

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No.: 84758

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Elizabeth A. Brown
Clerk of Supreme Court

WARWICK CALASSE,

Appellant,

v.

GEORGE SHARP,

Respondent.

Appeal From Order on Motion to Cancel Shares and Order on Motion
for Relief from Order

Eighth Judicial District Court
District Court Case No.: A-20-815182-B

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, 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 justices of the Supreme Court and the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Appellant Warwick Calasse is an individual.

The following law firms had partners or associates who have appeared for Appellant in the case or are expected to appear on his behalf in this Court:

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Dated: July 25, 2023.

AVALON LEGAL GROUP LLC

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JURISDICTIONAL STATEMENT

Appellant Warwick Calasse (“Appellant”) appeals from the district court’s Order Granting Motion to Cancel Shares of Goff Stock on an Order Shortening Time (“Ordering Canceling Stock”) entered on February 22, 2022. Notice of Entry of this Order was filed on February 23, 2022. Appellant further seeks appeal of the Order Denying Motion for Reconsideration and Order Granting Alternative Requested for Certification as Final (“Order Denying Relief”) entered on May 16, 2022 and as amended on June 27, 2022. Appellant timely noticed this appeal on May 17, 2022. Jurisdiction is proper under NRAP 3A(b)(1).

ROUTING STATEMENT

This case should be presumptively retained by the Supreme Court of Nevada pursuant to NRAP 17(b)(5). This Appeal arises from a civil action where the cancelled stocks – exclusive of interest, attorney’s fees, and costs – were in excess of \$250,000.00. *See* NRAP 17(b)(5). Due to the amount in question, Appellant requests that this matter remain with the Nevada Supreme Court.

STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion when it cancelled all of Appellant's stocks?
2. Did the district court abuse its discretion when it denied Appellant's request for relief pursuant to NRCP 60?
3. Does Appellant have standing to pursue the instant appeal although he was not listed as a party to the action and was not served?

Dated: July 25, 2023.

AVALON LEGAL GROUP LLC

By: /s/ Bryan Naddafi
Bryan Naddafi (NSBN 13004)
Elena Nutenko (NSBN 14934)

Attorneys for Appellant

I. STATEMENT OF THE CASE

This appeal arises from the custodianship of a Nevada corporation which was formerly known as GOFF Corp. (the “Corporation”). George Sharp (“Respondent”) was appointed as the custodian of the Corporation on June 9, 2021. I AA 001-009. On January 12, 2022, Respondent filed a motion seeking to terminate all of Warwick Calasse’s (“Appellant”) equity in the Corporation (“Motion to Cancel”). I AA 010-017. Specifically, the Motion to Cancel sought to cancel Appellant’s fifty million (50,000,000) shares of common stock and five million (5,000,000) shares of preferred stock in the Corporation. I AA 010-017. On February 22, 2022, the district court entered an order granting Respondent’s Motion to Cancel (“Ordering Canceling Stock”). I AA 117-126. A Notice of Entry of Order was filed on February 23, 2022. I AA 127-138.

On or about March 8, 2022, Appellant timely filed a Motion for Reconsideration Or Relief From The Order Pursuant To NRCP 60 And Alternative Request For Certification As Final (“Motion for Relief”). I AA 139-207. The district court denied Appellant’s request for reconsideration or relief from the Order pursuant to NRCP 60 but granted the request to certify the Order Cancelling Stock as final

pursuant to NRCP 54(b) (“Order Denying Relief”). II AA 268-272. The Order Denying Relief was filed on May 16, 2022, and the Notice of Entry of Order was filed the next day. II AA 273-279. This appeal followed. II AA 280-281.

II. STATEMENT OF FACTS

A. General Facts.

The relationship between Appellant and the Corporation dates back to 2013. I AA 168. Appellant first learned of the Corporation – a small start-up mining venture – in or around February 2013 through a personal friend. I AA 168. As of January 2022, Appellant owned fifty million (50,000,000) shares of common stock and five million (5,000,000) shares of preferred stock in the Corporation. I AA 166. The Corporation was placed under custodianship, and in January 2022 the custodian Respondent filed the Motion to Cancel seeking to terminate all of Appellant’s equity in the Corporation. I AA 010-017. The Motion to Cancel was granted. I AA 117-126. Appellant sought relief from the Order Canceling Stock which granted the Motion to Cancel but was unsuccessful. II AA 268-272.

B. Facts Related to Motion to Cancel.

On or about January 12, 2022, Respondent filed the Motion to Cancel. I AA 010-017. The Motion to Cancel sought to cancel or otherwise terminate fifty million (50,000,000) shares of common stock and five million (5,000,000) shares of preferred stock (collectively, the “Stock”) that Appellant personally owned in the Corporation. I AA 010-017. On or about January 29, 2022, Appellant, who lives in the United Kingdom, happened to learn of the Motion to Cancel through a third party. I AA 166.

On or about January 31, 2022, Appellant retained Leah Martin Law located in Nevada to represent Appellant in the instant matter. I AA 167. Appellant provided his counsel with facts and information to present to the Court to refute the allegations in the Motion to Cancel and to protect Appellant’s interest in the Stock. I AA 167. Appellant’s counsel filed Appellant’s Opposition to the Motion to Cancel (“Opposition”) the night before the hearing on the Motion to Cancel was scheduled to take place. I AA 107-110. Appellant – who was only provided a copy of the Opposition after the continued hearing had already taken place – was shocked to learn that the Opposition contained almost none of the

information, context, or evidence Appellant had provided to his counsel regarding his rightful ownership of the Stock. I AA 171. The Opposition failed to provide the district court with a declaration from Appellant, evidence, or legal analysis. I AA 171.

At the hearing on the Motion to Cancel, the district court stated that, from an evidentiary perspective, there was no legal opposition to the Motion to Cancel. I AA 123. The district court granted Respondent's request to cancel Appellant's Stock. I AA 117-126. Appellant, faced with unjustly losing millions of dollars of stock, then retained new counsel to seek relief. I AA 171.

C. Facts Related to Motion for Relief.

On or about March 8, 2022, Appellant timely filed a motion seeking reconsideration of the Order Cancelling Stock pursuant EDCR 2.24, relief pursuant to NRCP 60, as well as alternative relief for NRCP 54(b) certification to make the Order Cancelling Stock appealable ("Motion for Relief"). I AA 139-207. The Motion for Relief provided multiple grounds upon which to undo the decision to cancel Appellant's Stock, including: (a) the introduction of substantially different evidence; (b) legal analysis of NRS 78 showing a clearly erroneous result; (c) mistake or

inadvertence; and (d) effective abandonment by Appellant's former counsel. I AA 139-207. The Motion for Relief also provided the district court with a seven-page declaration from Appellant, evidence in the form of seven exhibits, and statutory and case law supporting Appellant's position that the Motion to Cancel was erroneously granted. I AA 139-207. On or about May 16, 2022, the district court denied the Motion for Relief, stating that the district court was concerned about relitigating an issue that had already been decided. II AA 268-272. The district court denied Appellant's request for reconsideration and for NRCp 60 relief but granted the request to certify the Order Cancelling Stock as final pursuant to NRCp 54(b) ("Order Denying Relief"). II AA 268-272. The Notice of Appeal was filed on May 17, 2022. II AA 280-281. Appellant appeals the Order Cancelling Stock and the Order Denying Relief.

III. SUMMARY OF THE ARGUMENT

The district court abused its discretion by granting the Motion to Cancel and thereby canceling Appellant's Stock. (As a threshold matter, because it was a motion for reconsideration, the Supreme Court may consider the arguments made in the Motion for Relief in deciding whether the district court erred in its decision to grant the Motion to

Cancel.) First, there was no statutory authority for a custodian to cancel issued shares or to undo transactions of a corporation. Second, the district court failed to correctly apply NRS 78.220, NRS 78.211, and NRS 78.225. Each of these statutes provided a basis for denying the Motion to Cancel. NRS 78.220 required Respondent to issue a written demand for payment, which he failed to do. NRS 78.211 required that Respondent make a showing of actual fraud by Appellant, which he failed to do. NRS 78.225 dictates that an action for recovery based on a party's failure to pay consideration is limited to one for breach of contract, and the cancellation of Appellant's Stock was a remedy in excess of the available remedies in an action for breach of contract. Third, the district court violated Appellant's due process rights by exercising jurisdiction over Appellant, a nonresident defendant, in a manner that violated his right to due process. Fourth, the district court failed to properly consider the substantially different evidence presented by Appellant with his Motion for Relief, namely his declaration.

The district court also abused its discretion by denying Appellant the NRCP 60(b) relief he sought in his Motion for Relief. The Motion for Relief made a showing of effective abandonment by Appellant's former

counsel at the time the Motion to Cancel was adjudicated.

As a final matter, Appellant maintains standing to pursue this appeal based on *Callie v. Bowling*, 123 Nev. 181, 182-183, 160 P.3d 878 (2007) and due to the unique character of NRS 78 proceedings.

IV. STANDARD OF REVIEW

The standard of review for a motion for reconsideration is abuse of discretion. *State Indus. Ins. Sys. v. Thomas*, 101 Nev. 293 (1985). Likewise, a district court's denial of a motion for relief pursuant to NRCP 60(b) is reviewed for abuse of discretion. *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 656 (2018) (citing *Cook v. Cook*, 112 Nev. 179, 181-82 (1996)). An abuse of discretion occurs when the district court's decision is not supported by substantial evidence," which is evidence that "a reasonable mind might accept as adequate to support a conclusion." *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013). (internal citations omitted.) Issues of statutory interpretation are questions of law reviewed de novo. *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013).

V. LEGAL ARGUMENT

As a threshold matter, in addition to the arguments made in the Opposition to the Motion to Cancel, the Supreme Court may also consider the arguments made in the Motion for Relief in deciding whether the district court erred in its decision to grant the Motion to Cancel. While a decision regarding a motion for reconsideration is itself not appealable, a motion for reconsideration preserves arguments for appeal. *See Arnold v. Kip*, 123 Nev. 410, 168 P.3d 1050 (2007). As long as the decision on the motion for reconsideration was entered prior to the notice of appeal (which it was), and the district court entertained the motion for reconsideration on its merits (which it did), then the Supreme Court “may consider the arguments asserted in the reconsideration motion in deciding an appeal from the final judgment.” *Id.* Both prongs have been satisfied in the instant matter, and the Supreme Court may consider arguments made in both the Opposition and the Motion for Relief.

A. The District Court Abused its Discretion When it Granted the Motion to Cancel.

The district court abused its discretion in granting the Motion to Cancel. First, in the Motion to Cancel, Respondent cited NRS 78.590, NRS 78.635 and NRS 78.650 as the alleged basis for his authority to

cancel Appellant's Stock. I AA 015. By granting the Motion to Cancel, the district court erred by giving Respondent power well in excess of what the Nevada legislature intended in these statutes. Second, the district court abused its discretion because it failed to properly apply NRS 78.220, 78.211, and 78.225, each of which provided a basis for denying the Motion to Cancel. Third, the district court violated Appellant's due process rights when it granted the Motion to Cancel and deprived Appellant of the Stock. Fourth, the district court erred when it failed to properly consider the substantially different evidence proffered by Appellant in his Motion for Relief.

1. The District Court Erred in Granting the Motion to Cancel as There Was No Statutory Authority to Cancel Appellant's Stock.

If a statute is unambiguous, a court does not look beyond its plain language in interpreting it. *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007). "Whenever possible, a court will interpret a rule or statute in harmony with other rules or statutes." *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999).

In his Motion to Cancel, Respondent cited NRS 78.590, NRS 78.635 and NRS 78.650 as the basis for his authority to cancel Appellant's Stock. I AA 015. While court-appointed corporate custodians do enjoy "all the powers and title of a trustee appointed under NRS 78.590, 78.635 and 78.650," the district court granted Respondent power well in excess of what the Nevada legislature intended.

NRS 78.635 reads in pertinent part:

2. Receivers or trustees shall have full power and authority:

(a) To demand, sue for, collect, receive and take into possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property, of every description of the corporation;

(b) To institute suits at law or in equity for the recovery of any estate, property, damages or demands existing in favor of the corporation;

(c) In their discretion to compound and settle with any debtor or creditor of the corporation, or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its insolvency or suspension of business, or afterwards, upon such terms and in such manner as they shall deem just and beneficial to the corporation; and

(d) In case of mutual dealings between the corporation and any person to allow just setoffs in favor of such person in all cases in which the same ought to be allowed according to law and equity.

NRS 78.635. Essentially, NRS 78.635 allows for the collection of a corporation's assets through various means. However, NRS 78.635 does not provide a custodian with the ability to cancel issued shares or to undo transactions. Had the Nevada legislature intended for a custodian or receiver to have the power to cancel an individual stockholder's equity in a corporation, then the statute would read as such. Indeed, in Nevada, the words in a statute are to be given their plain meaning unless this violates the spirit of the act. *Application of Filippini*, 66 Nev. 17, 24, 202 P.2d 535, 538 (1949). Where a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent. *Thompson v. District Court*, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984); *Robert E. v. Justice Court*, 99 Nev. 443, 664 P.2d 957 (1983). By granting the Motion to Cancel, the district court went well beyond the language of NRS 78.590, 78.635 and 78.650 and exceeded its jurisdiction.

2. The District Court Erred in Granting the Motion to Cancel Because Cancellation of Appellant's Stock was Improper Pursuant to NRS 78.220, 78.211, and 78.225.

The district court failed to properly apply NRS 78.220, 78.211, and 78.225 to its analysis of Respondent's Motion to Cancel. Each of these statutes provides a basis for denying the Motion to Cancel.

a. Cancellation of Appellant's Stock Was Improper Pursuant to NRS 78.220.

The Motion to Cancel sought to terminate or otherwise forfeit Appellant's Stock in the Corporation based on Respondent's argument that "there is no record GOFF received anything of value for the issuance of the stock" to Appellant. I AA 016. In canceling Appellant's Stock, the district court bypassed Appellant's statutory right to receive a written demand by Respondent pursuant to NRS 78.220. NRS 78.220 reads in pertinent part:

2. If default is made in the payment of any installment or call, the corporation may proceed to collect the amount due in the same manner as any debt due the corporation. In addition, the corporation may sell a sufficient number of the subscriber's shares at public auction to pay for the installment or call and any incidental charges incurred as a result of the sale. **No penalty causing a forfeiture of a subscription, of stock for which a subscription has been signed, or of amounts paid thereon, may be declared against any subscriber unless the amount due remains unpaid for 30 days after written demand.**

NRS 78.220 (emphasis added). Thus, if Respondent believed that Appellant failed to provide proper consideration to the Corporation, then pursuant to NRS 78.220 Respondent was required to issue a written

demand for payment. Only after the issuance of a written demand for payment could a forfeiture – rather than a cancellation, which is not the same as a forfeiture – occur. Respondent did not present any proof to the district court that he complied with NRS 78.220 and, rather than protect Appellant’s statutory rights provided to him by the Nevada Legislature, the district court abused its discretion and cancelled Appellant’s Stock.

The district court bypassed this written demand requirement when it canceled Appellant’s Stock without requiring Respondent to comply with NRS 78.220. Furthermore, even if Respondent had complied with NRS 78.220 and issued a written demand – which it did not – the Court would have still been limited to ordering forfeiture of the Stock rather than cancellation.

b. Cancellation of Appellant’s Stock Was Improper Pursuant to NRS 78.211.

NRS 78.211 authorizes a board of directors to issue shares in exchange for “tangible or intangible property or benefit to the corporation” and such judgment “as to the consideration received for the shares issue is **conclusive in the absence of actual fraud in the transaction.**” NRS 78.211 (emphasis added). “[S]hareholders must show actual fraud in any direct equity dilution claim they may have in

order to overcome the statutory deference afforded to the directors ...”
Parametric Sound Corp. v. Eighth Judicial Dist. Court, 133 Nev. 417, 401 P.3d 1100, 1110 n.15 (2017).

Accordingly, unless there was actual fraud, it was conclusive that the Corporation received consideration from Appellant for the shares issued to Appellant or to Appellant’s predecessors in interest. In the Motion to Cancel, Respondent claimed that, after review of the Corporation’s records, he determined that he could find no evidence of consideration for the stock that was issued to Appellant by the Corporation. I AA 014. Accordingly, Respondent claimed that he inquired into Appellant’s stock ownership and requested that Appellant provide proof of consideration. I AA 014-015. Respondent claimed that, having not received a response from Appellant, he then submitted the Motion to Cancel. I AA 015. In the Motion to Cancel, Respondent argued that Appellant had aided and abetted securities fraud. I AA 032-033. Respondent’s proof of said aiding and abetting securities fraud by Appellant was a 2015 SEC Complaint filed in New York Federal Court. Appellant was not a party to this SEC Complaint, nor was a finding of fact entered against Appellant in any capacity. I AA 028-

106. Respondent provided no evidence of his actual investigation into Appellant's stock ownership and, other than appending an SEC Complaint to which Appellant was not a party, provided no evidence to support the very serious accusation that Appellant committed securities fraud. The district court also failed to assess the credibility of Respondent (who stood to benefit from the cancellation of Appellant's stock).

Respondent provided no evidence of any actual fraud in the transaction related to the shares owned by Appellant. Yet, in spite of this dearth of evidence and in direct violation of the conclusive effect of NRS 78.211, the district court found that Appellant's "only service was to aid and abet securities fraud" and therefore cancelled Appellant's Stock. I AA 121. The district court's decision was clearly erroneous because the district court accepted the conjecture and speculation presented by Respondent as proof of "actual fraud."

c. Cancellation of Appellant's Stock Was Improper Pursuant to NRS 78.225.

NRS 78.225 governs situations when a corporation questions the value that was received in exchange for issued stock. In such a situation, NRS 78.225 mandates that the corporation is limited to an action for

breach of contract. Therefore, pursuant to NRS 78.225, if Respondent believed there was a question as to the value the Corporation received in exchange for issued stock, the Corporation should have pursued an action for breach of contract.

The district court ruled that the Corporation did not “receive any value” for Appellant’s 50 million common shares and 5 million preferred shares. I AA 121. The district court resolved this alleged failure to “receive any value” by cancelling all of Appellant’s Stock. However, pursuant to NRS 78.225, a purchaser of stock from a corporation is only liable “to pay the consideration for which the shares were authorized to be issued or which was specified in the written subscription agreement.” NRS 78.225. Accordingly, if a party has not tendered the entirety of its consideration for stock it has been issued, then the party will be liable to the corporation or its creditors. An action for recovery based on a party’s failure to pay consideration under NRS 78.255 is effectively one for breach of contract. *See In re PurchasePro.com, Inc.*, 322 B.R. 417, 431 (Bkrtcy. D. Nev. 2005) (United States Bankruptcy Court District of Nevada holding that an action for failure to perform as promised under a stock subscription agreement is to be reviewed “under contract law.”)

However, just because an action may be maintained against the party for failure to tender all consideration, NRS 78.225 does not void the issued shares. Accordingly, even in the event that Appellant was found to have not performed on his consideration, then NRS 78.225 only gives Respondent and the Corporation the right to sue for damages. The district court subverted NRS 78.225 by canceling Appellant's Stock, which is a remedy in excess of the available remedies in an action for breach of contract. It was an abuse of discretion for the district court to cancel the Stock in spite of the plain language of NRS 78.225.

3. The District Court Violated Appellant's Due Process Rights When It Canceled Appellant's Stock.

The Fourteenth Amendment affords a party due process before the government may deprive the party of property or a protected constitutional interest. *Callie v. Bowling*, 123 Nev. at 183, 160 P.3d at 879 (2007). The Nevada Supreme Court "has recognized that procedural due process requires notice and an opportunity to be heard." *Id.* (internal quotation marks omitted).

Nevada may exercise personal jurisdiction over a nonresident defendant only if doing so does not violate the defendant's right to due process. *Dogra v. Lilies*, 129 Nev. 932, 936, 314 P.3d 952, 955 (2013).

Since Nevada's long-arm statute reaches the limits of due process established by the United States Constitution, the requirements are the same for both (i.e., the long-arm statute and due process). *Id.*; see also *Baker v. Eighth Judicial Dist. Court*, 116 Nev. 527, 531-32, 999 P.2d 1020, 1023 (2000). The district court was therefore under an obligation to comport with the principles of due process when it exercised jurisdiction over Appellant.

Here, the jurisdiction of the district court was based on NRS 78.605 which grants a district court "jurisdiction of the application prescribed in NRS 78.600 and of all questions arising in the proceedings thereon, and may make such orders and decrees and issue injunctions therein as justice and equity shall require." NRS 78.605. However, NRS 78.600 only allows for the judicial appointment of a receiver to:

[T]ake charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation.

NRS 78.600. Accordingly, while NRS 78.605 and 78.600 provide a statutory basis to appoint a receiver or custodian to prosecute "in the

name of the corporation ... all such suits as may be necessary” to “collect the debts and property” of the corporation, neither statute grants personal jurisdiction over the property holder. Accordingly, it was incumbent upon Respondent to initiate a separate action against Appellant in conformance with Nevada’s long-arm statute in order to vest jurisdiction over Appellant or over Appellant’s Stock.

The record shows that Respondent did nothing to correct or supplement the district court’s jurisdiction over Appellant or over Appellant’s Stock. This includes failure to amend the underlying matter to include Appellant as a party. Because Appellant was the owner of the Stock cancelled by the district court, Appellant was invariably an indispensable party. *See Schwob v. Hemsath*, 98 Nev. 293, 646 P.2d 1212 (1982) (holding that a corporation was an indispensable party where it held legal title to real property in controversy and that failure to join the corporation was fatal to a judgment regarding that property). Furthermore, Respondent failed to conduct service onto Appellant or provide notice. As this Court is aware, failure to serve is antithetical to due process. *See Callie v. Bowling*, 123 Nev. at 183, 160 P.3d at 879 (2007). (“[P]rocedural due process requires notice and an opportunity to

be heard.”) (internal quotation marks omitted) *see also Griffin v. Griffin*, 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 635 (1945) (United States Supreme Court stating it “is plain in any case that a judgment in personam ... and thus purporting to cut off all available defenses, could not be rendered on any theory of the state’s power over him, without some form of notice by personal or substituted service...Such notice cannot be dispensed with even in the case of judgments in rem with respect to property within the jurisdiction of the court rendering the judgment.) (internal citations omitted). In sum, the district court abused its discretion when it granted the Motion to Cancel as it violated Appellant’s due process rights.

4. The District Court Failed to Properly Consider the Substantially Different Evidence Proffered by Appellant in His Motion for Relief.

EDCR 2.24 allows a party to seek reconsideration of a ruling of the court based on, among other factors, substantially different evidence that is subsequently introduced. A district court “may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous.” *Masonry & Tile Contractors Ass’n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

Pursuant to EDCR 2.21(a), factual contentions “must be initially presented and heard upon affidavits, unsworn declarations under penalty of perjury, depositions, answers to interrogatories, and admissions on file.” EDCR 2.21. In his Motion for Relief, Appellant provided a declaration supporting Appellant’s factual contentions that had not been previously presented to the Court. I AA 166-207. However, rather than consider the evidence proffered by Appellant, the district court discarded the declaration in its entirety, finding that the declaration “does not constitute new evidence as the information presented in the declaration could have been presented at the February 9, 2022 hearing [on the Motion to Cancel].” II AA 269. Unfortunately, the district court conflated the “substantially different evidence” standard set by *Masonry* with the “newly discovered evidence” standard set by NRCP 59(a)(1)(D) and NRCP 60(b)(2). The standard for NRCP 59(a) relief and NRCP 60(b) is separate and distinct from the standard for an EDCR 2.24 request for reconsideration. In fact, EDCR 2.24 specifically excludes motions “pursuant to NRCP 50(b), 52(b), **59 or 60**” (emphasis added) as falling outside of EDCR 2.24 reconsideration relief. See EDCR 2.24(b). Moreover, the Supreme Court of Nevada emphasized

this distinction when it wrote that “by its terms, EDCR 2.24(b) excludes motions for reconsideration under NRCP 59(e).” *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010).

The district court ignored these separate and distinct standards, then erroneously applied the incorrect standard (the newly discovered evidence standard). As a result of its application of the incorrect standard, the district court failed to properly consider the substantially different evidence presented by Appellant with his Motion for Relief, namely his declaration.

There is no doubt that the district court applied the wrong standard for reconsideration when considering substantially different evidence because the district court stated at the hearing, “[t]his was evidence in the possession, custody and/or control of the Defendant and no argument was set forth, right?” II AA 266. Appellant provided a declaration proffering testimony relating to his acquisition and his consideration for the Stock. I AA 166-207. In sum, Appellant introduced substantially different evidence in support of his Motion for Relief, but the district court applied the incorrect standard to this evidence such that reversal and remand is warranted.

B. The District Court Abused its Discretion by Denying Appellant NRCP 60(b) Relief Sought in the Motion for Relief.

In his Motion for Relief, Appellant requested relief pursuant to NRCP 60(b)(1) and (6). Appellant made a clear showing of effective abandonment by his former counsel at the time the Motion to Cancel was adjudicated. However, the district court abused its discretion and improperly denied Appellant NRCP 60(b) relief.

Pursuant to NRCP 60(b)(1), a court may relieve a party or a legal representative from a final judgment, order, or proceeding on a showing of “mistake, inadvertence, surprise, or excusable neglect.” *Hotel Last Frontier v. Frontier Prop.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963). Relevant and persuasive factors include prompt application, absence of intent to delay, lack of knowledge regarding procedural requirements, and good faith. *Id.* In addition to mistake, inadvertence, surprise, or excusable neglect as codified in NRCP 60(b)(1), pursuant to NRCP 60(b)(6), “the court may relieve a party or its legal representative from a final judgment, order, or proceeding for ... any other reason that justifies relief.” Extraordinary circumstances typically exist when “an extreme and unexpected hardship” would result if the relief sought is not granted.

Budget Blinds, Inc. v. White, 536 F.3d 244, 255 (3rd Cir. 2008).

Extraordinary circumstances include situations of gross negligence by counsel amounting to virtual abandonment. *See Mackey v. Hoffman*, 682 F.3d 1247, 1251 (9th Cir. 2012). While typically an attorney's knowledge and actions are imputed onto the client, an attorney's failure to "meet his professional obligations" which effectually deprives a client of legal representation warrants relief under NRCP 60(b). *Passarelli v. J-Mar Dev., Inc.*, 102 Nev. 283, 286, 720 P .2d 1221, 1224 (1986). The same relief is available pursuant to the Federal Rules of Civil Procedure. *See Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168-1171 (9th Cir. 2002) (Ninth Circuit disagreed with district court that an appellant's remedy should be a separate action for malpractice rather than relief from the default judgment because the Ninth Circuit reasoned that, while malpractice was a possibility, the remedy would be insufficient due to delay, increased load on the courts, and the uncertainty of receiving a monetary judgment in a malpractice action, while the client may have to pay out substantial sums before the action concludes many years in the future.)

As discussed in Appellant's Motion for Relief, Appellant's former counsel failed to provide any actual evidence in the briefing and argument presented to the district court at the time the Motion to Cancel was heard. I AA 172. Evidence of Appellant's former counsel's effective abandonment included, but was not limited to, the following: a) the filing of a threadbare, unsupported opposition that offered no admissible evidence (in spite of the fact that Appellant provided his former counsel with facts for a declaration that Appellant's former counsel assured him would be presented to the district court; b) the late filing of the opposition the night before the continued hearing on the Motion to Cancel; c) former counsel's appearance at the continued hearing on the Motion to Cancel wherein former counsel appeared unfamiliar with the facts of the case; and d) former counsel's inexplicable decision not to participate in drafting the Order Canceling Stock.

The district court found that because "the opposition was not supported by a declaration or other admissible Evidence ... there was no legal opposition to the Motion from an evidentiary perspective." I AA 123. Indeed, at the time of the hearing, the district court remarked: "I don't have anything that I can look at from an evidentiary perspective

that would legally oppose the motion as it currently sits, right?” I AA 115. It is clear from the district court’s own words that Appellant’s former counsel failed to meet her professional obligations by failing to provide a legal opposition to the Motion to Cancel.

However – in spite of the clear dereliction of duties by Appellant’s former counsel – the district court stated that because Appellant “was represented by counsel at the time of the February 9, 2022 hearing on the motion to cancel his shares in Goff Corp ... he was not effectively abandoned by his counsel and cannot avail himself of either NRCP 60(b)(1) or NRCP 60(b)(6) relief.” II AA 269. The district court stated at the hearing on the Motion to Cancel that the Opposition drafted by former counsel failed to provide any “legal opposition to the Motion [to Cancel] from an evidentiary perspective,” and yet the district court found there was no effective abandonment by former counsel simply based on the fact that Appellant was represented at the time of the hearing on the Motion to Cancel. I AA 115.

Despite the evidence and despite case law demonstrating that former counsel’s conduct constituted effective abandonment, the district court found that Appellant could not have been abandoned by virtue of

the fact that he was technically represented by counsel at the time of the Motion to Cancel. However, such a standard is not supported by the case law as it does not allow for any review of the quality of the representation. Rather, it puts in place a binary standard – either the party was represented or not. The district court’s denial of relief pursuant to NRCP 60 was an abuse of discretion.

C. Appellant Maintains Standing to Pursue this Appeal.

On May 12, 2023, this Court issued its Order Reinstating Briefing wherein it directed the parties to discuss “whether a person or entity in a corporate custodianship action has standing to appeal where they were not formally served with process or named as a party.” As discussed in Appellant’s Response to Order to Show Cause, the Court need look no further than its decision in *Callie v. Bowling*. In *Callie*, the appellant was not a party to the underlying action nor was the appellant ever served with a complaint or a summons. *Callie v. Bowling*, 123 Nev. 181, 182-183, 160 P.3d 878 (2007). In spite of the appellant being a non-party to the judicial proceedings, the district court entered a monetary judgment against the *Callie* appellant. *Id.* The *Callie* appellant, who did not intervene, then appealed the decision, and this Court reversed the

district court's judgment due to a violation of the *Callie* appellant's due process rights.

Like *Callie*, here the district court violated Appellant's due process rights by cancelling Appellant's Stock when the district court lacked jurisdiction over a non-party who did not receive service of process. Accordingly, the district court's Order Canceling Stock, much like the *Callie* judgment, is void as "the issuing court lacked personal jurisdiction or subject matter jurisdiction." *State Engineer v. Sustacha*, 108 Nev. 223, 826 P.2d 959, 961 n.3 (1992) (internal citations omitted).

In addition, to the similarities to *Callie*, Appellant maintains standing due to the unique character of NRS 78 proceedings. Because NRS 78 vests jurisdiction over the entity and the petitioning stockholder for purposes of administering the corporation's affairs, a corporate custodianship action is functionally analogous to a probate action. For example, in probate actions, executors initiate the matter by filing a petition rather than by initiating a lawsuit. Heirs – that is to say, individuals or entities with a beneficial interest in the estate – can appear in the estate matter and maintain the right to appeal. See *Hughes' Estate v. First Nat. Bank of Nevada*, 96 Nev. 178, 605 P.2d 1149 (1980)

(individuals who are deemed to be “non-existent heirs” do not maintain the requisite standing to appeal). Like heirs in probate matters, class members in class actions also maintain standing to appeal even though they are unnamed in an action. *See Marcuse v. Del Webb Cmtys., Inc.*, 123 Nev. 278, 285, 163 P.3d 462, 467 (2007) (concluding that unnamed class members “had standing to object to [a] proposed settlement and to appeal the district court's order dismissing the class action based on the settlement”).

Alternatively, if the Court finds that Appellant does not have standing, then it may still treat the instant appeal as a petition for mandamus as it has done in previous matters. *See Aug. H. v. State*, 105 Nev. 441, 777 P.2d 901 (1989); *Clark County Liquor v. Clark*, 102 Nev. 654, 730 P.2d 443 (1986); *see also Jarstad v. National Farmer's Union*, 92 Nev. 380, 552 P.2d 49 (1976). Ultimately, it is in the discretion of this Court whether it chooses to entertain a petition for an extraordinary writ. *State ex rel. Department of Transportation v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983). For extraordinary relief, Appellant must show that there is no plain, speedy, and adequate remedy available to Appellant in the ordinary course of law. *State v. District Court*, 116

Nev. 953, 957, 11 P.3d 1209 (2000). Such relief would be available to Appellant if the Court finds that Appellant has no standing to appeal as Appellant cannot then intervene in the district court proceedings after final adjudication. Because Appellant has no means other than a writ to access the relief that Appellant requests, and in light of the fact that Appellant has been deprived of millions of dollars of property as the result of the Order Canceling Stock and the Order Denying Relief – and because there is no risk of disruption to the district court proceedings by a petition for mandamus since the district court proceedings have been fully adjudicated – Appellant alternatively respectfully requests that this matter be treated as a petition for a writ.

VI. CONCLUSION

For the foregoing reasons, the district court abused its discretion when it granted the Motion to Cancel and cancelled all of Appellant's Stock and when it denied Appellant's Motion for Relief. Furthermore, Appellant maintains standing to pursue the instant appeal although he was not listed as a party to the action and was not served. Appellant respectfully requests that the Order Canceling Stock which granted the Motion to Cancel be reversed.

VII. AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Respectfully submitted this 25th day of July 2023.

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ATTORNEY'S CERTIFICATE

I 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 it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point font, Century Schoolbook style. I further certify that this brief complies with the type-volume limitations of NRAP 28.1(e)(2) and NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 14,000 words.

I hereby certify that I have read this 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 July 25, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Avalon Legal Group LLC,
and on the 25th day of July 2023, a true and correct copy of the foregoing
APPELLANT'S OPENING BRIEF was electronically served to all
counsel of record.

Dated July 25, 2023

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Employee of Avalon Legal Group LLC