

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

REV. LEONARD JACKSON,

Appellant,

vs.

FAIR MAPS NEVADA PAC,
NEVADA SECRETARY OF STATE,

Respondents.

Case No.: 80563

District Court Case No.:
19 OC 00209 1B

Opposition to Motion to Dismiss and for Sanctions

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Attorney for Appellant Rev. Leonard Jackson

I. Introduction

Appellant Rev. Jackson is aggrieved by the district court’s decision because the district court exceeded its jurisdiction by rewriting the description of effect, by failing to make findings of fact, and by writing a description that is inaccurate and misleading. Accordingly, the Motion should be denied in its entirety.

II. Facts and Relevant Procedural History

On November 4, 2019, Respondent Fair Maps Nevada PAC filed a constitutional initiative petition designated as “#C-02-2019” by the Secretary of State (the “Petition”). The Petition would amend the Nevada Constitution to create a purportedly “independent” redistricting commission.

On November 26, 2019, Appellant Rev. Leonard Jackson filed a complaint pursuant to NRS 295.009 and NRS 295.061 alleging that the Petition’s Description of Effect violated NRS 295.009(1)(b) because, among other things, the proposed redistricting commission would not in fact be “independent.”

The case was assigned to Department II of the First Judicial District Court. *Id.* On December 4, 2019, Fair Maps filed a peremptory challenge of judge, causing the case to be transferred to Department I. On December 13, 2019, Fair Maps filed its Answer and Answering Brief. On December 16, 2019 the district court held a setting and ordered that the hearing on the case be set for December 23, 2019. On December 20, 2019, Appellant filed his Reply brief.

The district court held the hearing on December 23, 2019. At that hearing, the court heard argument from each party. The district court indicated that it found the Petition’s description of effect to be insufficient, and that it would write its own description of effect. It ordered both parties to submit proposed orders within ten days of the hearing.

On January 2, 2020, the district court adopted Respondent Fair Maps’ proposed order, verbatim. Notice of entry of that order was served on January 6, 2020. Appellant timely filed his notice of appeal on February 5, 2020. Respondent Fair Maps filed its notice of cross-appeal on February 18, 2020.

III. Argument

A. There has been no pattern of delay in this case.

Respondent Fair Maps argues that Appellant Jackson has “exhibited a consistent pattern of delay” in this case. This argument must be rejected because all of Appellant’s filings have been within the prescribed deadlines, with no extensions requested.

Fair Maps complains that the Complaint was filed on the “last possible day” allowed by NRS 295.061(1). That is true, but NRS 295.061(1) mandates that the complaint be filed within 15 days, weekends and holidays excluded, from the day that the petition is filed with the Secretary of State. It also requires that “[a]ll affidavits and documents in support of the challenge must be filed with the

complaint.” NRS 95.061(1). To undersigned counsel’s knowledge, this is by far the shortest deadline / statute of limitations for any type of civil action prescribed in law. A mere 15 working days to challenge a petition, including gathering all legal and factual materials necessary to do so, is no small undertaking. That Appellant filed the Complaint on the last day of the 15 working day deadline is not a delay of any kind, let alone an undue delay.

Next, Fair Maps complains that Appellant filed the Notice of Appeal on the last possible day to appeal. Again, the deadline to appeal is prescribed in the Nevada Rules of Appellate Procedure. Complying with the deadlines in the rules is not a delay.¹

Fair Maps then asserts that “despite the 15-day deadline to ‘set the matter for hearing’ pursuant to NRS 295.061(3), Appellant unsuccessfully sought to delay the hearing even further during the hearing setting with the district court.” *See* Motion, p. 5. During the setting, the judicial assistant proposed the hearing be held on December 23, 2019, two days before Christmas. Counsel for Appellant did ask that the hearing be set after Christmas, due to plans for the holiday. There was no

¹ With respect to Fair Map’s assertions that, as of filing the Motion to Dismiss on February 18, 2020, it had not received a copy of the Notice of Appeal, undersigned counsel did learn that the attempt to email the courtesy copy was not completed. However, undersigned counsel also mailed the Notice of Appeal on February 5, 2020. It has not been returned by the postal service. Why or for how long it was apparently delayed is unknown. Exhibit 1, Benson decl.

nefarious attempt to delay the hearing. In any event, that request was denied, in part because Fair Maps had filed a peremptory challenge of judge, which had already caused a few days' delay to transfer the case to Department I. The hearing was held on December 23, 2019. The hearing was held well within what is typical for a petition challenge, and indeed was held earlier than is typical.

Finally, Fair Maps asserts that it proposed five different alternative descriptions of effect to Appellant Jackson in an attempt to amicably resolve the matter. Appellant reviewed the alternatives, but did not find any of the proposed alternatives satisfactory. Strangely, Fair Maps asserts that Appellant “ducked” the question when the district court asked Appellant’s counsel whether any of the alternatives were acceptable during the hearing. That is entirely false. Appellant expressly answered that none of the alternatives were acceptable, and twice attempted to explain in detail to the district court why each was not acceptable, but counsel was cut off by the court both times.² Each of the proposed alternatives suffered from various flaws that would violate NRS 295.009(1)(b). Fair Maps cannot expect Appellant to agree to one of its other flawed proposals, and then claim it is unreasonable delay when Appellant refuses.

² Undersigned counsel has requested a copy of the JAVS recording of the hearing, but has not received it in time to attach it as an exhibit to this Opposition.

In sum, Fair Maps would have this Court believe that Appellant played fast and loose with the rules to somehow thwart its Petition. In fact, Appellant complied with every statutory and procedural requirement, and did not seek any extensions, except just to ask that the hearing not be held right before Christmas. That request was denied. The statutory scheme for these types of challenges provides for an expedited procedure, which Appellant followed. There has been no delay.

B. Appellant Jackson is an Aggrieved Party.

The role of the district court is to make findings of fact and conclusions of law regarding what the actual effect of the petition is, and from those findings determine whether the description of effect complies with NRS 295.009(1)(b). *See Las Vegas Taxpayer Accountability v. City Council of Las Vegas*, 125 Nev. 165, 183-84, 208 P.3d 429, 441 (2009) (district court made findings of fact regarding the “true effect” of the referendum, and based on those findings determined that the description of effect was invalid); *Prevent Sanctuary Cities v. Haley*, 421 P.3d 281, Case No. No. 74966 (Nev. 2018) (unpublished – NRAP 36) (remanding to the district court to make findings of fact regarding the effect of the petition).

In this case, the district court found the description of effect to be invalid, but failed to make any findings of fact regarding the actual effect of the Petition. For example, Appellant demonstrated that the so-called “independent” commission

Fair Maps proposes is any but “independent.” Appellant explained in detail how the proposed commission lacks essentially all of the elements that truly independent commissions have, such as: independent and guaranteed funding, a third-party, non-legislative body that selects individuals or pools of individuals to serve on the commission, and prohibitions on political and personal gain from service on the commission.

The district court failed to make any findings of fact or conclusions of law regarding whether the proposed commission in fact is “independent.” Instead, the district court’s order states that the description of effect “does not adequately explain to voters what is meant by the term ‘independent’...” *See* Exhibit 3 to Motion, Order, p. 4. Contrary to Fair Maps’ argument, Appellant is not appealing a finding of fact or conclusion of law; Appellant is appealing the district court’s *failure* to make findings of fact. This is contrary to the district court’s duty under NRS 295.061 and *Las Vegas Taxpayer Accountability*, 125 Nev. at 183-84, 208 P.3d at 441 to make findings of fact regarding the true effect of the petition.

These findings of fact are important in this case for both the description of effect and the Petition itself. If the use of the term “independent” is false and misleading in the description of effect, it is likewise false and misleading in the Petition itself. The Petition, in bold type on the first page of the initiative, purports

to create the “Independent Redistricting Commission.” Exhibit 2 to Motion, (Exhibit 1 to Answering Brief).

In addition to failing to make findings, the district court went on to actually rewrite the description of effect for Fair Maps. This order must be vacated because the district court has no jurisdiction to draft its own description of effect. Where the district court enters an order that exceeds its jurisdiction, a party purportedly bound by that order can be aggrieved. *See e.g., In re Estate of Forney*, 44 Nev. 279, 285, 194 P. 331, 332 (1921) (administrator of estate was aggrieved where probate court ordered him to dispose of property where the district court lacked jurisdiction to do so, even though administrator was not personally interested in the property). Appellant is aggrieved because the district court essentially took on the role of the petition proponent and created a new description of effect. This improperly relieved Fair Maps of the obligation to redraft its description of effect.

As Fair Maps points out in its Motion, p. 9, NRS 295.061(3) states: “[i]f a description of effect of an initiative or referendum... is challenged successfully pursuant to subsection 1 and such description is amended in compliance with the order of the court, the amended description may not be challenged.” Fair Maps argues that, because of NRS 295.061(3), “the amended description of effect cannot be further challenged **in this appeal** or in a separate proceeding so as to prevent unlimited hyper-technical nitpicking of the description.” Motion, p. 10 (emphasis

added). According to Fair Maps, the district court’s description is immune not just from another lawsuit, but is immune from an appeal also. Clearly that is incorrect. Simply because the district court rewrote the description of effect does not mean that that description is *ipso facto* correct and therefore wholly un-appealable.³

In this case, the district court’s description of effect states that the commission will redraw the electoral maps, starting in 2023, and states that it “could” replace the maps drawn by the Legislature in 2021. Exhibit 3 to Motion, p. 5. That is incorrect and misleading because it is certain that the commission’s 2023 maps *will* replace the Legislature’s 2021 maps. The language of the Petition itself mandates that the commission adopt a redistricting plan “[n]ot later than July 1, 2023,” and sets forth additional criteria that the commission is required to consider that the Legislature is not. Appellant is therefore aggrieved because the district court’s description of effect is inaccurate and misleading.

By writing a new description of effect itself, the district court does not just call balls and strikes – it creates its own description of effect that, according to Fair Maps, is immune to any sort of challenge, even an appeal, no matter what the

³ Fair Maps’ resort to the legislative history of NRS 295.061(3) is misplaced. *See* Exhibit 5 to Motion. That history addresses only additional separate lawsuits challenging the description; it says nothing about appeals from the district court’s order. That is likely because the Legislature never contemplated that the district court would itself rewrite the description.

contents of that court-written description of effect might be. This is contrary to NRS 295.061 and 295.009.

Appellant Jackson is aggrieved because the district court has no jurisdiction or authority to redraft a description of effect, it failed to make the required findings of fact, and the district court's description of effect remains inaccurate and misleading.

C. There is no basis for sanctions in this appeal.

Fair Maps argues that the Court should impose sanctions pursuant to NRAP 38(b). It argues that "time is of the essence" in this case and others like it, and notes that NRS 295.061(1) sets forth an expedited hearing schedule and gives priority to the action in the district court. Motion, pp. 11-12. While there is no similar statute or rule regarding appeals in these cases, nothing prevents Fair Maps from making a motion to expedite this appeal, as has been done in other ballot measure cases. Furthermore, Appellant likewise has an interest in quick resolution of the appeal, otherwise he risks it becoming moot. *See* NRS 293.309 (providing that legal actions that would prevent the timely issuance of ballots are moot).

As discussed above, this appeal challenges the district court's failure to make findings of fact, its lack of jurisdiction to rewrite the description of effect, and the fact that the district court's description of effect is still inaccurate and misleading. Yet, according to Fair Maps, the district court's description cannot be

challenged, even on appeal, because of NRS 295.061(3). These are important and legitimate issues that require this Court's resolution, not just in this case, but for the sake of providing guidance for future cases.

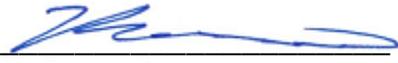
Nor do Fair Maps' various other complaints form a basis for sanctions. For example, besides complaining that Appellant refused to settle for any of its other flawed descriptions, Fair Maps also complains that it did not receive a response to its letter threatening a motion for sanctions in response to this appeal. That letter was mailed and emailed on Friday, February 7, 2020 and it demanded a response by noon the next Monday. Fair Maps argues that Appellant's lack of an immediate response, and Appellant's refusal to settle this case is somehow bad faith. *See* Motion, p. 12. However, Appellant is under no obligation to compromise his claims. As discussed above, this case has proceeded well within the expedited timeframe set by the district court. There has been no undue delay, and this appeal is legitimately brought to redress the district court's lack of jurisdiction to rewrite the description of effect, and the problems within the district court's description of effect.

IV. Conclusion

For the foregoing reasons, Appellant Jackson respectfully requests that the Motion be denied in its entirety.

Dated this 26th day of February, 2020.

BENSON LAW NEVADA

By: 
Kevin Benson, Esq.
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Carson City, NV 89706

CERTIFICATE OF SERVICE

Pursuant to NRCPC Rule 5(b), I hereby certify that I am an employee of Benson Law Nevada, and that on this date, I caused the foregoing document to be served to all parties to this action by electronically filing it with the Court's e-filing system, which will electronically serve the following:

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Dated: February 26, 2020.



Kevin Benson

NRAP 26.1 DISCLOSURE STATEMENT

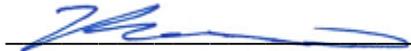
Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

Appellant Rev. Leonard Jackson is an individual and is not proceeding under a pseudonym.

Kevin Benson, Esq. of Benson Law Nevada represented Rev. Jackson in the district court and represents him in this appeal.

Dated this 26th day of February, 2020.

BENSON LAW NEVADA

By: 
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Carson City, NV 89706
Attorney for Appellant

INDEX OF EXHIBITS

<u>Exhibit</u>	<u>Description</u>	<u>Number of Pages</u> (Excluding Cover Pages)
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EXHIBIT 1

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DECLARATION OF KEVIN BENSON

I, Kevin Benson, declare the following under penalties of perjury:

1. I am counsel for the Plaintiff-Appellant, Rev. Leonard Jackson, in Jackson v. Fair Maps Nevada PAC, Case No. 19 OC 00209 1B in the First Judicial District Court.

2. I have represented various parties, including both the Secretary of State and private parties, in numerous other cases like this one, brought pursuant to NRS 295.061. I would estimate I have been involved in at least two dozen such cases. In my experience, the First Judicial District Court has consistently interpreted NRS 295.061 to require only that the hearing *be set* within 15 days of the filing of the complaint, not that the actual hearing be held within 15 days of the filing of the complaint.

3. I telephonically attended the setting for the hearing in this matter on December 16, 2019. The judicial assistant stated that the earliest available date for the hearing was on December 23, 2019. I requested that the hearing be held on a different date, because I had planned to take that entire week off for Christmas. To best of my recollection, the judicial assistant stated that the district court wanted to hold the hearing as soon as possible, and she noted that there had already been some delay due to the filing of the peremptory challenge of judge.

4. At the hearing on December 23, 2019, this district court asked whether any of the proposed alternatives submitted by Fair Maps was acceptable to my client. I clearly indicated that they were not, and I began to explain why each alternative was in violation of NRS 295.009(1)(b). The district court interrupted my argument and stated that I needn't continue.

5. Again, toward the end of the hearing, I attempted to again explain why each alternative was deficient, and again the district court interrupted and ended my argument.

6. Neither I nor my client agreed to any of the alternatives, nor to the description of effect set forth in the order of the district court.

7. At the end of the hearing, the district court ordered both parties to submit proposed orders within ten days of the hearing.

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1 8. On February 5, 2020, I mailed a copy of the notice of appeal in this matter to counsel for
2 Respondent Fair Maps. Respondent states that, as of the date of filing the Motion, it had not received
3 the mailed copy of the notice. The notice was mailed using postage from Stamps.com, which my
4 firm routinely uses. The notice has not been returned by the postal service. I have never encountered
5 any difficulty with postage from Stamps.com. I do not know why there apparently was a delay in
6 Respondent receiving the notice.

7 9. I requested a copy of the JAVS recording of the hearing, but I learned that it will take several
8 days to obtain a copy. Therefore I have not received a copy as of the date of this Opposition.

9 I declare under penalty of perjury that the above statements are true.

10 Dated this 25th day of February, 2020.

11
12 BENSON LAW, LLC

13
14 By: 

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