking maximum asset protection.” *Id.* (emphasis added)

(citing Michael Sjuggerud, *Defeating the Self-Settled Spendthrift Trust in Bankruptcy*, 28 FLA. ST. U. L. REV. 977, 986 (2001)).

Notably, NRS 112.230(2), which is in the Nevada Uniform Fraudulent Transfer Act, carves out an exception for spendthrift trusts. NRS 21.080 and NRS 21.090(1)(cc) and (dd) also provide an exemption from execution for spendthrift trusts. According to *Klabacka* and the discussion on the legislative intent of NRS Chapter 166, it is undeniable that spendthrift trusts were intended to shield assets from even involuntary tort creditors. In order for these policies to have any meaning, the protected status of the assets must be maintained, which is analogous to the protection of proceeds from the sale of real property with a homestead exemption. Otherwise, “[p]ermitting creditors to attach judgment liens to exempt homestead property would allow them to cloud the title to property that they have no legal right to execute against.” *In re Contrevo*, 123 Nev. 20, 24, 153 P.3d 652, 655 (2007) (explaining that Nevada’s constitutional directive would be thwarted if ‘dormant’ judgment liens could attach to fully exempt homestead property); *see also Klabacka*, 394 P.3d at 950 (“We conclude the statutory framework governing SSSTs does not allow a court to equalize spendthrift trust assets between or among different SSSTs.”); *In re Wachter*, 314 B.R. 365, 377 (Bankr. E.D. Tenn. 2004) (protecting both the corpus and income transferred between two spendthrift trusts). The Court

should now take this opportunity to grant en banc reconsideration and resolve this question.

4. **The District Court Lacked Subject Matter Jurisdiction Over the Bayuk Trust Since No *In Rem* Action Was Filed Against It.**

The District Court lacked subject matter jurisdiction over the Bayuk Trust since no *in rem* action was filed against it. See *In re Aboud Inter Vivos Tr.*, 129 Nev. 915, 922, 314 P.3d 941, 945–946 (2013). To the extent that the Court does not resolve this issue of subject matter jurisdiction in the related Case No. 79355, the Court should provide a vehicle for Defendants to have this issue reviewed. Bayuk, as trustee, is not the same as Bayuk, individually, or the Bayuk Trust. The United States Supreme Court recognized the same distinction in *Hanson v. Denckla*, 357 U.S. 235, 250, 78 S.Ct. 1228, 1238 (1958): “Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction. Therefore, so far as it purports to rest upon jurisdiction over the trust assets, the judgment of the Florida court cannot be sustained.” Cf. *Mona v. Eighth Judicial Dist. Court*, 380 P.3d 836, 842, 132 Nev. 719, 728 (2016) (“[Petitioner], in her individual capacity, is a distinct legal person and is a stranger to [Petitioner] in her representative capacity as a trustee of the Mona Family Trust.”) (citing *Alexander v. Todman*, 361 F.2d 744, 746 (3d Cir. 1966)).

Since the District Court did not have subject matter jurisdiction over the Bayuk Trust, the corresponding portions of the judgment are void. *See Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) (noting that when the district court lacks subject matter jurisdiction, the judgment rendered is void) (citations omitted). These portions of the judgment that should be vacated, include: (1) avoiding the transfer of the El Camino Property and the Los Olivos Property, and awarding the Trustee damages in the amount of \$884,999.95, with offset for amounts collected on account of the El Camino Property and the Los Olivos Property; (2) avoiding the transfer of Baruk LLC and awarding Plaintiff damages in the amount of \$1,654,550 with offset for amounts collected on account of Baruk LLC; (3) avoiding the transfer of \$420,250 and awarding the Trustee damages in the amount of \$420,250 with offset for amounts collected on account of the \$420,250; and (4) avoiding the Superpumper transfer and awarding the Trustee damages in the amount of \$4,949,000 with offset for amounts collected on account of the Superpumper transfer. 48 PA 8331. Due to these several issues of statewide importance, Defendants ask this Court to grant en banc reconsideration.

C. THE ISSUES IN THIS WRIT PETITION ARE LIVE, OR OTHERWISE SATISFY THE RECOGNIZED EXCEPTION TO MOOTNESS.

The subject matter of this writ petition involves several properties and businesses that were the subject of the Trustee's sole claim for fraudulent transfer.

48 PA 8331. Following the District Court’s entry of judgment, the Trustee has undertaken proceedings in the various states where the businesses and real properties are located. For example, the Trustee has initiated proceedings in Orange County, California to take possession of the real property located in that County. 58 PA 10132–10139. These Orange County proceedings are still ongoing, such that the issues presented in this original proceeding are live. *See, e.g., Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) (observing that “the requirement of an actual controversy has been construed as requiring a concrete dispute admitting of an immediate and definitive determination of the parties’ rights”). Indeed, this Court’s ruling on the several issues presented in this writ petition will affect the outcome of the properties that are included within the District Court’s judgment, such that this original proceeding presents live issues.

Even if the Court were to determine that the issues in this writ petition are moot, the presented issues fit within the recognized exception to mootness. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (“Even when an appeal is moot, however, we may consider it if it involves a matter of widespread importance that is capable of repetition, yet evading review.”) (citations omitted). For instance, the Trustee could, at any time, issue writs of execution, which the Trustee has. 58 PA 10123–10130. But, without en banc reconsideration from this Court, the Trustee will be permitted to continue to violate the applicable

spendthrift trust statutes presented in this writ petition. On the other hand, if this Court grants en banc reconsideration, Defendants can potentially save their businesses and real properties that are subject to the Trustee's further lawsuits out of state. *See Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987) ("Because real property and its attributes are considered unique and loss of real property rights generally results in irreparable harm, the district court erred in holding otherwise."); *Florida Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956, 958 (5th Cir. 1981) ("If appellants refrain from selling arguably proscribed items during the pendency of this appeal they may suffer substantial business losses that they may not be able to recoup should they ultimately succeed on appeal."); and *Guion v. Terra Marketing of Nev., Inc.*, 90 Nev. 237, 240, 523 P.2d 847, 848 (1974) (stating that acts committed that unreasonably interfere with a business or destroy its credit or profits, constitute irreparable injury). Therefore, due to the live issues presented in this writ petition, Defendants ask this Court to grant en banc reconsideration and order the Trustee to answer Defendants' writ petition.

III. CONCLUSION

In summary, Defendants ask this Court to grant en banc reconsideration due to the presented issues of statewide importance. Additionally, the issues presented in this original proceeding are live, or otherwise satisfy the recognized exception to

mootness. If the Court orders the Trustee to answer this petition for en banc reconsideration, the Court should also permit Defendants to file a reply.

Dated this 16th day of March 2021.

CLAGGETT & SYKES LAW FIRM

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Trust; Salvatore Morabito; and Snowshoe
Petroleum, Inc.*

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 2,580 words; or

☐ does not exceed _____ pages.

Dated this 16th day of March 2021.

CLAGGETT & SYKES LAW FIRM

By /s/ Micah S. Echols
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Attorneys for Petitioners, Superpumper, Inc.; Edward Bayuk, individually and as Trustee of the Edward Bayuk Living Trust; Salvatore Morabito; and Snowshoe Petroleum, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITION FOR EN BANC RECONSIDERATION** was filed electronically with the Supreme Court of Nevada on the 16th day of March 2021. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Salvatore Morabito; and
Snowshoe Petroleum, Inc.

I further certify that the foregoing document was deposited in the United States Mail, postage prepaid, addressed as follows:

Honorable Connie J. Steinheimer, District Court Judge
Second Judicial District Court, Department 4
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/s/ Anna Gresl

Anna Gresl, an employee of
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EXHIBIT 1

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IN THE SUPREME COURT OF THE STATE OF NEVADA

SUPERPUMPER, INC., AN ARIZONA CORPORATION; EDWARD BAYUK, INDIVIDUALLY AND AS TRUSTEE OF THE EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, AN INDIVIDUAL; AND SNOWSHOE PETROLEUM, INC., A NEW YORK CORPORATION,
Petitioners,

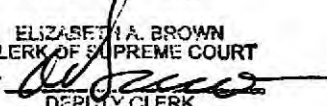
vs.

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE,
Respondents,
and
WILLIAM A. LEONARD, TRUSTEE FOR THE BANKRUPTCY ESTATE OF PAUL ANTHONY MORABITO,
Real Party in Interest.

No. 82157

FILED

JAN 15 2021


ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

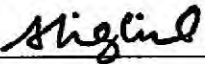
**ORDER DENYING PETITION
FOR WRIT OF MANDAMUS OR PROHIBITION**

This original petition for a writ of mandamus or prohibition challenges district court orders denying claims of exemption from post-judgment enforcement proceedings and a claim brought under the third-party claims statute, NRS 31.070. Having considered the petition and the supporting documentation, we are not persuaded that our extraordinary and discretionary intervention is warranted. NRS 34.160; NRS 34.320; *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (observing that the party seeking writ relief bears the burden of showing such relief is warranted); *Smith v. Eighth Judicial Dist. Court*, 107 Nev.

674, 677, 679, 818 P.2d 849, 851, 853 (1991) (recognizing that writ relief is an extraordinary remedy and that this court has sole discretion in determining whether to entertain a writ petition). Accordingly, we

ORDER the petition DENIED.

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Silver

cc: Hon. Connie J. Steinheimer, District Judge
Hartman & Hartman
Claggett & Sykes Law Firm
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Washoe District Court Clerk