

Alexander M. Falconi

Appearing in Proper Person

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALEXANDER M FALCONI,
Petitioner,

vs.

SECRETARY OF STATE--STATE OF
NEVADA, ANN

Respondents.

Case No.: 65289

FILED

AUG 13 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

APPELLANT'S OPENING BRIEF

COMES NOW, Appellant, Alexander M. Falconi, appearing in proper person, and hereby files an appellant's opening brief. This brief is based upon the following memorandum of points and authorities and the certified record of the district court.

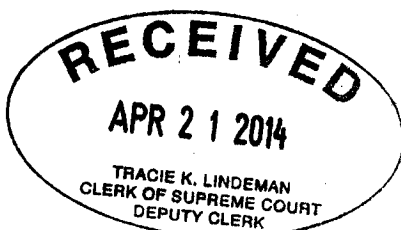
I. NRAP 26.1 Disclosure

Appellant is a natural person and therefore no such parent corporation exists.

DATED this 10 day of APRIL, 2014.



Alexander M. Falconi
In Proper Person



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IV. Jurisdictional Statement

The Second Judicial District Court entered *Order Denying Request for Costs ('ODRC')* on March 3, 2014; it is a special order after judgment and disposes of the issue in its entirety. *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) ("A post-judgment order awarding attorney's fees and/or costs may be appealed as a special order made after final, pursuant to NRAP 3A(b)(2)"). *Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 565 (1993) (In handling an appeal on costs, recognizing that the appellant "was entitled to recover all of his costs as a matter of right."). No tolling motions have been filed.

Appellant is aggrieved by the order as it denies him costs to which he is entitled as a matter of right. NRAP 3A(a). "In *Kenney v. Hickey*, 60 Nev. 187, 105 P.2d 192 (1940), this court held that an aggrieved party is one whose personal right is injuriously affected by the adjudication..." *Bates v. Nevada Sav. & Loan Association*, 85 Nev. 441, 456 P.2d 450 (1969).

Original jurisdiction is established in the Second Judicial District Court of the State of Nevada, Department 11, under CV13-01019. The special order after judgment was entered March 3, 2014, and *Notice of Appeal* was timely filed March 19, 2014. NRAP 4(a)(1).

V. Statement of the Issues

1. Whether Appellant waived his right to appeal; and,
2. Whether Ms. [REDACTED] was a party to a Proceeding; and,
3. Whether Ms. [REDACTED] should have been considered the "losing party"; and,
4. Whether Ms. [REDACTED] should have been considered an "opposing party"; and,
5. Whether Appellant waived his right to recover costs; and,
6. Whether the district court failed to allow Appellant an opportunity to respond.

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VI. Statement of the Case

The underlying matter follows the recently published *Falconi v. Secretary of State*, 299 P.2d 378 Nev. (2013)¹. Under this court's directive, Appellant filed a writ petition in the district court challenging the issuance of a fictitious address. Ms. [REDACTED] the Real-Party in Interest in the underlying action, failed to file any responsive pleadings and failed to appear at the hearing on the matter. On that basis, and because Appellant and Ms. [REDACTED] share a common minor child, the district court issued a *Writ of Mandamus* compelling the Secretary of State, the Respondent in the underlying action, to disclose to Appellant Ms. [REDACTED] actual physical address. Appellant subsequently moved for costs, which the district court summarily denied on the basis that costs could be taxed only against the Secretary of State.

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VII. Procedural Background

On May 13, 2013, the district court entered *Order Granting Motion to Proceed in Forma Pauperis*.

On May 15, 2013, Appellant filed *Petition for Writ of Mandamus*, wherein he expressly waived the right to tax costs against the Secretary of State. Page 5:25-6:2.

On November 22, 2013, Appellant and the Secretary of State convened before the district court on a hearing to determine whether or not a writ of *mandamus* would issue under *Falconi v. Secretary of State*, 299 P.2d 378 Nev. (2013)¹. Although Ms. [REDACTED] was ordered to attend, she failed to appear, and the district court ordered orally that the writ would issue. Ms. [REDACTED] filed no responsive pleadings in the underlying action.

On November 25, 2013, Appellant filed timely *Memorandum of Costs* together with *Motion for Costs*. Ms. [REDACTED] failed to respond.

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¹ *Falconi v. Secretary of State*, 129 Nev. Adv. Op. No. 28.

1 On December 24, 2013, the district court entered *Writ of Mandamus*.

2 On March 3, 2014, the district court entered *Order Denying Request for Costs*.

3 On March 19, 2014, Appellant filed *Notice of Appeal*.

4 **VIII. Summary of Argument**

5 The district court basis its denial on arguments made *sua sponte* in its *ODRC*, the gist of
6 which is that costs must be taxed against The Secretary of State, not Ms. [REDACTED] Appellant argues
7 that Ms. [REDACTED] was a party to the proceeding, that she was an opposing party, that she was the
8 losing party, that Appellant's waiver to tax costs against the Secretary of State did not extend to
9 Ms. [REDACTED] and that Appellant did not waive his right to appeal. The district court also challenges
10 documentation provided by Appellant, but did not give Appellant an opportunity to provide
11 clarifying documentation. For these several reasons, the district court abused its discretion.
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13 **IX. Legal Analysis**

14 The district court concedes that NRS 18.020(4) mandates an award of costs in the
15 underlying action because a writ petition is a special proceeding. *ODRC* at page 5:25-26. The
16 district court concedes that Ms. [REDACTED] failed to oppose the *Motion for Costs*. *Foley v. Kennedy*,
17 110 Nev. 1295, 1304, 885 P.2d 583, 588 (1994) ("It may be said generally that any proceeding in
18 a court which was not under the common-law and equity practice, either an action at law or
19 a suit in chancery, is a special proceeding.") Accordingly, Petitioner is entitled to costs as a
20 matter of right. NRS 18.020(4) (mandating an award of costs when a party prevails in a special
21 proceeding). *Motion for Costs* at page 2:10-15. Ms. [REDACTED] also failed to move to retax the costs.
22 NRS 18.110 (4) (the party receiving the memorandum of costs must move to retax).
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24 "A district court's award of attorney fees and costs will not be disturbed on appeal unless
25 the district court abused its discretion in making the award." *U.S.* (citation continued on next pg.)
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21 matter of right. NRS 18.020(4) (mandating an award of costs when a party prevails in a special
22 proceeding). *Motion for Costs* at page 2:10-15.
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25 FATHER now addresses the issues the district court asserted *sua sponte* in denying
26 Appellant's request for costs. "A district court's award of attorney fees and costs will not be
27 disturbed on appeal unless the district court abused its discretion in making the award." *U.S.*
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1 *Design & Constr. Corp. v. International Broth. Of Elec. Workers* 118 Nev. 458, 462, 50 P. 3d
2 170, 173 (2002). An abuse of discretion is "[a] clear ignoring by the court of [applicable legal
3 principles], without apparent justification." *Hotel Last Frontier v. Frontier Prop., Inc.*, 79 Nev.
4 150, 154, 380 P.2d 293, 294 (1963). These issues present pure questions of law. Questions of law
5 are subject to *de novo* review. *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 644-45, 173
6 P.3d 734, 738 (2007).

8 **1. Appellant Did Not Waive His Right to Appeal**

9 The district court noted that "Petitioner also states in his Motion [for Costs] that he will
10 not appeal an order in relation to Ms. [REDACTED] and his request for costs." *ODRC* at page 7:16-17.
11 But this is not the case. What Petitioner actually stated was that "[he] has no intention of
12 appealing an order that declines to require Ms. [REDACTED] to pay this filing fee to the [c]ourt, and
13 merely cites this authority because of his aforementioned pledge to Chief Judge David Hardy
14 (emphasis added)." *Motion for Costs* at page 2:22-25. By "this", Petitioner was referring to the
15 portion of costs NRS 12.015(4) mandates be paid to the district court. This court need only look
16 back a single sentence to confirm this.

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19 "A waiver is the intentional relinquishment of a known right". *Mahban v. MGM Grand*
20 *Hotels*, 100 Nev. 593, 596, 691 P.2d 421, 423 (1984). It is the district court's prerogative if it
21 wishes to deprive the government of fees it is statutorily entitled to; such an order does not
22 aggrieve Appellant nor does he have any interest in appealing such a denial. A denial by the
23 district court to require Ms. [REDACTED] to pay waived filing fees was what Appellant stated he would
24 not appeal. It is manifest error to extend this waiver beyond Appellant's "intentions". *Id.*

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2. Ms. [REDACTED] Was a Party to the Proceedings

The district court raises a number of points that appear to challenge Ms. [REDACTED] status as a party to the underlying litigation. *ODRC* at page 2:21-3:23. Appellant did not expect this court to "infer that the named individual is a party to the case". *Campion v. Sessions*, 1 Nev. 478, 1865 WL 1078 (1865) is a case holding that a party cannot be incorporated into an action by inference, specifically that "county commissioners of the county of Washoe" did not make the County of Washoe a defendant to the action; this is distinguishable from the underlying case because Ms. [REDACTED] was specifically named as Real-Party In Interest and there was no expectation or assertion that she be incorporated into the case by inference. Likewise, Ms. [REDACTED] did receive "proper notice" and the notice she received did include "notice that the person is a party against whom judgment is sought". Finally, this court expressly mandated Ms. [REDACTED] inclusion in the underlying action. *Falconi v. Secretary of State*, 299 P.2d 378, 386 Nev. (2013)¹ ("the program participant, as the party seeking to maintain confidentiality, **must** be included as a real party in interest and required to oppose the writ petition if the petitioner establishes an initial right to relief. In this way, a petition for a writ of mandamus allows the petitioner to give proper notice and bring all interested parties into the proceeding.") Ms. [REDACTED] inclusion was a matter of her constitution right to due process.

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3. Ms. [REDACTED] Was A Losing Party

The district court noted that "there is no case law in Nevada defining 'losing party'". *ODRC* at page 2:17-20. The district court also conceded that "[Appellant] prevailed in his action". *ODRC* at page 5:23-24. Just because this court has not yet defined "losing party", does not mean the district court could not exercise inference. An inference has been defined as "[a] logical and reasonable conclusion of fact not presented by direct evidence but which, by process

1 of logic and reason, a trier of fact may conclude exists from the established facts." *Bass-Davis v.*
2 *Davis*, 122 Nev. 442, 448, 134 P.3d 103, 107 (2006). Ms. [REDACTED] had her physical address
3 concealed from Appellant until the resolution of the underlying matter, wherein it was ordered
4 that her physical address be revealed to Appellant. An inference can be drawn from *Valley*
5 *Electric Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (defining "prevailing
6 party") to the facts of the case establishing Ms. [REDACTED] as a losing party.
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8 4. Ms. [REDACTED] Was An Opposing Party

9 The district court further asserted that Ms. [REDACTED] was not "liable" as an "opposing party".
10 ODRC at page 3:24. The district court first cited *Connerly v. State Personnel Bd.*, 37 Cal. 4th
11 1169, 39 Cal. Rptr. 3d 788 (Cal. 2006). ODRC at page 3:25-4:7. *Connerly* is vastly
12 distinguishable from the instant case in that it seeks to clarify if not draw an exception to the
13 "active participation in litigation" rule established in previous cases; namely, that despite an
14 amicus curiae's "active participation in litigation", it is exempt from being considered an
15 opposing party due to the purpose and function an amicus curiae serves. The district court then
16 cited *McGuigan v. City of San Diego*, 183 Cal. App. 4th 610, 107 Cal. Rptr. 3d 554 (2010). But
17 this case actually does more to support Appellant's position than the district court's. The
18 *McGuigan* court affirmed a refusal to award costs on the basis that "the City, a settling party and
19 fellow respondent in the third party's appeal challenging the class action settlement, was simply
20 not an "opposing party" to the current Appellant when these fees were incurred; **rather, these**
21 **parties were allied in interest in defending the settlement**, for which they had sought and
22 obtained court approval". The *McGuigan* court further recognized "The dictionary definition of
23 'opposing' is 'opposite in position' or 'active in or offering opposition.' ... An 'opposite party'
24 means '[a]n adversary in litigation.' ... Thus, we construe the term 'opposing party' as used in
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1 section 1021.5 to mean a party whose position in the litigation **was adverse to that of the**
2 **prevailing party** (emphasis added)." Ms. [REDACTED] was in no way aligned with Appellant in the
3 underlying manner. Ms. [REDACTED] actively sought and obtained a fictitious address from The
4 Secretary of State in 2009. Ms. [REDACTED] and Appellant were diametrically opposed in interest. For
5 these several reasons, Ms. [REDACTED] was an opposing party with respect to Appellant.
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7 **5. Appellant Did Not Waive His Right To Recover Costs**

8 The district court appears to assert that under *LaGue v. Second Judicial Dist. Court*, 131,
9 133, 299 P.2d 162, 163 (1951) (citation corrected²), costs in writ petition cases can only be taxed
10 against the respondent. ODRC at page 4:16-28. But the *LaGue* court did not hold that costs could
11 only be awarded against respondent courts, it only went so far as to reject the Second Judicial
12 District Court's argument that the lower court "should not award costs against it because of its
13 official status as a district court". Basically, the status of a respondent as a district court does not
14 preclude recovery of costs against it; *LaGue* is not restrictive in any sense, if anything, it is
15 expansive.
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17 The district court also recognizes and in part appears to base its decision on this courts
18 presumption in *LaGue* that "in most cases [costs] have been paid by the real party in interest and
19 not by the respondent court or the respondent judge". If this is true, then this provides precisely
20 the vehicle by which the district court could have granted Appellant's motion. An order taxing
21 costs against a respondent but requiring their payment by a real party in interest is not
22 functionally different than an order taxing costs against a real party in interest itself. The result is
23 the same; costs are paid by the real party in interest. To deny costs on the basis that Appellant
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27 ² The district court erroneously cited to the original *LaGue* case, which did not discuss the
28 relevant points on costs. Appellant's correction points to the petition for rehearing, as mentioned
by the district court.

1 waived his right to tax costs against Respondent is a hyper technicality and inconsistent with the
2 theory of waiver. *Mahban v. MGM Grand Hotels*, 100 Nev. 593, 596, 691 P.2d 421, 423 (1984)
3 ("A waiver is the **intentional** relinquishment of a known right") (emphasis added).

4 There is also the issue that, despite Appellant's waiver, taxing costs against Respondent
5 would be unfair in the instant case. This court "conclude[d] that ... the Secretary of State was
6 required to issue the fictitious address to [REDACTED] upon the presentation of the temporary
7 restraining order. The fictitious address program does not authorize the Secretary of State to
8 investigate or determine whether a protective order was issued based on a finding of domestic
9 violence or on a finding of a potential threat of violence before approving an application."
10 *Falconi v. Secretary of State*, 299 P.2d 378, 383 Nev. (2013)¹. It was Ms. [REDACTED] who submitted
11 an application for a fictitious address, complete with the lie that she was the victim of domestic
12 violence. It was Ms. [REDACTED] who was burdened with proving substantive questions at the
13 underlying proceeding. Costs should be taxed against Ms. [REDACTED] not The Secretary of State.

16 **6. The District Court Failed to Allow Appellant An Opportunity to Respond**

17 As an initial matter, Appellant notes the district court misunderstand the scope of
18 Appellant's request for costs. *Order Requiring Request for Costs* at page 6:3-7:15. The district
19 court recognizes Appellant's assertions that Ms. [REDACTED] "deliberately dragged this proceeding
20 out". This was specifically in the context of the underlying proceeding; Appellant is not, as the
21 district court appears to believe, seeking to recover costs on any other proceedings, such as those
22 leading up to this court's publication of *Falconi v. Secretary of State*. Appellant understands that
23 before this publication, the law was unclear; he only seeks to recover costs on the underlying
24 proceeding where once, *Falconi* having been published, the law was clear.
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1 Finally, the district court "notes that the amount of costs sought by [Appellant] is not
2 large. However, neither Petitioner's claim for postage nor copies is supported by receipt for
3 payment in the amount claimed." ODRC at page 8:1-4. The *Memorandum of Costs* filed
4 November 25, 2013 has Exhibit 1 (postage for a parcel) and Exhibit 2 (price of photocopies at
5 Kinkos) attached to it. Appellant purchased his stamps from the federal post office and made
6 copies at Kinkos. The excess postage costs were not an estimate, but a precise derivation of the
7 number of envelopes mailed to parties multiplied by the price of a federal postage stamp.
8 Likewise, the photocopies costs were computed by multiplying the price per page with the
9 number of pages printed. Because stamps are purchased in books a "receipt for payment" would
10 not reflect an accurate amount. Nevertheless, had opposition to Appellant's motion been filed
11 with that assertion, he would have addressed it on reply and at least provided proof of purchase
12 of a book of stamps. No opposition was filed, so the district court raised this issue in its order,
13 *sua sponte*. Although the district court is within its discretion to request supplemental
14 documentation, Appellant should at least have an opportunity to provide such documentation.
15 *Clark County Sports Enterprises, Inc. v. Kaighn*, 93 Nev. 395, 396, 566 P.2d 411, 412 (1977)
16 ("[a] central tenet of our legal system is the concept of notice and hearing. Justice is served only
17 when parties are given adequate notice and an appropriate opportunity to respond in open
18 court.")

22 X. Conclusion

23
24 THEREFORE, Appellant hereby requests that:

- 25 1. The Supreme Court REVERSE the district court's ODRC and REMAND with
26 instructions to tax costs against Ms. [REDACTED] and in favor of Appellant; and,
27 2. For an award of costs; and,
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3. For such further relief as this court deems necessary and just.

AFFIRMATION³: This document does not contain a social security number of any person.

DATED THIS 10 day of APRIL, 2014.



Alexander M. Falconi

VERIFICATION OF ALEXANDER M. FALCONI

I, Alexander M. Falconi, state that I have read this *Brief* and that the contents are true and correct of my own personal knowledge, except for those matters I have stated that are not of my own personal knowledge, but that I only believe them to be true, and as for those matters, I do believe they are true.

I declare⁴ under penalty of perjury that the foregoing is true and correct.

EXECUTED this 10 day of APRIL, 2014.



Alexander M. Falconi

³ This affirmation is in accordance with NRS 239B.030.

⁴ NRS 53.045: "Any matter whose existence or truth may be established by an affidavit or other sworn declaration may be established with the same effect by an unsworn declaration of its existence or truth signed by the declarant under penalty of perjury, and dated, in substantially the following form: If executed in this State: "I declare under penalty of perjury that the foregoing is true and correct."

NRAP 25(b) CERTIFICATE OF SERVICE

I, Alexander M. Falconi, do hereby solemnly swear under penalty of perjury that I am over the age of 18 and a party to this action and that I placed a true and correct copy of this *Brief* into a sealed envelope and mailed it, postage prepaid, *via* United States Postal Service, addressed as follows:

Ann

Kevin Benson, Esq.

Ann

SERVED THIS 10 day of APRIL, 2014.


Alexander M. Falconi