CASE NOS. 70083, 71045

IN THE SUPREME COURT OF NEVADA

VALLEY HEALTH SYSTEM, LLC, a Nevada limited liability company, d/b/a CENTENNIAL HILLS HOSPITAL MEDICAL CENTER; AND UNIVERSAL HEALTH SERVICES, INC., a Delaware corporation,

Appellants,

vs.

ESTATE OF JANE DOE, BY AND THROUGH ITS SPECIAL ADMINISTRATOR, MISTY PETERSON,

Respondent.

HALL PRANGLE & SCHOONVELD, LLC; MICHAEL PRANGLE, ESQ.; KENNETH M. WEBSTER, ESQ.; AND JOHN F. BEMIS, ESQ.,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE RICHARD SCOTTI, DISTRICT JUDGE,

Respondents,

And

MISTY PETERSON, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JOHN DOE,

Real Party in Interest.

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA

HONORABLE JUDGE RICHARD SCOTTI, CASE NO. A-09-595780-C

APPELLANTS' SUPPLEMENTAL BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

VALLEY HEALTH SYSTEM, LLC, a Nevada limited liability company, d/b/a CENTENNIAL HILLS HOSPITAL MEDICAL CENTER; AND UNIVERSAL HEALTH SERVICES, INC., a Delaware corporation, Appellants, vs. ESTATE OF JANE DOE, by and through its Special Administrator, MISTY PETERSON, Respondent.	Supreme Court No. 70083 District Court No. A595780
HALL PRANGLE & SCHOONVELD, LLC; MICHAEL PRANGLE, ESQ.; KENNETH M. WEBSTER, ESQ.; AND JOHN F. BEMIS, ESQ., Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE RICHARD SCOTTI, DISTRICT JUDGE, Respondents, And	Supreme Court No. 71045 District Court No. A595780

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MISTY PETERSON, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JOHN DOE,

Real Party in Interest.

APPELLANTS' NRAP 26.1 DISCLOSURE

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 judges of this Court may evaluate possible disqualification or recusal.

Appellant Valley Health System, LLC d/b/a Centennial Hills Hospital Medical Center ("Centennial Hills") is a Delaware Limited Liability Company. It is wholly owned and operated by UHS of Delaware, Inc., a Delaware Corporation, the management company for Appellant Universal Health Services, Inc. ("UHS"), also a Delaware Corporation. UHS is a holding

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company that is a wholly owned subsidiary of Universal Health Services, a publicly held company that owns 10% or more of Appellants' stock.

DATED this 7th day of September, 2017.

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Cases

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Pursuant to this Court's July 19, 2017 Order Directing Supplemental Briefing, the sole issue relates to "whether [A]ppellant[s] ha[ve] presented a justiciable controversy in the appeal…." As explained in detail below, the global settlement between the parties did not moot the Sanction Order for two reasons.

First, the Sanction Order[1] painted Appellants with a "Scarlet Letter," forcing them to attempt to explain its circumstances ***and*** minimize its effect on discovery disputes in future litigation, especially because this Court has identified deterrence as one of the non-exhaustive discovery sanction factors. Reversal of the Sanction Order is necessary for Appellants to avoid collateral damage in future matters.

Second, the Sanction Order included $18,000.00 in monetary sanctions, with $9,000.00 payable to Doe and $9,000.00 payable to a non-party. The global settlement does not preclude Appellants from seeking reimbursement of these monetary sanctions, thereby presenting a live controversy to this Court.

/ / /

[1] Capitalized terms have the meaning assigned to them in Appellants' Opening Brief.

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II. STATEMENT OF FACTS RELEVANT TO JUSTICIABILITY

Appellants' Opening Brief includes the relevant facts underlying the merits of the appeal. For the purposes of this brief, Appellants will highlight the facts relevant to justiciability (*i.e.*, mootness).

On July 14, 2015, in response to Doe's Motion for Rule 37 Sanctions, Commissioner Bulla ordered Centennial Hills and UHS, *inter alia*, to pay $18,000.00 in monetary sanctions ($9,000.00 to Doe and $9,000.00 to a non-party). (Appellants' Appendix ("AA"), Vol. IV, Tab 19, at 608). On November 4, 2015, as part of the Sanction Order, the District Court "re-affirmed" the $18,000.00 in monetary sanctions issued by Commissioner Bulla. (*Id.*, Vol. VII, Tab 23, at 1346.)[2] On December 7, 2015, Centennial Hills and UHS paid the $18,000.00 in monetary sanctions. (*Id.*, Vol. XVII, Tab 83, at 3254-3255.)[3]

The Sanction Order also included harsh findings against Centennial Hills and UHS, including, but not limited to, the following.

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[2] The District Court approved and signed Commissioner Bulla's Report and Recommendations on August 15, 2015. (*Id.*, Vol. VII, Tab 23, at 1314.)

[3] Appellants did not contest payment of the monetary sanctions ***at that time***, and instead complied with that aspect of the Sanction Order in order to continue litigating. As explained in detail below, the monetary portion of the Sanction Order was preserved for appeal despite the payment.

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- "Centennial [and UHS] intentionally and willfully (a) violated its discovery obligations under NRCP 16.1…." (*Id.*, Vol. VII, Tab 23, at 1311.)
- Centennial and UHS "unfairly and wrongfully inflicted" extreme prejudice upon Plaintiff. (*Id.* at 1312.)
- "Centennial's failure to comply with its NRCP 16.1 obligations was material, substantial, and extremely prejudicial to Plaintiff Jane Doe." (*Id.* at 1331.)
- "Centennial provided false discovery responses under oath, designed to mislead this Court." (*Id.* at 1334.)
- "The discovery abuse was indeed extreme, and warrants a very severe sanction against Defendant Centennial." (*Id.* at 1336).
- "Centennial is the party that elected to hide evidence to prevent Jane Doe from adjudicating its claim on the merits." (*Id.* at 1344.)
- "The misconduct in this case is clearly that of Centennial, to an equal or greater extent that [sic] its lawyers." (*Id.*)

On February 29, 2016, following a global settlement between the parties, the District Court entered an Order dismissing "each and every claim"

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with prejudice. (*Id.*, Vol. X, Tab 32, at 1858). Each party (including Doe) and the District Court agreed to the following:

> [T]he Parties hereby stipulate and agree that, notwithstanding the dismissal of this matter and the terms of the Settlement Agreement and Release between the Parties, Centennial Hills and Hall Prangle & Schoonveld hereby preserve their right to appeal the November 4, 2015 Order Striking Answer of Defendant Valley Health System LLC as Sanction for Discovery Misconduct (the "November Order"), along with the associated December 10, 2015 Order Denying Motion for Reconsideration (the "December Order") (the November Order and the December Order are jointly referred to as the "Sanction Order"). This Court shall retain jurisdiction over this matter until thirty days following resolution of the appeal.

(*Id.*) Consistent with the February 29, 2016 Stipulation and Order, the terms of the Settlement Agreement and Release do not preclude Appellants from appealing the Sanction Order and do not release Appellants' right to seek reimbursement of the monetary sanctions that were paid on December 7, 2015.[4]

/ / /

[4] The Settlement Agreement and Release is confidential and therefore has not been filed with the Court. If the Court requests a copy, Appellants will immediately file it under seal.

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III. ARGUMENT

A. The Future Adverse Impact of the Sanction Order Requires a Decision on the Merits of the Appeal.

The justiciability of an appeal includes whether or not the appeal is moot. *Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). "[A] controversy must be present through all stages of the proceeding…." *Id.* However, sanction orders are analyzed differently with respect to mootness. For example, this Court has repeatedly permitted attorneys to seek review of sanction orders by extraordinary writs regardless of whether or not they affect the underlying litigation. *See Watson Rounds v. Dist. Ct.*, 131 Nev. Adv. Op. 79, 358 P.3d 228, 231 (2015); *Office of Washoe County Dist. Atty. v. Dist. Ct.*, 116 Nev. 629, 635, 5 P.3d 562, 566 (2000); *Albany v. Arcata Associates, Inc.*, 106 Nev. 688, 690 n. 1, 799 P.3d 566, 567 n. 1 (1990). Federal courts also allow attorneys to challenge sanction orders by direct appeal recognizing the stigma and reputational damage of such findings. *See U.S. v. Taleo*, 222 F.3d 1133, 1138 (9th Cir. 2000); *Butler v. Biocore Med. Tech., Inc.*, 348 F.3d 1163, 1168-69 (10th Cir. 2003); *Adams v. Ford Motor Co.*, 653 F.3d 299, 306 (3d Cir. 1999); *Walker v. City of*

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Mesquite, Tex., 129 F.3d 831, 832 (5th Cir. 1997).

Although few courts have addressed the injurious effect of a sanction on a party (as opposed to an attorney), two courts have permitted a party to pursue an appeal of a sanction (along with its attorney) following settlement of the underlying case. *See Grider v. Keystone Health Plan Central, Inc.*, 580 F.3d 119, 133 (3d Cir. 2009) ("Appellants respond that the settlements did not moot the appeals because the Appellants experienced (and continue to experience) reputational harm. This court's precedent supports Appellants' position."); *Perkins v. Gen. Motors Corp.*, 965 F.2d 597, 600 (8th Cir. 1992).

Based on the authority above, as well as Nevada's approach to discovery sanctions, this Court should permit appellate review of harsh sanctions against parties (not just attorneys) regardless of whether or not the underlying case has been settled. As reflected in the Sanction Order, Nevada adopted the following non-exhaustive factors for the issuance of discovery sanctions.

> The factors a court may properly consider include, but are not limited to, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the

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> severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses.

Young v. Johnny Ribeiro Bldg., Inc., 106 Nev. 88, 93, 787 P.2d 777, 780 (1990). The first and last factors are particularly relevant. The Nevada Supreme Court previously affirmed the consideration of prior discovery misconduct in the same action in order to measure the level of willfulness (the first factor). *See, e.g., Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1049 (2010) ("[W]e conclude that appellants' continued discovery abuses and failure to comply with the district court's first sanction order evidences their willful and recalcitrant disregard of the judicial process…."). California courts have done the same. *See, e.g., Liberty Mut. Fire Ins. Co. v. LcL Administrators, Inc.*, 78 Cal.Rptr.3d 200, (Cal. Ct. App. 2008) ("[T]he sanctioned party's history as a repeat offender is not only relevant, but also significant, in deciding whether to impose terminating sanctions."). This

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rationale would likewise allow a district court to consider sanctions from prior cases in order to analyze the level of sanction needed for deterrence (the last factor).

Thus, if Centennial Hills and/or UHS are accused of discovery misconduct in future litigation (a common occurrence regardless of diligence), they will be forced to explain the circumstances of the Sanction Order and to try to convince the Court that it should not be considered with respect to that discovery dispute.[5] As shown above, the Sanction Order includes numerous findings that are extremely damaging to Appellants' reputation. For the reasons set forth in Appellants' Opening Brief, those findings are factually inaccurate and are based on incorrect applications of the law. Yet, without appellate review, Appellants face the daunting task of attempting to explain this Sanction Order time and time again in future litigation. Just like an attorney who has the right to redress reputational damage through an extraordinary writ, parties should not be forced to forego settlement in order to

[5] To be sure, the District Court issued the Sanction Order, in part, "to deter further misconduct by Centennial." (AA, Vol. VII, Tab 23, at 1345.) If the District Court had been aware of a sanction against Appellants from a prior case, it would have undoubtedly factored that into its analysis and used it as a basis for an even harsher sanction.

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ensure they have the right to appeal a wrongful sanction. Because the Sanction Order presents the risk of collateral damage in future litigation, the Sanction Order is a live controversy and was not mooted by the global settlement. *See Am. Nat. Bank and Trust Co. of Chicago v. Equitable Life Assur. Society of the U.S.*, 406 F.3d 867, 876-77 (7th Cir. 2005) (finding that an appeal was not moot because the party faced adverse consequences from the discovery sanction even though the underlying case was dismissed).

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B. <u>The Appeal of the Sanction Order Includes a Live Controversy of $18,000.00 in Monetary Sanctions.</u>

As described above, the Sanction Order included the District Court's affirmance of $18,000.00 in monetary sanctions against Appellants ($9,000.00 to Doe and $9,000.00 to a non-party). Despite Appellants' payment of $18,000.00 on December 7, 2015, this Court has the authority to order reimbursement of that payment. *Corley v. Rosewood Care Center, Inc.*, 142 F.3d 1041, 1057 (7th Cir. 1998). As stated by the Seventh Circuit:

> We have said that when a party or its counsel are sanctioned in the course of litigation, immediate payment of the sanction is the cost the two must bear for the privilege of continuing to litigate. The propriety of the sanction may then be challenged on appeal once

> there is a final decision in the case, even if that is long after the sanction was paid. Payment of the sanction does not moot the appeal because the appellate court can fashion effective relief to the appellant by ordering that the sum paid in satisfaction of the sanction be returned.

Id. (internal citations omitted). Thus, Appellants' payment of the monetary sanctions did not moot the appeal. *Id.*

Further, the global settlement between the parties did not moot the appeal because it did not preclude Appellants from seeking reimbursement of the monetary sanctions. *See Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1108-09 (9th Cir. 2005) ("Ford therefore has a stake in the outcome of our evaluation of the legality of the monetary sanctions that were made payable to the district court. This issue is not moot."). Specifically, following the execution of the Settlement Agreement and Release, each and every party (including Doe) and the District Court agreed that Appellants shall have the right to appeal the Sanction Order, which included the $18,000.00 in monetary sanctions.[6] As a result, that portion of the Sanction Order remains a live controversy for this Court's appellate review.

[6] Likewise, the Settlement Agreement and Release does not include a release of Appellants' right to seek reimbursement of any portion of the

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IV. CONCLUSION

The appeal is not moot for two reasons. First, the Sanction Order will undoubtedly harm Appellants in future discovery disputes considering the severity of the findings and the relevancy of deterrence under *Young v. Johnny Ribeiro Bldg., Inc.* Second, this Court has the authority to reverse the Sanction Order and direct reimbursement of the $18,000.00 monetary sanction paid to Doe and to a non-party.

DATED this 7th day of September, 2017.

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monetary sanctions, including the $9,000.00 paid to Doe and the $9,000.00 paid to a non-party.

NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby 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:

[x] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[x] Proportionally spaced, has a typeface of 14 points or more, and contains 2,126 words.

3. Finally, 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

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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 this 7th day of September, 2017.

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 7th day of September, 2017, service of the foregoing **APPELLANTS' SUPPLEMENTAL BRIEF** was made by electronic service through Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known addresses:

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