IN THE SUPREME COURT OF THE STATE OF NEVADA

No.

LEWIS HELFSTEIN; MADALYN HELFSTEIN; SUMMIT LASER PRODUCTS, INC; AND SUMMIT TECHNOLOGIES, LLC.
Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK
Respondent,

and

IRA AND EDYTHE SEAVER FAMILY TRUST, IRA SEAVER, CIRCLE CONSULTING CORPORATION.

Real Parties in Interest.

Eighth Judicial District Court, Clark County, Nevada
The Honorable Elizabeth Gonzalez, District Judge
The Honorable Elissa Cadish, District Judge

District Court Case No. A-09-587003

PETITION FOR EXTRAORDINARY WRIT RELIEF

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SUPREME COURT OF THE STATE OF NEVADA

LEWIS HELFSTEIN; MADALYN HELFSTEIN; SUMMIT LASER PRODUCTS, INC; AND SUMMIT TECHNOLOGIES, LLC. Petitioners, vs, EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, Respondent, And, IRA AND EDYTHE SEAVER FAMILY TRUST, IRA SEAVER, CIRCLE CONSULTING CORPORATION. Real Parties in Interest.	Supreme Court Case No. District Court Case No. A-09-587003 **PETITION FOR EXTRAORDINARY WRIT RELIEF**

Petitioners LEWIS HELFSTEIN, MADALYN HELFSTEIN, SUMMIT LASER PRODUCTS, INC, AND SUMMIT TECHNOLOGIES, LLC. (collectively "Petitioners"), through their undersigned counsel, hereby Petition for

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Extraordinary Writ Relief in the form of a Writ of Mandamus or Prohibition.

DATED this 11th day of April, 2014.

FOLEY & OAKES, PC

/s/ J. Michael Oakes
J. Michael Oakes, Esq.
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I.

INTRODUCTION AND STATEMENT OF ISSUES PRESENTED

There are three issues involved in this Petition.

First, the lower court has ruled that Real Party In Interest Respondents' (hereafter "Respondents") NRCP 60(b) motion, which seeks to set aside a notice of voluntary dismissal entered some three years and four months prior to the filing of the motion, is timely. The lower court has reasoned that the 6 month limitation on filing a motion under NRCP 60(b) does not begin to run until the entire case has been decided, such that the case is "final" for appeal purposes. Petitioners assert that this is wrong, as a matter of law, particularly following a notice of dismissal from which there is no right to appeal, and that such a conclusion would greatly hinder the desirable goal of furthering the finality of negotiated settlements.

Second, the lower court has ruled that since Petitioners filed a motion to compel arbitration of the crossclaim/third party complaint filed against them by the other defendant in the case below, Petitioners waived their objection to the assertion of specific personal jurisdiction against them by the Plaintiff, i.e., the Respondents. Again, Petitioners assert that this is wrong, as a matter of law, since the Petitioners did not seek affirmative relief from the court.

Third, in the alternative, the lower court, through a different judge, i.e., the Honorable Judge Elissa Cadish, denied Petitioners' motion to disqualify the

Honorable Judge Elizabeth Gonzalez, despite the strong appearance of impropriety demonstrated by her comments concerning the Petitioners and their successful appeal of her prior decision, and her formation of opinions concerning the Petitioners in the trial between Respondents and the other defendant in the case. Petitioners assert that the formation of opinions about them in a case in which their interests were not represented and in which they were not parties, when coupled with the comments made by the court, mandate disqualification of the judge.

This Court has some familiarity with this case, as this is the second time this case has been brought before this Court. The prior case was here on an interlocutory appeal from an order denying a motion to compel arbitration, which resulted in this Court's reversal in Supreme Court Case No. 56383. That decision concluded the case below for the Petitioners, since they had previously been dismissed from the case by the Respondents (Plaintiffs below).

Notwithstanding their dismissal from the case, the lower court has explained, now that the Respondents are seeking to set aside their own voluntary dismissal of the Petitioners, that "…there were a lot of issues related to Mr. Helfstein during the course of the litigation. And I was disappointed that the Supreme Court decided to essentially say, you didn't have to be part of the litigation, which is why we are currently in this position. If you'd been here on the third-party complaint, we wouldn't be in this position, Mr. Oakes." The clear

implication is that Petitioners actions in successfully obtaining dismissal from this Court of the third party complaint, based upon a valid arbitration agreement, has placed them in peril, since if they had not done so, they "wouldn't be in this position."

II.

STATEMENT OF FACTS

On April 3, 2009, Respondents filed their Complaint below. Vol. I PA, 1-16. It alleged that Petitioners had manipulated the books and records of the company in which Respondent was a member, breached the operating agreement of the company, engaged in self-dealing, acted with malice, intentionally exploited company assets for their own benefit, breached their fiduciary obligations, and, demanded an accounting.

On or about November 20, 2009, before filing a responsive pleading, the Helfstein parties concluded a Settlement Agreement with the Plaintiffs and paid the $60,000 settlement payment.

The Settlement Agreement called for a dismissal with prejudice and contained provisions for a broad general release of all claims, exclusion of any oral promises, and for negating any claim that either party was relying upon any statement or representation of the other. The release specifically related to claims

that had been brought or those that could have been brought. Vol. II PA, 472-518, and specifically 490-495.

On November 23, 2009, Respondents filed a "Notice of Voluntary Dismissal of the Summit Defendants." Vol I PA, 38-39. Although the Settlement Agreement had said that the dismissal was to be with prejudice, the Notice of Voluntary Dismissal filed by counsel for the Respondents did not so state.

On January 19, 2010, the remaining defendant below, Uninet, filed a third party claim (incorrectly labeled a crossclaim) against Petitioner. Vol. I PA, 40-73.

On February 19, 2010, the Respondents filed a motion to approve the settlement with Petitioner as a good faith settlement. Vol. I PA, 74-122. In the motion, the Respondents' counsel explained that:

> "After protracted negotiations, a settlement in the amount of $60,000, to be paid by the Summit Defendants to Plaintiffs, was reached. This amount represents a good faith, fair, negotiated settlement to the contested claims. First, the Summit Defendants had no insurance coverage for these claims, and their ability to finance long and protracted litigation was questionable. Further, there was the possibility that, after costly litigation, even if a much larger judgment was awarded, such a judgment would not be collectible. Thus, after months of settlement negotiations, a fair compromise in the amount of $60,000 was reached."

The moving papers explained further that:

> In this case, the proposed settlement of sixty thousand dollars ($60,000) is substantial and represents a fair

> account of the Summit Defendants' potential liability, the ability of such amounts to be collected, and the risks and costs of litigation. The settlement was reached after months of extensive negotiations between the parties See Exhibit "C". Plaintiffs and the settling defendants were afforded a full and adequate opportunity to review and evaluate the nature of the allegations and the potential defenses."

The motion included the declaration of counsel for the Respondents, Jeffrey R. Albregts, where he stated under penalty of perjury:

> "2. In early 2009, on behalf of the Plaintiffs, settlement negotiations were initiated with Defendants Lewis Helfstein, Madalyn Helfstein, Summit Laser Products, Inc. and Summit Technologies, LLC (collectively the "Summit Defendants").
>
> 3. These settlement negotiations continued for approximately 10 months, during which time the strengths and weaknesses of our case were thoroughly considered.
>
> 4. Over the course of those 10 months, before reaching a settlement of $60,000.00, multiple rounds of offers and counter-offers were made between these parties."

On March 25, 2010, the motion for approval of the settlement as being in good faith was vacated, and, as a result, the Court never ruled on the settlement and the claims for contribution and indemnity by the other defendants were not precluded.

For their initial response to the third party claim, Petitioners filed a Motion for Stay or Dismissal, and to Compel Arbitration. Vol. I PA, 123-160. That motion was denied by the lower court, but on an interlocutory appeal to this Court, as Case

No. 56383, the lower court decision was reversed by way of a decision on April 10, 2011, enforcing a contractual arbitration and choice of venue clause.

In March and April of 2012, the trial of the matter between the Plaintiffs and the Saporiti Defendants was conducted. The Respondents prevailed on their claim against the other defendant, and the lower court made a specific finding that the trial testimony of Petitioner Lewis Helfstein, as a non-party witness, was not credible. See Conclusion of Law No. 6, Vol. II PA, 369-383.

On or about March 25, 2013, almost a full year after the trial, and three years and four months after the filing of the Notice of Voluntary Dismissal, Respondents sought to rescind their settlement with Petitioners, by filing a Motion to Set Aside Rescinded Settlement Agreement pursuant to NRCP 60(b). Vol. II PA, 384-411.

Petitioners filed their opposition, setting forth several arguments, including the argument that the motion was untimely. Vol. II PA, 472-518.

The lower court held that the motion was timely, incorrectly reasoning that the 6 month limitation on filing a motion under NRCP 60(b) did not commence until final judgment was entered in the case, with the claims between the Respondents and the remaining defendant being fully adjudicated. This rationale had not even been raised by the Respondents in the pleadings relative to the motion. See the Transcript, Vol III PA, 626-650, and the Order for Evidentiary

Hearing On Plaintiff's Motion To Set Aside Rescinded Settlement Agreement, Vol IV, 917-921.

Based upon comments made at the hearing on the motion, Petitioners filed a Motion for Disqualification, asserting that the lower court's impartiality "might reasonably be questioned." Excerpts from the Transcript, Vol. III PA, 626-650, of the prior hearing show the following colloquy:

Page 5-7:

MR. OAKES: Gives them more time, but is also imposes a much more stringent standard that is nowhere close to anything that happened in this case. According to - -

THE COURT: **Unfortunately, you weren't here for the trial where your client testified and lots of unusual things occurred.**

MR. OAKES: I've read the findings, Your Honor, and I understand you made credibility determinations concerning my client that were not favorable to him. And I think that goes, frankly, to the prejudice of having this motion heard by this Court. And by no means am I suggesting any denigration of Your Honor -

THE COURT: Oh, I understand, Mr. Oakes.

MR. OAKES: - - But my client was not represented by counsel in any of the discovery, initiated no discovery, took no depositions, participated in no - -

THE COURT: But he was represented by counsel. You were his lawyer. It's just because of the ruling you had from the Nevada Supreme Court you did not participate in the litigation.

MR. OAKES: Yeah. He was dismissed.

THE COURT: But he was represented by counsel. I mean, he had counsel.

MR. OAKES: Well, he had counsel.

THE COURT: Plus he's trained as an attorney.

MR. OAKES: Your Honor, initiated no discovery because not a party to the case, was dismissed from the plaintiff's claim, and the third-party claim was dismissed and stayed. He was not participating as a party through any of the discovery, did not send any interrogatories or written requests, did not obtain an expert to respond to any of their expert allegations.

What they're asking you to do here is, since you've already tried the case and made negative findings against my client as a witness at the time, to take those and somehow apply those in a res judicata manner or some quasi res judicata matter when he wasn't a party to the case, he was dismissed.

Page 10 -12:

THE COURT: Well, some of the things they said in court was that Mr. Helfstein was nor cooperating in accordance with the terms of the settlement

agreement. That was one of the other things they said, and that he wasn't providing the information that he had agreed to provide. **So there were a lot of issues related to Mr. Helfstein during the course of the litigation. And I was disappointed that the Supreme Court decided to essentially say, you didn't have to be part of the litigation, which is why we are currently in this position. If you'd been here on the third-party complaint, we wouldn't be in this position, Mr. Oakes.**

MR. OAKES: Your Honor, I'm hard pressed to concede that I made an error by trying to invoke an arbitration and forum - - choice of venue clause.

THE COURT: I understand what you are saying.

MR. OAKES: And I'm also - -

THE COURT: **But the long-term consequences of that are that you weren't in the litigation when issues related to your client - -**

MR. OAKES: My client settled, Your Honor. He was out of the case. He had a document that says, the settlement agreement would be given res judicata and collateral estoppel effect.

THE COURT: Mr. Oakes, he was a third-party defendant. And while it may be that the arbitration provision was enforceable and your client tried - - chose to invoke that provision, because you had duplicative forums of litigation occurring - - **and I don't know what happened between the Uninet defendants**

and your client on the third-party complaint, but because you had duplicative forums, you had the potential for conflicting rulings. Which is the situation we were ultimately placed in here and which was why I had a motion to amend the findings of fact and conclusions of law that was filed I think by Mr. Silvestri - - no, by Mr. Lee.

MR. OAKES: **There's no conflicting ruling relative to my client, Your Honor. You found against the Uninet defendants, as you had every right to do.** Cases get tried against one defendant when another gets let out all of the time. What would be fundamentally unfair to my client…

The Motion for Disqualification was denied (Vol. IV, 909-911), with the Honorable Judge Elissa Cadish determining that there was no appearance of impartiality, relying upon the Declaration of the Honorable Judge Elizabeth Gonzalez (Vol. IV, 869-889).

Petitioners then filed a Motion to Dismiss (Vol. IV PA, 933-939), asserting that the lower court did not have specific personal jurisdiction over them.[1] At the hearing, the lower court denied the motion, concluding incorrectly that Petitioners

[1] The jurisdictional issue was originally raised in the Opposition to Plaintiff's Motion To Set Aside Rescinded Settlement Agreement (Vol. II PA, 472-518), but a ruling on the jurisdictional issues was reserved for a later date. See Order, Vol. IV PA, 917-921.

had waived their jurisdictional objection by filing their motion to compel arbitration of the third party claims asserted against them by the other defendants. The Order has yet to be signed. As shown in the Transcript of Proceeding April 1, 2014, Vol. IV PA, 977-991, the Court's ruling was as follows:

Page 8-9

"THE COURT: Thank you.

The motion is denied. Six months begins to run from the final judgment in the case. Here the final judgment was recently entered, despite the fact we tried this case long, long ago.

The Helfstein appeared in the case originally and did not contest personal jurisdiction in requesting the affirmative relief that they did…"

As with the other adverse ruling against the Helfsteins, this rationale was one that had not been raised by the Respondents in their pleadings relative to the motion.

III.

RELIEF REQUESTED

The Petitioners seek a writ of mandamus and/or prohibition, as appropriate, compelling the District Court to:

1) Deny, as untimely, Respondent Plaintiff's Motion To Set

Aside Rescinded Helfstein Settlement Agreement and Proceed On Claims Against Them (Vol. II PA, 384-411),

2) Grant Petitioners' Motion To Dismiss (Vol. IV PA, 933-939), inasmuch as there has been no waiver of Petitioners' right to object to specific personal jurisdiction herein, and

3) In the absence of the foregoing, grant Petitioners' Defendants' Motion for Disqualification of Judge (Vol. III PA, 651-759).

In exercising its discretion, "this [C]ourt may entertain mandamus petitions when judicial economy and sound judicial administration militate in favor of writ review." Scarbo v. Eighth Jud. Dist. Ct., *125* Nev. Adv. Op. No. 12, 206 P.3d 975, 977 (2009). "Additionally, this Court may exercise its discretion and entertain a writ petition when 'an important issue of law requires clarification.'" Id. (quoting State v. Second Jud. Dist. Ct., 120 Nev. 254, 258, 89 P.3d 663, 665-66 (2004). In deciding whether to consider a petition for mandamus, this Court has said "Ultimately, however, our analysis turns on the promotion of judicial economy." See Williams v. Eighth Judicial District Court, 127 Nev. Adv. Op. No. 45, (2011).

A writ of prohibition is the appropriate remedy for a district court's erroneous refusal to quash service of process. See Arbella Mutual Insurance Co. v. Eighth Judicial District Court, 122 Nev. ___, 134 P.3d 710 (Nev. 2006).

A petition for a writ of mandamus is an appropriate vehicle to seek disqualification of a judge. See Towbin v. Eighth Judicial District Court, 112 P.3d 1063, 121 Nev. 251 (Nev. 2005).

In the context of a writ petition, this Court gives deference to the district court's findings of fact, but reviews questions of law de novo. Gonski v. Dist. Ct., 126 Nev. ___, 245 P.3d 1164, 1168 (2010).

Petitioners assert that the issues raised in this Petition are questions of law, to be reviewed de novo. Further, Petitioners asks that these important legal issues be decided now, in order to promote judicial economy.

IV.

POINTS AND AUTHORITIES

A. The Motion is Time Barred

The NRCP 60(b) motion of the Respondents was filed just over 3 years and 3 months after their own Notice of Voluntary Dismissal was filed.

NRCP 60(b) provides as follows:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. **On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding** for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; or, (5) the judgment has

> been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have prospective application. **The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served.** A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

The language of the rule does not set forth a requirement that a matter be "final" for appeal purposes before the 6 month limitation period begins to run. The rule provides that a party may seek relief from (i) a final judgment, (ii) an order, or (iii) a proceeding. It then states that the motion must be filed not more than 6 months after (i) the proceeding was taken or (ii) the date that written notice of entry of the judgment or order was served. There is no language in the rule to denote that the "proceeding," the "judgment," or the "order" must be a final judgment in order to start the running of the time.

Furthermore, the effect of a voluntary dismissal is different from a dismissal on the merits by the court. Unlike a dismissal on the merits, a voluntary dismissal

does not give rise to any appeal rights, and it becomes "final" immediately, terminating the jurisdiction of the court over the dismissed party.

This Court so held in Jeep Corporation v. District Court, 98 Nev 440, at 443-444, 652 P.2d 1183 (Nev. 1982):

> The primary issue posed is whether the stipulation of dismissal is effective. We hold that it is. In pertinent part, NRCP 41(a)(1) reads as follows: [a]n action may be dismissed by the plaintiff upon repayment of defendants' filing fees, without order of the court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. (Emphasis supplied.) **Once the stipulation has been signed and filed, dismissal is effectuated automatically without need of judicial sanction or affirmation.** First National Bank of Toms River, N. J. v. Marine City, Inc., 411 F.2d 674 (3rd Cir. 1969). **This Court has previously held that the notice of dismissal under NRCP 41(a)(1)(i) "closes the file. There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play.** This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court." Federal Sav. and Loan Ins. Corp. v. Moss, 88 Nev. 256, 495 P.2d 616 (1972). The only difference between subsection (i) and subsection (ii) of the rule is that the former is a unilateral dismissal by plaintiff before issues are joined and the latter is a stipulated dismissal which may be filed at any time. **In neither case may the court intervene or otherwise affect the dismissal. In both instances, the action is terminated and the court is without further jurisdiction in the matter. The language of the rule is clear."** (Emphasis added).

The voluntary dismissal was not an adjudication upon the merits by the court, and was not an interim or partial order subject to appeal only upon entry of final judgment. There is no appeal from it. It is final for the party dismissed, and results in terminating the action and the court's jurisdiction over the dismissed party right then, not at some later point in time. See Jeep Corporation, supra.

As a result, even if the 6 month period for filing a 60(b) motion to alter a court ordered dismissal commences only upon entry of final judgment - a conclusion disputed by Petitioners - that rule does not, and should not, apply to a voluntary dismissal.

This result is sensible and logical. Although this was a business case, the posture of this case was the same as the posture in thousands of tort cases. The plaintiff sued two defendants and before filing an answer, one of them settled and was dismissed. The finality of that settlement should not be subject to attack by motion under NRCP 60 for the many years it may take to resolve the case between the remaining parties. Neither the language of the rule or the policy of concluding settlements points to such a result. To hold otherwise would negate what the settling party bargained for, i.e., finality.

The Respondents' NRCP 60(b) motion should be deemed time barred.

B. The Petitioners' Filing of A Motion To Compel Arbitration of the Crossclaim Was Not A Waiver of Petitioners' Jurisdictional Objections to Plaintiffs/Respondents' Claims

The individual Petitioners are New York residents. The entity Petitioners are New York limited liability companies. See Respondents' Complaint at paragraph 2, Vol. I PA, 1-16. The claims asserted by the Respondents are based upon a membership interest in Summit Technologies, LLC, a New York limited liability company, with Respondents asserting that "…Mr. Helfstein had been fraudulently operating the Summit companies for many years prior to selling them to Mr. Saporiti." See page 4, lines 17-20 of Plaintiffs' Motion to Set Aside Rescinded Helfstein Settlement Agreement and Proceed on Claims Against Them (Vol. II PA, 384-411). These activities, even if true, took place in the State of new York, not Nevada.

When faced with Petitioners' jurisdictional challenge, the Respondents presented no evidence in their opposition. Instead, they relied upon things that they say were testified to at the trial between Respondents and the other defendant. Of course, at that time, Petitioners were not parties to the case, and the question of jurisdiction over them was not even before the court.

The lower court avoided that issue by determining that Petitioners had waived their jurisdictional argument by filing their Motion for Stay or Dismissal, and to Compel Arbitration of the crossclaim filed by the other defendant. Vol. I PA, 123-160. The lower court's conclusion as to waiver was wrong, as a matter of law.

In Dogra v. Liles, 129 Nev.Adv.Op. 100, ____ P.3d _____ (2013), this Court rejected the argument that a motion for consolidation operated as a waiver of jurisdictional objections. The opinion explained:

> The Dogras also contend the district court erred in determining it lacked personal jurisdiction over Jane on the basis of her filing a motion to consolidate in the Dogras' case. They argue that, by filing the motion, Jane sought affirmative relief from Nevada's courts and thereby waived her right to object to Nevada's exercise of jurisdiction. We disagree.
>
> We assume without deciding that seeking affirmative relief from a court subjects a litigant to that court's jurisdiction and cannot simultaneously be done while the litigant objects to the court's exercise of jurisdiction. *See, e.g., S.E.C. v. Ross,* 504 F.3d 1130, 1148 (9th Cir. 2007) ("[A] party cannot simultaneously seek affirmative relief from a court and object to that court's exercise of jurisdiction."). Ordinarily, a litigant seeks affirmative relief when he or she alleges wrongful conduct against another and seek damages or equitable relief thereon, or defends against an action by denying or asserting defenses to allegations made against him or her. *See, e.g., Black's Law Dictionary* 1404 (9th ed. 2009) (defining "affirmative relief as "[t]he relief sought by a defendant by raising a counterclaim or cross-claim that could have been maintained independently of the plaintiffs action").
>
> Jane's consolidation motion did none of these things. A review of the record below shows the motion was essentially a case management device employed by Jane (and Susan) to promote efficiency in resolving the various cases, including the Dogras' action, arising from the accident. None of the parties' substantive rights were implicated by the motion. On these facts, we cannot conclude that Jane's consolidation motion amounted to a

> request for affirmative relief that waived her right to object to personal jurisdiction.

The Petitioners' filing of a motion to dismiss in order to compel arbitration and enforce a choice of venue clause was not seeking affirmative relief from the court and did not result in a waiver of their right to object to personal jurisdiction. To the contrary, those steps were taken to remove themselves from this court, so that the disputes between them and the other defendant could be resolved in the place and in the manner in which they had agreed.

C. The Motion For Disqualification Should Be Granted

There is no known Nevada case that deals with this precise situation, where an attempt is made to bring a witness and previously dismissed party into the same case in which he or she previously testified at trial. Petitioners assert that the trier of fact and law in a case where they were not parties, should not serve as trier of fact in a case against them involving similar subject matter. This would be like a case where an individual is charged with a crime, defends themselves by pointing the finger at another, wins an acquittal, followed by having the same judge and jury assigned to the subsequent trial of the previously absent defendant. Such a trial would be grossly and fundamentally unfair.

In the case below, the court conducted a trial, heard evidence, and made findings in order to determine the dispute before it, which was Respondents' case

against the other named defendant. Petitioners had been dismissed by the Respondents back in November of 2009, and had been dismissed from the defendants' third party claim back in April of 2011. Petitioners were not parties at the time of the trial, and the lower court did not have jurisdiction over them.

During that trial, both parties pointed at the empty chair, i.e., the Petitioners, in assigning blame for the matters they were arguing about. Not surprisingly, the court made negative findings about the credibility of Petitioner, Lewis Helfstein, whose testimony had been given at trial.

Now, Respondents seek to take advantage of the court's predisposition towards the Petitioners, by bringing them back into the case, and having their case heard by the same judge.

Since the Petitioners were not parties to the case at the time of trial the decision in the case would have no res judicata effect against them whatsoever. This is beyond dispute. Yet, what is happening here is much worse. Here, the Petitioners must now "roll the boulder uphill" if they seek to have any chance of prevailing. They are not litigating on an even playing field, and the "judge's impartiality might reasonably be questioned."

This case is significantly different from the case of Liteky v. U.S., 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (U.S. 1994), which was relied upon by the lower court in denying the motion for disqualification. In Liteky, the district court judge had presided over a prior trial of the defendant. The court held that this was not grounds for disqualification, stating:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby

> recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." In re J. P. Linahan, Inc., 138 F.2d 650, 654 (CA2 1943). Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. **It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant."** (Emphasis added).

This is significantly different from the situation here, where the Petitioners were not parties at the time of trial. The negative findings made by the court took place when they were not even involved in the contested trial, and no voice was being given to their position. Yet, if the case goes forward, they will have to overcome all of the conclusions that were made relative to their interests. The predisposition of the lower court towards the Petitioners was not acquired during the course of proceedings against them. It was acquired in proceedings in which the petitioners were not parties.

Canon 2 of the NCJC provides that "A judge shall perform the duties of judicial office impartially, competently, and diligently." Rule 2.11 under Canon 2,

and the comments concerning that rule provide, in pertinent part, as follows:

> **"Rule 2.11. Disqualification.**
>
> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
>
> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding…
>
> **COMMENT**
>
> [1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply."

In this case, "the judge's impartiality might reasonably be questioned." The judge has gained knowledge about the Petitioners and become predisposed towards them in a case where they were not parties. Thus, the Liteky rule is inapplicable. Clearly, if we were talking about a juror who had heard the case below, no one would argue that the juror should not be excused for cause in a trial involving Respondents' case against Petitioners. The same should hold true when we are talking about the judge. In both instances, their "impartiality might reasonably be questioned."

Furthermore, the comments made by the lower court reveal a predisposition. The court was "disappointed that the Supreme Court decided to essentially say,

you didn't have to be part of the litigation, which is why we are currently in this position. If you'd been here on the third-party complaint, we wouldn't be in this position, Mr. Oakes."

The mere fact that the court was "disappointed" about the Supreme Court's enforcement of the arbitration provisions governing disputed between Petitioners and the other defendant should, in and of itself, be enough to show that the court's "impartiality might reasonably be questioned."

Furthermore, the clear inference about the Petitioners being "in this position" is that it is a bad position, and it was brought about by their audacity in appealing the court's incorrect order concerning the arbitration provision with the other defendant.

Of course, the final straw is when the lower court explained that the Petitioners must now face the "long term consequences" of their obtaining a dismissal of the third party complaint, and not being present when issues about them were being decided: "But the long-term consequences of that are that you weren't in the litigation when issues related to your client…"

These comments make it clear that the lower court's impartiality might reasonably be questioned. This is not to cast aspersions towards the court, as the court decided the case that was in front of it. However, in doing so, it has been made abundantly clear that the lower court still has strong feelings about the case,

and those feelings would make it such that Petitioners would not have an even playing field in the absence of disqualification.

V.

CONCLUSION

Petitioners ask that this Court issue a writ of prohibition or mandamus to correct the errors of law committed by the lower court, to the effect that:

1) The Motion to Set Aside Rescinded Settlement Agreement should be denied as untimely,

2) The Motion to Dismiss of the Petitioners, asserting that they are not subject to the jurisdiction of the court, should be granted, inasmuch as there was no waiver of the jurisdiction objection, and

3) In the event that this Court does not grant the foregoing relief, such that the matter proceeds in the lower court, the Motion for Disqualification of Judge should be granted, so that the adjudication of the matter will take place on a level playing field, free from any question about the impartiality of the court.

Dated this 11th day of April, 2014.

FOLEY & OAKES, PC

/s/ J. Michael Oakes
J. Michael Oakes, Esq.
Nevada Bar No. 1999
850 East Bonneville Avenue
Las Vegas, Nevada 89101
Attorney for Petitioners

VERIFICATION

STATE OF NEVADA }
} SS;
COUNTY OF CLARK }

I, J. Michael Oakes, Esq., hereby declare under penalty of perjury of the laws of Nevada, that I am the attorney for the Petitioners named in the foregoing Petition for know the contents thereof, the pleading is true of my own knowledge, except as to those matters stated on information and belief, and that as to such matters, I believe them to be true.

Executed this 11th day of April, 2014.

/s/ J. Michael Oakes
J. Michael Oakes

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Foley & Oakes, PC, and that on the 11th day of April, 2014, I served the following document(s):

PETITION FOR EXTRAORDINARY WRIT RELIEF

I served the above-named document(s) by the following means to the persons as listed below:

[x] **By United States Mail**, postage fully prepaid to person(s) and addresses as follows:

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Honorable Elissa F. Cadish
Eighth Judicial District Court
Department 6
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

Honorable Elizabeth Gonzelez
Eighth Judicial District Court
Department 11
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

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

/s/ Elizabeth Gould

An employee of FOLEY & OAKES, PC

FOLEY & OAKES