IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGELA DECHAMBEAU and JEAN-PAUL DECHAMBEAU, both Individually and as Special Administrator of the ESTATE OF NEIL DECHAMBEAU Petitioners, vs. THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE and JUDGE PATRICK FLANAGAN Respondents, STEPHEN C. BALKENBUSH, ESQ., and THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER, a Nevada professional Corporation, Real Parties in Interest.	Sup. Ct. Case No. Dist. Ct. Case No. CV12-00571

NRAP 21(a)(6) EMERGENCY PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR STAY OF TRIAL

Pursuant to NRAP 21(a)(6), Petitioners hereby move for an Emergency Writ of Mandamus and a Stay of Trial. Adjudication of this Petition is necessary A.S.A.P. as trial in the matter is scheduled to commence on January 17,

2017. The matter appears to be appropriate for adjudication by the Court of Appeals in accordance with NRAP 17(b)(8).

OVERVIEW

The underlying action involves a claim of malpractice where Petitioner's husband died on the operating table. Twenty days prior to the commencement of trial, the District Court granted Summary Judgment dismissing the action against the Balkenbush Defendants with Prejudice. (A0020). At the time, discovery was complete and the case was ready for trial. (A0037:18-28). Petitioners appealed and this Court reversed, remanding the case to the District Court for trial. (A0021).

After remand, the District Court issued a Scheduling Order on February 1, 2016 which allowed for discovery and expert disclosures to begin anew in contradiction of parties' ~~that~~ agreement in the 16.1 Case Conference Report. (A0027). Taking advantage of this, the Balkenbush Defendants would name a medical expert from Baltimore, Maryland, not previously disclosed. Although Petitioners objected, the District Court allowed its Scheduling Order to stand and the new expert to testify. The Order denying Petitioners objection came twenty-seven days prior to the commencement of trial. (A0154).

AN EMERGENCY WRIT OF MANDAMUS IS APPROPRIATE UNDER THE CIRCUMSTANCES

NRAP 21(a)(6) allows for Emergency Petitions in which the Court shall grant relief in less than 14 days.

NRS 34.170 provides that a Writ of Mandamus "shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law". Even when alternative remedies may be available, a Writ of Mandamus is proper where circumstances reveal urgency, strong necessity or where an important issue of law needs clarification and public policy is served. Business Computer Rentals v. State Treasurer 114 Nev. 63, 67, 953 P.2d 13, 15 (1998).

A Writ of Mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office or to control an abusive, arbitrary or capricious exercise of discretion. State v. Eighth Judicial District Court 116 Nev. 374, 379, 997 P.2d 126, 130 (2000). An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason or one that is contrary to the evidence or established rules of law. Abuse of discretion occurs when the law is misinterpreted, overridden or misapplied. State v. Eighth Judicial District Court 267 P.3d 777, 780 (2011). A lack of substantial evidence to support a discretionary act is an abuse of discretion. City of Henderson v. Henderson Auto Wrecking, Inc. 77 Nev. 118, 122, 359 P.2d 743, 745 (1961). Substantial evidence is that which reasonable minds accept as adequate to support a conclusion. City of Las Vegas v. Donald Laughlin 111 Nev. 557, 558, 893 P.2d 383, 384 (1995).

The mere existence of other possible remedies does not necessarily preclude Mandamus. List v. Douglas County 90 Nev. 272, 277, 524 P.2d 1271, 1274 (1974). The fact that an Appeal is available does not preclude the issuance of a Writ. G. and

M. Properties v. Second Judicial District Court 95 Nev. 301, 304, 594 P.2d 714, 715 (1979). Each case for a Writ must be individually examined. Jeep Corp. v. Second Judicial District Court 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982).

STATEMENT OF THE CASE

On November 15, 2016, Petitioners filed their Motion to Strike with the District Court. (A0031). The Motion would relay the following:

On March 6, 2012, Petitioners filed their Complaint and Demand for Jury. On March 28, 2012, the Balkenbush Defendants filed their Answer. (A0031:23-24).

On April 30, 2012, the District Court entered its Pretrial Order. (A0001). With regard to discovery, the Order states: "A continuance of trial does not extend the deadline for completing discovery. A request for an extension of the discovery deadline, if needed, must be included as part of any motion for continuance." (A0032:1-5).

Pursuant to NRCP 16.1(b), counsel for the parties are required to participate in an early case conference where, among other things, they are to develop a discovery plan and determine when discovery will be completed. The case conference occurred on May 9, 2012. (A0032:6-8).

On May 29, 2012, an Application for Setting was filed, establishing October 14, 2013 as the date set for trial. (A0032:9-11).

On August 17, 2012, the parties filed their Joint Case Conference Report. According to the Report, the parties "agreed" that the final date for "expert

disclosures" would be 120 days prior to trial or June 17, 2013 and that discovery would close 90 days prior to trial or July 16, 2013. (A0032:12-16).

In a paper dated June 14, 2013, the Balkenbush Defendants disclosed a total of five expert witnesses, Fred Marady, M.D., David Smith, M.D., Edward Lemons, Esq., Michael Navratil, Esq., and Peter Durney, Esq. (A0032:17-19).

On July 11, 2013, a Stipulation and Order to Amend Joint Case Conference Report was filed. (A0017). Pursuant to it, the parties agreed that the depositions of experts Richard Teichner, Gerald Gillock and Peter Durney along with the depositions of lay witnesses Doris Stewart and Pastor Dave Smith may go forward beyond the July 16, 2013 "close of discovery" date previously set. (A0032:20-24).

Aside from the July 11, 2013 Stipulation, no other agreements were made to change the discovery dates set forth in the parties' Joint Case Conference Report. (A0032:25-26).

On August 14, 2013, the Balkenbush Defendants filed their Motion for Summary Judgment. (A0032:28).

In a letter to Defendants' counsel dated September 4, 2013, Petitioners' counsel confirmed: "We will object to any experts being called in the trial on behalf of Mr. Stephen Balkenbush or Dr. Smith, other than those designated in your expert witness designation filed June 17, 2013... The discovery cut off has long passed for any discovery depositions of any other medical experts." (A0033:1-6).

On September 3, 2013, Petitioners filed their Opposition to Motion for Summary Judgment and on September 6, 2013, the Balkenbush Defendants filed their Reply. Following oral argument and on September 24, 2013, the District Court granted Defendants' Motion for Summary Judgment. The Court's Order came 20 days before the date set for trial. (A0033:7-12).

Subsequently, Petitioners appealed. On November 24, 2015, the Nevada Supreme Court entered its Order of Reversal and Remand. (A0021). In doing so, the Supreme Court returned the matter "to the district court for proceedings consistent with this order." Nowhere in the Order did it state that discovery was re-opened. A Supreme Court's decision and remand does not alter discovery deadlines. Discovery deadlines "remain in place absent a party's motion to extend deadlines and a subsequent order by the trial court." Douglas v. Burley 134 So.3d 692, 697 (Miss 2012). (A0033:13-21).

In fact, the District Court's 4/30/12 Pretrial Order specifically stated that a "continuance of trial does not extend the deadline for completing discovery" and a request for such extension must be made by Motion. (A0033:22-24).

Although no such Motion was made, the District Court would enter a Scheduling Order on February 2, 2016 that "initial expert disclosures" be made "on or before September 3, 2016" and that all discovery be completed by "December 2, 2016". (A0027). The Court's Scheduling Order clearly contradicts its Pretrial Order. Furthermore, "initial expert disclosures" were made by the Balkenbush

Defendants on June 14, 2013, thirty-two months prior to the Scheduling Order. (A0033:25- A0034:2).

On September 2, 2016, the Balkenbush Defendants submitted a Disclosure identifying six experts, Fred Morady, M.D., David Smith, M.D., Edward Lemons, Esq., Michael Navratil, Esq., Peter Durney, Esq. and, for the first time, Hugh Calkins, M.D. Of significance in terms of added costs and fees from this late addition of this expert is Dr. Calkins resides in Baltimore, Maryland. (A0034:3-8).

In a letter dated September 28, 2016, Petitioners' counsel addressed the Disclosure as follows: "We are taking the position that this case was fully prepared for trial at the time the Motion for Summary Judgment was granted by the trial judge. The only outstanding matter that needed to be completed was the trial deposition of Dr. Morady. On this point, were Dr. Calkin, Bhandari and Doshi disclosed as experts in this case?" (A0034:9-15).

In her letter dated October 18, 2016, Dominique Pollara responded that neither Bhandari nor Doshi have been disclosed as experts but Dr. Calkin is being disclosed as an expert pursuant to the September 2, 2016 Disclosure. (A0034:15-18).

In his letter dated October 27, 2016, Petitioners' counsel Craig Lusiani informed Ms. Pollara as follows:

> You have confirmed to us the intent on disclosing a further expert witness for the very first time in this [September 2, 2016] letter.

> We feel that this attempted disclosure is late for a number of reasons which will be recited below. We intend on filing a Motion to Strike in that regard, accordingly.
>
> Please note the Joint Case Conference Report filed August 17, 2012. Pursuant to that agreement expert disclosures were cut off 120 days prior to trial. The trial date to which this disclosure cut off was relevant eventually became October 14, 2013.
>
> There has been no agreement to extend any discovery since that date and, in fact, you will recall at the Settlement Conference that we attended
> last month that our position was, and continues to be, that there was no further disclosure of experts possible.
>
> There is no reason why a further expert could not have been named previously up to and including as this matter moved towards the October,
> 2013 trial date.
>
> To allow testimony from a newly identified expert at this point, we believe would be an abuse of discretion on behalf of the trial judge. In that regard, we ask you to note the case of Douglas v. Burley, 134 So. 3d 692 (2012).
>
> Please provide us with your position as it relates to this issue by not later than 5 PM on November 1, 2016. As noted above, we shall be filing a Motion to Strike your current attempt at identifying a new expert subsequent to that.
>
> (A0034:19- A0035:13).

In her letter faxed on November 1, 2016, Ms. Pollara failed to cite any further discovery agreement between the parties and failed to dispute the contention that the Balkenbush Defendants could have disclosed Dr. Caulkin as an expert prior to the agreed upon cut-off date of June 17, 2013. In arguing the disclosure of Dr. Caulkin

was indeed proper, Ms. Pollara failed to cite any Rule supporting her position. She failed to cite to any case law controverting Douglas v. Burley. (A0035:14-20).

Douglas is remarkably similar to the case at hand. According to the Opinion, James Burley filed a wrongful death action on June 7, 2004 for the deaths of his daughter and grandchildren resulting from a vehicular accident between his daughter and an employee (Douglas) of Yazoo Valley Electric Power Association (YVEPA). (A0035:21-25).

In response to an interrogatory, Burley identified Ricky Shivers as his expert witness on March 17, 2005. (A0035:26-28).

Subsequently, the trial court entered a Scheduling Order that plaintiff's experts be designated on or before May 30, 2005, defendants' experts be designated on or before June 30, 2005 and that all discovery be completed on or before October 30, 2005. Trial was set for April 3, 2006. (A0036:1-5).

The parties eventually stipulated that discovery be completed on or before December 31, 2005 but all other terms of the Scheduling Order would remain in effect. (A0036:6-7).

Burley would withdraw Shivers as an expert and trial was reset for December 3, 2007. (A0036:8).

YVEPA moved for Summary Judgment and on November 7, 2007, the trial court granted the Motion. Burley appealed. On November 5, 2009, the supreme

court reversed and remanded the case to the trial court '"for further proceedings consistent with [its] opinion."' (A0036:9-12).

On October 8, 2010, Burley filed an expert designation of Alvin Rosenhan. According to the designation, Burley stated he would make Rosenhan available for deposition at an agreeable time and would be responsible for the associated charges of Rosenhan along with those of a court reporter. (A0036:13-17).

In response to the expert designation, YVEPA moved to strike Rosenhan. YVEPA argued that the designation was untimely since it was filed 5½ years after the expert designation deadline and 5 years after the close of discovery. YVEPA further argued the disclosure failed to comply with Rule 26. (A0036:18-22).

At hearing on the Motion to Strike, Burley argued, that on remand, the Scheduling Order had no effect as there was a '"clean slate"'. The trial court noted that neither party had moved to extend the Scheduling Order and queried why, if Rosenhan was so important, Burley did not initially designate him as an expert. (A0036:23-27).

Following hearing, the trial court refused to strike Rosenhan and directed the parties to enter into a new agreed Scheduling Order. YVEPA then filed an Interlocutory Appeal. (A0037:1-2).

On appeal, the supreme court found the trial court abused its discretion in refusing to strike the designation of Rosenhan. In rendering its Opinion, the supreme court stated "the plaintiffs are incorrect that, when this Court remands a

case, it completely starts over as with a 'clean slate.'" "Thus, upon remand, prior orders governing discovery remain in place absent a party's motion to extend deadlines and a subsequent order by the trial court." Since there was no such Motion, the supreme "Court's decision and remand did not alter discovery deadlines". (A0037:3-10).

The Opinion goes on to point out "plaintiffs designated Rosenhan approximately six years after filing the Complaint, five and a half years after the expert-designated deadline, and five years after the close of discovery." Moreover, all discovery was completed at the time of the first Appeal. Under Rule of Civil Procedure 26, a party has a duty to timely supplement its responses respecting expert witness disclosures. Burley failed in this regard. As found, "the plaintiffs presented no evidence of an excusable oversight." (A0037:11-17).

With respect to the case at hand, NRCP 26(e) also provides that a party has a duty to timely supplement its expert witness disclosures. The disclosure of Calkin as an expert comes 54 months after the Complaint was filed, 39 months after the agreed upon deadline for expert disclosures, 38 months after the agreed upon deadline for discovery and 10 months after the Supreme Court's Order of Reversal. (A0037:18-23).

At no time did the Balkenbush Defendants file a Motion to extend the deadline for expert disclosures set forth in the Joint Case Conference Report. When Summary Judgment was granted on September 24, 2013, all discovery was

completed, but for the deposition of Dr. Morady, and the case was ready for trial. (A0037:24-28).

In Jama v. City and County of Denver 304 F.R.D. 289 (D. Colo. 2014), the court granted a Motion to Strike witnesses, finding the supplemental disclosure untimely. As cited therein: "The mandatory disclosures serve several purposes, including eliminating surprise, promoting settlement, and giving the opposing party information about the identification and locations of persons with knowledge so as to assist that party in contacting the individual and determining which witness should be deposed." Id at 295. Rule 26(e) requires that any supplemental disclosures be made timely. "The obligation to supplement arises when the disclosing party reasonable should know that its prior discovery responses are incomplete, e.g. because the party had now obtained information it did not previously have." Id at 299-300. As the court found, "Plaintiffs untimely production poses prejudice to Denver in the form of additional and undue delay in the resolution of this already-aged matter." "As the adage goes, 'time is money.' undue delay necessarily translates to additional attorney's fees, incurred in revising strategies in light of the new disclosures, attorneys re-familiarizing themselves with the proceedings after delays, and even intangible costs relating to maintaining files for an ongoing action." Id at 300-301. (A0038:1-17).

Considering that Dr. Caulkin resides in Baltimore, the costs and fees Petitioners will come to bear will be significantly magnified. (A0038:18-19).

In Santana v. City and County of Denver 488 F.3d 860 (10th 2007), it was held that the magistrate judge did not abuse discretion in excluding witnesses and denying a request to re-open discovery. As cited therein: "It is generally not an abuse of discretion for a court to exclude evidence based upon a failure to timely designate." Id at 867. (A0038:20-24).

NRCP 37(c)(1) provides: "A party that without substantial justification fails to disclose information required by Rule 16.1, 16.2 or 26 (e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." A failure to timely disclose expert testimony is not substantially justified where "the need for such testimony could reasonably have been anticipated." Plumley v. Mockett 836 F.Supp.2d 1053, 1064 (C.D. Cal. 2010). (A0039:1-8).

Citing Rule 37 (c), the court in Miksis v. Howard 106 F.3d 754 (7th 1997) found no abuse of discretion in striking defendant's experts for failing to make timely disclosures. As noted therein, defendants failed to provide their expert disclosures until 60 days after the deadline. Id at 760. (A0039:9-13).

In Marolf v. Aya Aguire 2011 WL 6012203 (D. Neb. Dec. 1, 2011), the plaintiff filed a Motion for Leave to identify an additional expert. The Motion was filed on August 12, 2011, more than four months after the March 25, 2011 deadline for disclosing plaintiff's liability experts. In denying the Motion, it was ruled that

the plaintiff did not make a threshold showing of due diligence. The need or want of an additional expert "could have been anticipated before the March 25, 2011 expert disclosure deadline." Id at *5. Citing to Rule 1, it was noted: "In all cases involving the interpretation and application of the Federal Rules of Civil Procedure, the court must fairly balance the obligations and positions of the parties to promote the 'just, speedy, and inexpensive determination of every action."' Id. at *4 (A0039:14-24).

Certainly, the expert testimony of Dr. Calkin could have reasonably been anticipated when the Balkenbush Defendants disclosed their experts in a paper dated June 14, 2013. (A0039:25-27).

Discovery deadlines are "designed, at least in part, 'to offer a measure of certainty in pretrial proceedings, ensuring that at some point both the parties and the pleadings will be fixed."' Wingates, LLC v. Commonwealth Insurance 21 F.Supp.3d 206, 214 (E.D. Ny. 2014). According to the recitation of the Wingates, LLC case, discovery closed on August 14, 2013. On December 16, 2013, Commonwealth moved for Summary Judgment dismissing the Complaint. In opposing, plaintiffs submitted the Affidavit of Hess in which, at times, he purports to give his expert opinion regarding common insurance claim standards and practices. (A0040:1-8).

On April 24, 2014, Commonwealth moved to strike Hess's Affidavit on the basis plaintiffs failed to disclose him as an expert. (A0040:9-11).

On April 29, 2014, plaintiffs moved to re-open discovery to disclose Hess and Zendler as experts. The Motion was made more than 8 months after the close of discovery and plaintiffs sought no extensions in order to disclose these experts prior to the conclusion of discovery. (A0040:12-14).

The court would deny the Motion to re-open discovery and strike those portions of the Affidavit where Hess proffered expert testimony. As the court cited, "the discovery period should not be extended when a party has had ample opportunity to pursue the evidence during discovery." The court also noted the fact that plaintiffs previously disclosed Hess as a possible lay witness "does not cure their failure to disclose him as an expert". Id at 215-216. (A0040:15-20).

In the case at bar, the exclusion of Calkins as an expert would not hamper the defense of the case since the Balkenbush Defendants have timely designated two other medical experts upon which they can rely. Dr. Calkins' testimony would be merely cumulative. Further, there can be no prejudice to Defendants in excluding Calkins as he could have been disclosed pursuant to the parties' agreement, but was not. (A0040:22-27).

On November 30, 2016, the Balkenbush Defendants filed their Opposition to Motion to Strike. The Opposition essentially argued that the Scheduling Order allowed them to name a previously undisclosed expert. (A0068). On December 6, 2016 Petitioners filed their Reply. (A0147).

On December 21, 2016 the District court entered its Order Denying the Motion to Strike, finding that its Scheduling Order re-opened discovery. (A0154). The ruling was obviously an abuse of discretion pursuant to the holding in Douglas supra.

CONCLUSION

Due to the foregoing, an Emergency Writ vacating the District Court's Scheduling Order and Granting the Motion to Strike is warranted. In Addition, a stay of the trial, currently set for January 17, 2016, is warranted.

AFFIRMATION: The undersigned affirms that neither the Petition for Writ nor its Appendix contain the social security number of any individual.

DATED this 27th day of December 2016.

Submitted by:

/s/ Charles R. Kozak, Esq.
CHARLES R. KOZAK, ESQ.
Nevada Bar Identification No. 11179
KOZAK LUSIANI LAW, LLC.
3100 Mill Street, Suite 115
Reno, Nevada 89502
Phone: 775-322-1239
Fax: 775-800-1767
E-mail: chuck@kozaklusianilaw.com

CERTIFICATE OF SERVICE

Pursuant to NRCP Rule 5(b), I hereby certify I am an employee of Kozak Lusiani Law, LLC and that on December 27th, 2016, I caused to be delivered a true and correct copy of the **NRAP 21(a)(6) EMERGENCY PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR STAY OF TRIAL** and its **APPENDIX** as follows:

By U.S. Mail, facsimile, and e-mail:

Dominique Pollara, Esq.
Pollara Law Group
3600 American River Dr., #160
Sacramento, CA 95864
dp@pollara-law.com
Fax: (916)550-5066

Kim Mandelbaum, Esq.
Mandelbaum Ellerton & McBride
2012 Hamilton Lane
Las Vegas, Nevada 89106
filing@memlaw.net
Fax: (702)367-1978

By hand delivery and e-mail

Chief Judge Honorable Patrick Flanagan
Department 7
c/o Judicial Assistant Kathryn Simms
75 Court Street
Reno, NV 89501
kathryn.sims@washoecourts.us

/s/ Dedra Sonne
Dedra Sonne
Employee of Kozak Lusiani Law, LLC