

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANCH BANKING & TRUST
COMPANY, a North Carolina corporation,

Appellant,

vs.

DOUGLAS D. GERRARD, ESQ.,
individually; and GERRARD & COX, a
Nevada professional corporation, d/b/a
GERRARD COX & LARSEN; JOHN
DOE INDIVIDUALS I-X; and ROE
BUSINESS ENTITIES XI-XX,

Respondents.

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Supreme Court No. 73848

District Court Case No.:
A-16-744561-C

**JOINT APPENDIX
VOLUME V**

Appeal from the Eighth Judicial District Court, Clark County, Nevada
(Honorable Nancy L. Allf Presiding)

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DOCUMENT INDEX

DOC.	FILE/HRG. DATE	DOCUMENT DESCRIPTION	VOL.	BATES NOS.
1	10/05/16	Summons	I	AA0001-0003
2	10/05/16	Summons	I	AA0004-0006
3	10/05/16	Complaint [subsequently amended]	I	AA0007-0035
4	10/18/16	Affidavit of Service on Defendant Douglas D. Gerrard	I	AA0036-0037
5	10/18/16	Affidavit of Service on Defendant Gerrard Cox Larsen	I	AA0038-0039
6	11/21/16	Defendant Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen's Notice of Motion and Motion to Dismiss Complaint; Memorandum of Points and Authorities [subsequently superceded and ultimately never ruled on]	I	AA0040-0070
7	12/02/16	Demand for Jury Trial	I	AA0071-0072
8	12/28/16	Plaintiff's Opposition to Motion to Dismiss; and Alternative Countermotion for Leave to Amend [subsequently superceded]	I	AA0073-0103
9	01/17/17	Reply In Support of Defendants Douglas D. Gerrard, Esq., and Gerrard Cox & Larsen's Motion to Dismiss Complaint And Opposition to Alternative Countermotion for Leave to Amend [subsequently superceded]	I	AA0104-0124
10	01/27/17	Plaintiff's Reply in Support of Alternative Countermotion for Leave to Amend Complaint [subsequently superceded]	I	AA0125-0130
11	02/06/17	Stipulation and Order to Dismiss the Second Cause of Action from the Plaintiff's Complaint	I	AA0131-0134
12	02/07/17	Notice of Entry of Stipulation and Order to Dismiss the Second Cause of Action from the Plaintiff's Complaint	I	AA0135-0140
13	02/07/17	Minutes from February 7, 2017 Hearing entered by Court Clerk	I	AA0141

DOC.	FILE/HRG. DATE	DOCUMENT DESCRIPTION	VOL.	BATES NOS.
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22	03/21/17	Plaintiff's Response and Partial Opposition to Defendants' March 8, 2017 Request for Judicial Notice and Counter-Request for Judicial Notice by Plaintiff	II & III	AA0310-0457 AA0458-0622
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24	04/07/17	Defendants Douglas D. Gerrard, Esq., and Gerrard Cox & Larsen's (1) Reply in Support of Defendants' Request for	III	AA0644-0694

DOC.	FILE/HRG. DATE	DOCUMENT DESCRIPTION	VOL.	BATES NOS.
		Judicial Notice; (2) Response and Partial Objection to Plaintiff's Counter-Request for Judicial Notice; and (3) Request for Judicial Notice on Reply		
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26	04/12/17	Plaintiff's Reply in Support of Alternative Countermotion for Leave to Amend Complaint	IV	AA0718-0783
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28	04/19/17 Hrg.	Transcript: April 19, 2017 Hearing on Motion to Dismiss and other pending filings (File Date – 6/26/17)	IV	AA0785-0804
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24	04/07/17	Defendants Douglas D. Gerrard, Esq., and Gerrard Cox & Larsen's (1) Reply in Support of Defendants' Request for Judicial Notice; (2) Response and Partial Objection to Plaintiff's Counter-Request for Judicial Notice; and (3) Request for Judicial Notice on Reply	III	AA0644-0694
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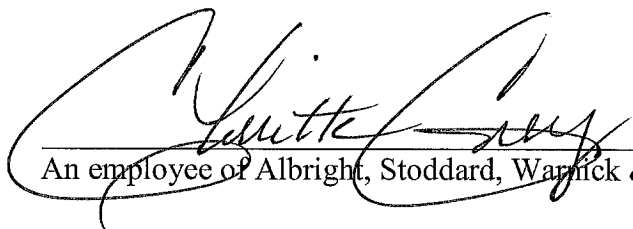
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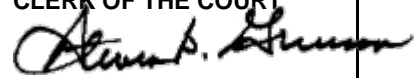
CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on this 14th day of March, 2018, the foregoing **JOINT APPENDIX, VOLUME V**, was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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<input type="checkbox"/>	Certified Mail
<input checked="" type="checkbox"/>	Electronic Filing/Service
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<input type="checkbox"/>	Hand Delivery
<input type="checkbox"/>	Regular Mail


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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a)	Case No.: A-16-744561-C
North Carolina corporation,	)	Dept. No.: 27
)	
Plaintiff,	)	The Honorable Nancy L. Allf
)	
vs.	)	DEFENDANTS DOUGLAS D.
	)	GERRARD AND GERRARD COX
DOUGLAS D. GERRARD, ESQ., individually; and	)	LARSEN'S OPPOSITION TO
GERRARD COX & LARSEN, a Nevada	)	MOTION TO ALTER OR AMEND,
professional corporation, JOHN DOES I-X; and	)	BY VACATING, ORDER OF
ROE BUSINESS ENTITIES XI-XX,	)	DISMISSAL, PURSUANT TO
	)	NRCP 59(e)
Defendant.)	
	)	Date of Hearing: July 19, 2017
	)	Time of Hearing: 9:00 a.m.
)	

Defendants Douglas D. Gerrard, Esq. and Gerrard Cox Larsen (collectively,
"Defendants"), by and through their attorneys, Craig J. Mariam, Esq., Robert S. Larsen, Esq. and
Wing Yan Wong, Esq., of the law firm of Gordon & Rees LLP, and hereby respectfully submit
their Opposition to Plaintiff's Motion to Alter or Amend, by Vacating, Order of Dismissal,
Pursuant to NRCP 59(e).

1 This Opposition is based on the pleadings and papers filed in this action, the attached
2 Memorandum of Points and Authorities, and any oral argument and evidence the Court may
3 allow at the hearing on the Motion.

4 DATED this 22nd day of June, 2017.

5 Respectfully submitted,

6 GORDON & REES, LLP

7 /s/ Craig J. Mariam

8 Craig J. Mariam, Esq.

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10 Robert S. Larsen, Esq.

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17 *Gerrard, Esq. and Gerrard Cox Larsen*

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **I. INTRODUCTION**

20 This Court correctly ruled that the statute of limitations had expired based on Nevada
21 precedents. BB&T's Motion is nothing more than a motion for reconsideration and a *fourth* bite
22 at the apple as to its argument regarding the applicable statute of limitations. This, alone,
23 justifies denial of the Motion because there is nothing new – fact or law – to address. *Dale &*
24 *Shelby Superette & Deli v. United States Dep't of Agric.*, 838 F.Supp. 1346, 1348 (D. Minn. Dec.
25 14, 1993) (Rule 59 “is not intended to routinely give litigants a second bite at the apple, but to
26 afford an opportunity for relief in extraordinary circumstances.”) Plaintiff has already fully
27 briefed this issue and argued verbally twice. There has been no intervening change in the law
28 and no newly discovered evidence. There is no manifest error of law or manifest injustice in this
Court's Decision and Order, filed on May 25, 2017 (“Order”). This Court's Order was strongly
grounded in fact and law.

Consistent with the Nevada Supreme Court's ruling in the seminal case *Semenza v.*
Nevada Med. Liability Ins., 104 Nev. 666, 765 P.2d 184 (1988) (per curiam), this Court correctly

Regardless, of all the potential scenarios under which the remittitur could have been recalled or stayed, the undisputed fact is none of that happened in this case. BB&T never asked the Nevada Supreme Court to stay the issuance of the remittitur. The Nevada Supreme Court never recalled or stayed the issuance of the remitter. The Nevada Supreme Court issued its order of affirmance and the remittitur. The trial court's judgment was "affirmed on appeal" at that time. That triggered the statute of limitations. The petition for writ of certiorari to the U.S. Supreme Court was not an appeal. Denial of the writ petition was not an affirmance of the Nevada Supreme Court's decision. Plaintiff is not entitled to extend the statute of limitations when there was no further *appeal*.

The Court properly reached its Order. Defendants respectfully request the Court to deny Plaintiff's Motion.

This Court has broad discretion to decide a NRCP 59(e) motion. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). However, the courts have routinely warned that this type of reconsideration motion is an extraordinary remedy and should be used sparingly in the interest of finality and conservation of judicial resources.” *Edward H. Bohlin C o. v. Banning Co.*, 6 F.3d 350, 355-60 (5th Cir. 1993); *Penn. Ins. Guar. Ass’n v. Trabosh*, 812 F. Supp. 522, 524 (E.D. Pa. 1992). NRCP 59(e) echoes the federal counterpart in FRCP 59(e); therefore, federal law interpreting the rule is instructive. *AA Primo Builders, LLC*, 126 Nev. at 582, 245 P.3d at 1192-93. This Court may grant this motion to alter or amend a judgment only in the following circumstances: 1) to correct “manifest errors of law or fact”, 2)

1 to account for “newly discovered or previously unavailable evidence”, 3) to prevent manifest
2 injustice”, or 4) to account for a change in controlling law.” *Id.* (citations omitted).

3 ““To be clearly erroneous, a decision must strike [the court] as more than just maybe or
4 probably wrong; it must, strike [the court] as wrong with the force of a five-week-old
5 unrefrigerated dead fish.”” *Southwest Circle Group v. Perini Bldg. Co.*, 2010 U.S. Dist. LEXIS
6 118012, *4 (D. Nev. Nov. 5 2010) (denying motion for reconsideration) (quoting *Parts & Elec.*
7 *Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)). Rule 59 motions ““are
8 not intended merely to relitigate old matters nor are such motions intended to allow the parties to
9 present a case under new theories.”” *Diebitz v. Arreola*, 834 F. Supp. 298, 302 (E.D. Wis. Sept.
10 28, 1993) (quoting *Evans Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 244 (N.D. Ill. 1976)). Rule
11 59 “is not intended to routinely give litigants a second bite at the apple, but to afford an
12 opportunity for relief in extraordinary circumstances.” *Dale & Shelby Superette & Deli v.*
13 *United States Dep’t of Agric.*, 838 F.Supp. 1346, 1348 (D. Minn. Dec. 14, 1993) (Rule 59 motion
14 denied because it properly seeks to introduce new evidence and new arguments).

15 In this case, there is no dispute that there is no newly discovered or previously
16 unavailable evidence and no change in the controlling law. Contrary to Plaintiff’s argument,
17 there is also no “manifest errors of law” or “manifest injustice” to warrant any amendment or
18 vacating this Court’s Order. This Court’s Order is strongly supported by Nevada law. Plaintiff’s
19 Motion should be denied.

20 III. LEGAL ARGUMENTS

21 A. There Is No Clear Error of Law, Manifest Injustice, or New Evidence to 22 Warrant Altering, Amending, or Vacating This Court’s Order.

23 1. It Is Absurd to Argue There Was Any “Manifest Error of the Law” or Any 24 “Manifest Injustice” When This Court’s Order Correctly Followed Nevada Precedent.

25 This Court’s Order was properly and robustly grounded in fact and law and specifically
26 the Nevada Supreme Court precedent in *Semenza v. Nevada Med. Liability Ins.*, 104 Nev. 666,
27 765 P.2d 184 (1988) (per curiam). The Nevada Supreme Court ruled that “a legal malpractice
28 action does not accrue until the plaintiff’s damages are certain and not contingent upon the

outcome of an *appeal*.” *Id.* at 668, 765 P.2d at 186 (emphasis added). The Nevada Supreme Court clearly held, “Therefore, it is only after the underlying case has been *affirmed on appeal* that it is appropriate to assert injury and maintain a legal malpractice cause of action for damages.” *Id.* (emphasis added). This Court’s Order followed the ruling in *Semenza*:

THIS COURT FINDS after view, in Nevada, an action for legal malpractice does not begin to accrue until the “plaintiff’s damages are certain and not contingent upon the outcome of an appeal.” *Semenza v. Nevada Med. Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d 184, 186 (1988). “It is only after the underlying case has been affirmed on appeal that it is appropriate to assert injury and maintain a legal malpractice cause of action for damages.” *Id.*

THE COURT FURTHER FINDS after review that on March 31, 2013, the Nevada Supreme Court affirmed the district court’s ruling in the underlying case, and issued its remittitur. “The reversal and remittitur comprise the judgment by which the parties and the district court are thereafter bound.” *In re Estate & Living Trust of Miller*, 125 Nev. 550, 553, 216 P.3d 239, 242 (2009). The remittitur “terminated the case below as to all issues settled by the judgment” and formally informs the district court of appellate court’s final resolution of the appeal. *Cerminara v. Eighth Judicial Dist. Ct.*, 104 Nev. 663, 665, 765 P.2d 182, 184 (1998); *Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1134 (1998).

...

THE COURT FURTHER FINDS after view that because BBT did not have a right to a writ of certiorari to the United States Supreme Court, and because BBT failed to file a motion to stay the remittitur under NRAP 41(a)(3)(A), the Nevada Supreme Court’s May 31, 2013 decision to affirm the district court’s ruling and its remittitur to the district court, constitutes an final adverse appellate ruling for BBT. Therefore, the statute of limitations was not tolled when BBT filed a petition for a writ of certiorari to the United States Supreme Court. Accordingly, the statute of limitations began to run on or about May 31, 2013, making BBT’s deadline under the statute of limitations for its legal malpractice claim two years later on or about May 31, 2015.

See Order, entered on May 25, 2017. Nothing in this Court’s Order was “clearly erroneous” or “wrong with the force of a five-week old unrefrigerated dead fish.” *Southwest Circle Group v. Perini Bldg. Co.*, 2010 U.S. Dist. LEXIS 118012, *4 (D. Nev. Nov. 5 2010). This Court’s Order closely tracked the language in *Semenza* and reached the correct ruling based upon *Semenza*, other Nevada case precedents, and the Nevada Rules of Appellate Procedures.

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2. Plaintiff Is Barred from Raising the Same Arguments That a Writ Petition Is Somehow an Appeal.

Plaintiff belabored the timeliness of its petition to the U.S. Supreme Court and the effects of such a petition, (Motion at 6:14-7:12), but Plaintiff already raised that point in its Supplemental Brief and must be barred from rehashing the same argument. *See* Plaintiff’s Supplemental Brief filed on April 28, 2017 at 5:5-7; 6:14-11:28. The case law was available at the time of briefing a few months ago. Plaintiff is also barred to the extent it attempts to provide any further analysis that it chose not to include in the prior briefing. *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir.2001) (citations omitted) (“A district court does not abuse its discretion when it disregards legal arguments made for the first time on a motion to amend [judgment].”).

In any event, Plaintiff’s argument misses the point because a writ of certiorari is not an appeal. Even if the petition for a writ of certiorari was timely under U.S. Supreme Court Rule 13, that does not change the fact that the review is discretionary and is not considered an “appeal.” Sup. Ct. R. 10 (a writ of certiorari is a matter of judicial discretion, not a matter of right). Furthermore, in *Semenza*, the Nevada Supreme Court did *not* rule that damages accrued only upon exhaustion of all possible reviews. Instead, the court carefully stated that the statute of limitations commences when the judgment is “affirmed on appeal.” *Semenza*, 104 Nev. at 668, 765 P.2d at 186.

The Nevada Supreme Court understood the differences between an appeal and a writ petition. The *Semenza* decision was issued on December 9, 1988. Just months earlier, on September 21, 1988, the Nevada Supreme Court ruled that a writ for habeas corpus is “not an appeal.” *Sheriff, Humboldt County, Nev. v. Gleave*, 104 Nev. 496, 498, 761 P.2d 416, 418 (1988). In that case, the County of Humboldt argued that a writ petition challenging the finding of probable cause was “akin to an appeal from the finding of probable cause.” *Id.* The Nevada Supreme Court specifically explained, “Habeas corpus is an independent proceeding and, as such, is not an appeal from the justice’s court’s probable cause determination.” *Id.* This is consistent with Nevada’s long history of jurisprudence recognizing that writ petitions are not

1 appeals. *See Jarstad v. Nat'l Farm. U. Prop. & Cas. Co.*, 552 P.2d 49 (1976) (an order quashing
2 service of process is not appealable, but the court would review the "appeal" as a petition for
3 mandamus); *Monroe v. Columbia Sunrise Hosp.*, 123 Nev. 96, 102, 158 P.3d 1008, 1012 (2007)
4 (petition for writ of mandamus is not an appeal).

5 Even Nevada's own Rules of Appellate Procedures recognize the distinctions between an
6 appeal and a writ. *E.g.*, NRAP 8(c) (the appellate courts generally consider the following when
7 deciding whether to issue a stay or injunction: (1) "whether the object of the appeal *or* writ
8 petition will be defeated if the stay or injunction is denied." (emphasis added)); NRAP 17(a)
9 (The Supreme Court shall hear and decide the following: "(2) All direct applies, postconviction
10 appeals, *and* writ petitions in death penalty cases." (emphasis added)). The U.S. Supreme Court
11 itself distinguishes a writ proceeding from an appeal. U.S. Supreme Court Rules 10 to 16
12 address the court's "Jurisdiction on Writ of Certiorari" while Rule 18 addresses "Appeal from a
13 United States Supreme Court." The U.S. Supreme Court time and again cautioned that denial of
14 a petition for writ of certiorari is not an affirmance of the lower court's decision. *See United*
15 *States v. Carver*, 260 U.S. 482, 490 (1923) ("The denial of a writ of certiorari imports no
16 expression of opinion upon the merits of the case[.]") The granting or denial of petitions for writ
17 of certiorari is not a reflection of the Court's positions on the merits of the issues presented.
18 *Hamilton-Brown Shoe Co. v. Wolf Bros & Co.*, 240 U.S. 251, 258, 36 S. Ct. 269, 271 (1916) ("It
19 is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in
20 no case equivalent to an affirmance of the decree that is sought to be reviewed.").

21 It is not error or unjust for this Court to follow the Nevada Supreme Court's precedent.
22 This Court's Order closely followed the Nevada Supreme Court's precedent. Plaintiff's damages
23 became certain once "the underlying case has been affirmed on appeal." *Semenza*, 104 Nev. at
24 668, 765 P.2d at 186. After the Underlying Action involving Plaintiff was affirmed by the
25 Nevada Supreme Court, Plaintiff did not request for stay of the issuance of the remittitur
26 pursuant to NRAP 41(a)(3)(A). The remittitur "terminated the case below as to all issues settled
27 by the judgment." *Cerminara v. Eighth Jud. Dist. Ct.*, 104 Nev. 663, 665, 765 P.2d 182, 184
28

(1988). Plaintiff had two years from the time of affirmance to file this action but failed to do so. Plaintiff's claim is now time-barred. This Court reached the correct decision in its Order.

3. The Definitions of "Final Judgment" Plaintiff Offered Are Not the *Semenza* Standard.

Plaintiff's focus on "final" judgment strayed from the holding in *Semenza*. According to *Semenza*, "it is only after the underlying case has been ***affirmed on appeal*** that it is appropriate to assert injury and maintain a legal malpractice cause of action for damages." *Semenza*, 104 Nev. at 668, 765 P.2d at 186. That is the definition of a "final judgment" that the *Semenza* Court adopted. The trial court's judgment was "affirmed on appeal" once the Nevada Supreme Court issued an order of affirmance and the remittitur. The Nevada Supreme Court did not leave open the definition of a "final judgment" in the context of statute of limitations of a malpractice claim.

In any event, the legal authorities cited by Plaintiff are not persuasive because they relate to criminal cases and federal jurisprudence. *United States of America v. Thomas*, 203 F.3d 350 (5th Cir. 2000) dealt with 28 U.S.C. § 2255, which addresses ***federal*** post-conviction habeas corpus relief. § 2255(f)(1) mandates that the habeas motion must be filed within one year from "the date on which the judgment of conviction becomes final." The Fifth Circuit in *Thomas* evaluated when the judgment became "final" for purposes of this statute. The Fifth Circuit ultimately ruled a conviction was final upon exhaustion of all post-conviction reviews. *Id.* (citing *Gendron v. United States*, 154 F.3d 672, 674 (7th Cir. 1999)). However, Nevada has a similar post-conviction relief statute, but the time for filing such motion begins from the time the Nevada appellate court issues its ***remittitur***:

NRS 34.726 Limitations on time to file; stay of sentence.

1. Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution issues its ***remittitur***.

(emphasis added). Nevada's own post-conviction relief statute does not follow the Fifth Circuit's approach in *Thomas*. Instead, Nevada's post-conviction relief becomes available upon the issuance of the ***remittitur***, not the exhaustion of discretionary reviews.

1 *Nika v. State of Nevada* is also not persuasive. 124 Nev. 1272, 198 P.3d 839 (2008).
2 *Nika* dealt with the question of retroactivity, whether an intervening change of criminal law
3 applied to pending criminal cases. *Id.* at 1276, 198 P.3d at 842. The Nevada Supreme Court in
4 *Nika* was drawing from the U.S. Supreme Court’s guidance, addressing the federal constitutional
5 due process implications stemming from the application of newly declared constitutional rule to
6 pending criminal cases. *Id.* at 1287, 198 P.3d at 850. The federal due process considerations are
7 not the same as Nevada’s own statute of limitations on a state law claim, and Plaintiff failed to
8 provide any support that they are the same.

9 In fact, Nevada also has case law defining a civil judgment as “final” upon issuance of
10 the remittitur. *In In re Estate of Miller*, the Nevada Supreme Court clarified:

11 We conclude that the word “judgment” in this context connotes a ***final judgment***.
12 The trial and appellate stages are naturally related, and if an appeal is taken, the
13 final outcome may change depending on the outcome on appeal. When this court
14 reverses a judgment on a jury verdict for insufficient evidence and declares the
 appellant entitled to judgment as a matter of law, the reversal and ***remittitur***
 comprise the judgment by which the parties and the district court are thereafter
 bound.

15 125 Nev. 550, 216 P.3d 239, 242 (2009) (emphasis added).

16 “Final judgment” may carry different meanings in different contexts, but that term’s
17 meanings in other contexts do not change *Semenza*’s ruling—once a judgment is “affirmed on
18 appeal,” the statute of limitations begins. 104 Nev. at 668, 765 P.2d at 186. This Court is
19 correct, the statute of limitations on Plaintiff’s claim expired two years after the Nevada Supreme
20 Court’s affirmance, or by May 31, 2015. There is no basis to vacate this Court’s Order.

21 4. There Is No New Evidence to Warrant Vacating This Court’s Order.

22 Since Defendants brought a motion to dismiss under NRCP 12(b)(5), Plaintiff’s
23 explanation regarding why it did not seek to stay the remittitur is outside the four-square of the
24 pleadings and should not be considered. *See* Motion at p.5, fn. 2; *Baxter v. Dignity Health*, 131
25 Nev. Adv. Op. 76, p.6, 357 P.3d 927, 930 (2015) (when evaluating a motion to dismiss, the court
26 may look outside the complaint under very limited circumstances). Furthermore, this is not “new
27 evidence” that Plaintiff did not have in its possession at the time of the briefing on Defendants’
28

1 Motion to Dismiss a few months ago. Even if the Court considers this explanation, Plaintiff still
2 cannot explain away the fact that it did not seek to stay the issuance of the remittitur.

3 The stay of the remittitur is not a tool to stay execution of a judgment even though the
4 courts have the power to stay execution of a judgment pending an appeal. *Gladys Baker Olsen*
5 *Fam Trust v. Olsen*, 109 Nev. 838, fn. 2, 858 P.2d 385 (1993) (ordering stay until the remittitur
6 in the appeal issues). Plaintiff explained that in the Underlying Action, the prevailing party had
7 filed bankruptcy, which stayed the foreclosure of the property and any distribution of the
8 proceeds from the sale. *See* Motion at p.5, fn. 2. However, as this Court recognized in its Order,
9 the remittitur has specific jurisdictional functions. *See* Order at 3:16-24.

10 Once the Nevada Supreme Court issued its remittitur, the remittitur “terminated the case
11 below as to all issues settled by the judgment.” *Cerminara v. Eighth Jud. Dist. Ct.*, 104 Nev.
12 663, 665, 765 P.2d 182, 184 (1988) (“Upon receipt of this court's remittitur, it was the duty of
13 the district court to comply with the mandate of this court without variation”). A remittitur is
14 “[a] certified copy of the judgment and opinion of the court.” NRAP 41(a)(2). “The purpose of
15 a remittitur, aside from returning the record on appeal to the district court, is twofold: it divests
16 this court of jurisdiction over the appeal and returns jurisdiction to the district court, and it
17 formally informs the district court of this court’s final resolution of the appeal.” *Dickerson v.*
18 *State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1134 (1998); *see In re Estate of Miller*, 125 Nev.
19 550, 216 P.3d 239, 242 (2009) (the offer of judgment rule “connotes a final judgment,” which is
20 satisfied by the reversal and remittitur by the Nevada Supreme Court).

21 The remittitur therefore signals the completion of the appeal to the Nevada Supreme
22 Court. Plaintiff had at its disposal the ability to request the Nevada Supreme Court to stay the
23 issuance of the remittitur pending a petition for rehearing or *en banc* reconsideration as well as /

24 **(1) Petition for Rehearing or En Banc Reconsideration.** The timely filing of a petition for
25 rehearing or en banc reconsideration stays the remittitur until disposition of the petition, unless the
26 court orders otherwise. If the petition is denied, the remittitur shall issue 25 days after entry of the
27 order denying the petition, unless the time is shortened or enlarged by order.

28 **(2) Petition for Review by Supreme Court.** The timely filing of a petition for review by the
Supreme Court of a Court of Appeals’ decision shall stay the issuance of the remittitur of the
Court of Appeals. Upon the issuance of an order denying a petition for review, the clerk of the
Supreme Court shall issue the remittitur.

1 **(3) Application for Certiorari to the United States Supreme Court.**

2 (A) A party may file a motion to stay the remittitur pending application to the
3 Supreme Court of the United States for a writ of certiorari. The motion must be
4 served on all parties.

5 (B) The stay shall not exceed 120 days, unless the period is extended for cause
6 shown. If during the period of the stay there is filed with the clerk of the
7 Supreme Court of Nevada a notice from the clerk of the Supreme Court of the
8 United States that the party who has obtained the stay has filed a petition for the
9 writ in that court, the stay shall continue until final disposition by the Supreme
10 Court of the United States.

11 (C) The court may require a bond or other security as a condition to granting or
12 continuing a stay of the remittitur.

13 (D) The clerk of the Supreme Court shall issue the remittitur immediately when
14 a copy of a United States Supreme Court order denying the petition for writ of
15 certiorari is filed.

16 NRAP 41(b) clearly delineates how Plaintiff could have requested for a stay of the issuance of
17 the remittitur and the duration of the stay. The issuance of the remittitur could have been stayed
18 pending the petition for rehearing, the petition for *en banc* reconsideration, **and** the petition for
19 writ of certiorari to the U.S. Supreme Court. Plaintiff chose to forego all these options,
20 permitting the Nevada's Supreme Court's order of affirmance to stand and remittitur to issue.

21 The appeal was complete when the Nevada Supreme Court affirmed the trial court's
22 judgment and issued the remittitur. There is no new evidence. The petition for writ of certiorari
23 did not change the ruling in *Semenza* that damages accrued upon affirmance on **appeal**. 104
24 Nev. at 668, 765 P.2d at 186. This Court's Order was correct and consistent with Nevada law.
25 Plaintiff's Motion should be denied.

26 5. This Court Is Not Required to Render an Advisory Opinion on What
27 Might Be Possible If the Remittitur Had Been Recalled.

28 This Court is not required to render any advisory opinion. *Herbst Gaming, Inc. v. Sec'y*
of State, 122 Nev. 877, 141 P.3d 1224, 1233 (2006) (district court's "attempt to apply the
measure to a hypothetical set of facts" was "an improper advisory opinion") (citing Nev. Const.
art. 6, § 6; *Lamb v. Doe*, 92 Nev. 550, 551, 554 P.2d 732, 733 (1976); *City of No. Las Vegas v.*
Cluff, 85 Nev. 200, 201, 452 P.2d 461, 462 (1969)); *Nat'l Collegiate Athletic Ass'n v. Univ. of*
Nev., 624 P.2d 10, 10 (1981) ("the duty of every judicial tribunal is to decide actual controversies
by a judgment which can be carried into effect, and not to give opinions upon moot questions or

1 abstract propositions, or to declare principles of law which cannot affect the matter in issue
2 before it.”).

3 Much of Plaintiff’s Motion asks the Court to consider all sorts of hypotheticals; but Court
4 does not need not make those determinations because the remittitur was not stayed or recalled in
5 the Underlying Action. Plaintiff questioned “what date the Court would have indicated the
6 statute of limitations began to expire had the remittitur been stayed.” Motion at p.3, fn. 1.
7 Plaintiff believed that this Court somehow should have considered “what would have happened
8 if the U.S. Supreme Court had granted the Petition for Writ of Certiorari.” Motion at 6:4-5.
9 ***What if*** the remittitur had been recalled by the Nevada Supreme Court? Motion at 8:10-10:11.
10 Plaintiff would have this Court consider all types of hypothetical scenarios that simply did not
11 happen. These are not the actual “facts” before the Court. Plaintiff’s reliance on many of the
12 cases cited in its Motion is misplaced because none of the circumstances of those cases occurred
13 in this case.

14 In *Bass-Davis v. Davis*, the Nevada Supreme Court recalled the remittitur only after the
15 respondent “petitioned this court for *en banc* reconsideration of the panel’s decision” and the
16 court wished to resolve the issues presented therein. 133 P.3d 251, 251 (Nev. 2005). In the
17 Underlying Action, Plaintiff did not request a recall of the remittitur and no circumstances
18 prompted the Nevada Supreme Court to recall the remittitur on its own accord.

19 In *City of Long Beach v. Bozek*, the U.S. Supreme Court granted a petition for writ of
20 certiorari and vacated the Supreme Court of California’s judgment. 33 Cal. 3d 727, 727, 661
21 P.2d 1072, 1072 (1983). While the judgment was vacated as of January 10, 1983, the California
22 Supreme Court recalled the remittitur on April 25, 1983, reexamined its prior decision, and
23 affirmed the same on April 25, 1983. *Id.* at 727-28, 661 P.2d 1072 (“Pursuant to [the U.S.
24 Supreme Court’s mandate,] the remittitur is recalled.... Because we deem it unnecessary to
25 modify our prior opinion, we reiterate that opinion in its entirety.... Let the remittitur issue
26 forthwith.”). The remittitur appeared to have been recalled and re-issued on the same day. *Id.*
27 In the Underlying Action, the U.S. Supreme Court did not grant the petition for writ of certiorari,
28 and the Nevada Supreme Court did not recall its own remittitur.

1 In *Gradsy v. United States*, the issuance of the mandate was stayed while the appellants
2 petitioned the U.S. Supreme Court. 376 F.2d 993 (5th Cir. 1967). The Fifth Circuit recalled the
3 mandate for the non-petitioning defendants because of “the unusual circumstances of this case,
4 [including] the government’s expression of non-opposition, and [the court’s] desire to avoid
5 further protracted litigation by appellants not presently participating in this remand action. *Id.* at
6 995. The Fifth Circuit was careful to note, however, “Usually the issuance of a mandate by this
7 court means that the litigation has come to an end.” *Id.* (citing *Hines v. Royal Indemnity Co.*,
8 253 F.2d 111 (6th Cir. 1958)). Unlike *Gradsy*, the remittitur was not stayed pending Plaintiff’s
9 petition to the U.S. Supreme Court in the Underlying Action. The Nevada Supreme Court also
10 did not find any “unusual circumstances” to recall of the remittitur on its own accord.

11 Here, there is no dispute that the remittitur was never recalled by the Nevada Supreme
12 Court in the Underlying Action. It was never stayed by the Nevada Supreme Court. This Court
13 properly took these factors into consideration to reach its well-informed conclusion that the
14 statute of limitations had expired. BB&T had the opportunity to request for stay of the remittitur,
15 but it never did that before filing the petition for writ of certiorari or even when the petition for
16 writ of certiorari was pending. There is no reason for this Court to consider all these
17 hypothetical scenarios when Plaintiff simply did not request the Nevada Supreme Court to stay
18 or recall the issuance of the remittitur.

19 Defendants do not dispute that had the U.S. Supreme Court reversed the state court
20 judgment, or if the Nevada Supreme Court had recalled the remittitur, the analysis before the
21 Court today could potentially be different. But these are not the facts before the Court. In the
22 Underlying Action, the Nevada Supreme Court affirmed the trial court’s judgment. Plaintiff did
23 not request for stay of the issuance of the remittitur. The remittitur was never recalled.
24 Plaintiff’s argument effectively renders the Nevada Supreme Court’s affirmance and remittitur
25 entirely meaningless until sanctioned by the U.S. Supreme Court, *i.e.*, when the writ petition is
26 denied or when the time for filing such petition expires. This position has no legal basis. Denial
27 of the petition for writ of certiorari to the U.S. Supreme Court is **not** an affirmance of the
28 judgment on the merits. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918, 70 S. Ct. 252,

255 (1950) (“[S]uch a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review.”). Filing or denial of the writ petition had *no effect* on the Nevada Supreme Court’s affirmance of the trial court’s judgment. Under the facts of this case, delaying the commencement of the statute of limitations erroneously equates the denial of the writ petition with an affirmance of the underlying decision, which is wrong.

This Court correctly concluded that the statute of limitations began when the Nevada Supreme Court affirmed the trial court’s judgment and issued the remittitur. Plaintiff’s reconsideration motion should be denied.

IV. CONCLUSION

This Court’s Order finding the statute of limitations had expired is rooted in long standing Nevada precedents and the Rules of Civil and Appellate Procedures. There is no “manifest” error of the law or injustice. There certainly has not been any intervening change in the law or newly discovered evidence. Plaintiff’s Motion is nothing more than its third attempt to convince this Court on an issue that Plaintiff has two prior opportunities to address. Many of the arguments in the Motion were in Plaintiff’s Supplemental Briefing and Opposition to Defendant’s motion to dismiss. Defendants respectfully requests that the Court deny Plaintiff’s Motion to Alter or Amend, by Vacating, Order of Dismissal.

DATED this 22nd day of June, 2017.

Respectfully submitted,

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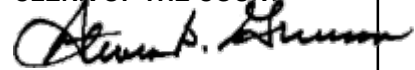
*Attorneys for Defendants Douglas D.
Gerrard, Esq. and Gerrard Cox Larsen*

CERTIFICATE OF SERVICE

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I hereby certify under penalty of perjury that I am an employee of GORDON & REES LLP, and that on the 22nd day of June, 2017, the foregoing **DEFENDANTS DOUGLAS D. GERRARD AND GERRARD COX LARSEN'S OPPOSITION TO MOTION TO ALTER OR AMEND, BY VACATING, ORDER OF DISMISSAL, PURSUANT TO NRCP 59(e)** was served upon those persons designated by the parties in the E-Service Master List in the Eighth Judicial District court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-1 and the Nevada Electronic Filing and Conversion Rules, upon the following:

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DISTRICT COURT
CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY,
a North Carolina corporation,

Plaintiff,

vs.

DOUGLAS D. GERRARD, ESQ., individually;
and GERRARD & COX, a Nevada professional
corporation, d/b/a GERRARD COX &
LARSEN; JOHN DOE INDIVIDUALS I-X;
and ROE BUSINESS ENTITIES XI-XX,

Defendants.

CASE NO.: A-16-744561-C
DEPT. NO.: XXVII

**REPLY POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO ALTER OR
AMEND, BY VACATING, ORDER OF
DISMISSAL, PURSUANT TO NRCP 59(e)**

DATE OF HEARING: July 19, 2017
TIME OF HEARING: 9:00 a.m.

COMES NOW, Plaintiff, BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, qualified and registered to do business in Nevada (hereinafter "Plaintiff" or "BB&T"), by and through its attorneys of record, ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and, in response to Defendants' June 22, 2017 Opposition, hereby files these Reply Points and Authorities in Support of its June 5, 2017 NRCP 59(e) Motion for this Court to Alter or Amend, by Vacating, its Decision and Order Granting Defendants Motion to Dismiss First Amended Complaint, entered on May 25, 2017.

REPLY POINTS AND AUTHORITIES

I.

INTRODUCTION

This Court has granted a motion to dismiss the instant litigation-malpractice lawsuit, as filed too late under Nevada's statute of limitations for such a suit. This dismissal was entered (i) despite the timely filing of a petition for writ of certiorari with the U.S. Supreme Court after the full adjudication of all Nevada State court appeals and rehearing petitions in the underlying litigation; and (ii) despite this suit having been filed within two years of denial of that certiorari petition; and (iii) despite the rule in Nevada, as set forth in *Semenza v. Nevada Med. Liability Ins. Co.*, 104 Nev. 666, 668, 765 P.2d 184, 186 (1988), that "a legal malpractice action does not accrue" for purposes of the statute of limitations beginning to run, "until the Plaintiff's damages are certain and not contingent upon the outcome of an appeal."

This Court's Order of Dismissal treated the issuance of a remittitur by the Nevada Supreme Court, following the denial of the final State appeal rehearing petition, and before the timely filing of the petition to the U.S. Supreme Court for writ of certiorari, as a dispositive event, with claim accrual no longer delayed, based upon said remittitur being issued. Essentially, this Court's Order thus treated the issuance of the remittitur (and the Plaintiff's failure to move to stay the issuance thereof) as having rendered the "Plaintiff's damages . . . certain" and no longer "contingent" on the outcome of an appeal, for purposes of applying the *Semenza* rule, notwithstanding that the petition to the U.S. Supreme court did in fact render the Plaintiff's damages uncertain and contingent (on whether the U.S. Supreme Court granted that petition and then reversed the outcome in Nevada), until it was denied.

The Plaintiff's Motion to Alter or Amend argued and demonstrated to this Court, that the issuance of a remittitur does not in fact render a Plaintiff's damages "certain" or no longer "contingent" where a timely writ petition is filed, because the U.S. Supreme Court can still grant certiorari, and can still reverse a lower State Court determination, regardless of whether or not a remittitur has issued, and the Nevada Supreme Court can readily recall a remittitur, including in order to accommodate that process. Thus, the issuance of such a remittitur is a fairly benign and relatively insignificant event, as it has no effect upon the more important event: a timely filed petition for writ

1 of certiorari to the U.S. Supreme Court, which timely filing renders the outcome in Nevada uncertain
2 and contingent, until said petition is ruled upon.

3 For obvious reasons, Defendants' Opposition to the Plaintiff's Motion to alter or amend, by
4 vacating, this Court's Order of dismissal, spends very little time addressing these chief points of the
5 Motion, as to the U.S. Supreme Court's treatment of a remittitur as a completely irrelevant event, and
6 as to the relative ease with which a remittitur may be recalled. Instead, the Opposition, reduced to its
7 essence and combining all redundant or similar arguments together, primarily focuses on the following
8 four assertions:

9 (a) that the standards for granting an NRCP 59(e) motion to alter or amend are extraordinarily
10 high, and have not been met (Opposition pp. 2-6; 9-10; 14);

11 (b) that a petition for writ of certiorari is not "an appeal" including for purposes of the
12 following rule from the Nevada Supreme Court's decision in *Semenza v. Nevada Med. Liability Ins.*
13 *Co.*, 104 Nev. 666, 668, 765 P.2d 184, 186 (1988): "a legal malpractice action does not accrue until
14 the Plaintiff's damages are certain and not contingent upon the outcome of an appeal" (Opposition at
15 pp. 6-7);

16 (c) that the remittitur should be treated as having a finalizing effect rendering the Judgment
17 final (Opposition at pp. 7-9); and

18 (d) finally, that the Plaintiff's Motion deals in hypotheticals and improperly seeks an advisory
19 opinion herein (Opposition at pp. 11-14).

20 Each of these assertions is inaccurate, or misses the actual point of the *Semenza* rule, and each
21 is addressed, in turn, below.

22 II.

23 LEGAL ANALYSIS

24 **A. The Standard of Review Required of an NRCP 59(e) Motion Has Been Met.**

25 The Nevada Supreme Court has recognized that NRCP 59(e) "covers a broad range of motions"
26 (*AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 581, 245 P.3d 1190, 1192-1193 (2010))
27 including "a motion to vacate a judgment rather than merely amend it." (*Id.*) And, contrary to
28 Defendants' assertion that only a decision as wrong as five-week-old dead fish may properly be

1 reviewed under NRCP 59(e), the discretion afforded to this Court to review such a motion is
2 remarkably high. Indeed, so great is that discretion that an order granting an NRCP 59(e) Motion is
3 not even appealable. *TRP Int'l Inc. v. Proimtu MMI, LLC*, 391 P.3d 763 (Nev. April 6, 2017).
4 Likewise, even an Order *denying* such a motion is not “separately appealable as a special order after
5 judgment” but is instead reviewable only “for abuse of discretion on appeal from the underlying
6 judgment.” *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010).

7 In Nevada, a district court does not abuse its discretion in entering a new order on a previously
8 decided matter, even though “the facts and the law [are] unchanged” if the Judge is simply “more
9 familiar with the case” and is “persuaded by the rationale” of subsequent arguments. *Harvey's Wagon*
10 *Wheel, Inc. v. MacSween*, 96 Nev. 215, 218, 606 P.2d 1095, 1097 (1980). A Rule 59(e) Motion may
11 be granted on any “legal basis” this Court determines to be sufficiently “compelling” to avoid a
12 “manifest injustice.” *AA Primo* 125 Nev. at 582, 245 P.3d at 1193. Given the nature of the legal
13 issues raised in the granted Motion to Dismiss, it is well within this Court’s discretion to ensure that
14 it has fully considered all available legal arguments about its own Order before upholding a ruling
15 completely dismissing the lengthy, serious, and substantive allegations set forth in the initial and
16 amended pleading initiating this matter.

17 Moreover, a compelling legal argument under NRCP 59 has in fact been made, which would
18 in fact meet even the high standard of review suggested in the Opposition. This Court’s decision and
19 order essentially treated the remittitur as an event which rendered the Plaintiff’s damages, from its
20 prior lawyers’ claimed malpractice, as “certain” and no longer “contingent” on the outcome of any
21 appeal, under Nevada’s *Semenza* rule.

22 The Motion points out that a remittitur has no such actual effect, and this constitutes a
23 compelling legal basis for this Court to therefore rethink and vacate its Order, to overcome a manifest
24 injustice. The Motion to Alter or Amend correctly gives this Court the opportunity to review whether
25 its treatment of the importance of a remittitur (or of the failure to seek a stay of remittitur) was
26 warranted, in light of the actual jurisprudence relating to the issuance of an unstayed remittitur or
27 mandate, followed by a petition for writ of certiorari before the U.S. Supreme Court. That actual
28 practice demonstrates that, where a timely petition for writ of certiorari is filed, the Plaintiff’s damages

1 are not "certain" but remain "contingent" upon the outcome of such a petition, and the issuance of a
2 remittitur has no real bearing on that fact.

3 The relevant question currently before this Court on the pending Motion, and under *Semenza*,
4 is whether, on the date the remittitur issued in this case, Plaintiff's damages suddenly became "certain"
5 and no longer "contingent"; or, whether, instead, based on the timely filing of a petition for writ of
6 certiorari, said damages were in fact "contingent" and no longer "certain" until a ruling issued on that
7 petition. In order to answer that question, this Court must address what would have happened if, after
8 the issuance of a remittitur, the U.S. Supreme Court *had* granted the Petition for Writ of Certiorari,
9 and had then reversed the Nevada Supreme Court's decision. As outlined in the Plaintiff's NRCP
10 59(e) Motion, such an event would have required the Nevada Supreme Court to recognize the U.S.
11 Supreme Court's decision, and the earlier issuance of a remittitur would not have allowed or required
12 otherwise. Rather, upon a U.S. Supreme Court decision reversing the Nevada Supreme Court, the
13 remittitur would simply have been recalled, demonstrating its relevant insignificance, in that its
14 issuance did not render anything "certain" or no longer "contingent" under the *Semenza* rule.

15 For example, in *City of Long Beach v. Bozek*, 661 P.2d 1072, 1073 (Cal. 1983), "[o]n January
16 10, 1983, the Supreme Court of the United States granted a petition for writ of certiorari [indicating
17 that] 'The judgment is vacated and the case is remanded to the Supreme Court of California to consider
18 whether its judgment is based upon federal or state constitutional grounds, or both.' (459 U.S. 1095,
19 103 S.Ct. 712, 74 L.Ed.2d 943.)." Based on that event, the California Supreme Court issued a new
20 ruling which, first and foremost, indicated that "[p]ursuant to" the U.S. Supreme Court's ruling, the
21 California Supreme Court's earlier "remittitur is recalled."

22 Thus, there is nothing legally magical about the issuance of a remittitur which forecloses any
23 further uncertainty or contingency in a case, if, thereafter, a timely petition for writ of certiorari is filed.
24 Regardless of whether a remittitur has issued or not, such a filing means that uncertainty exists until
25 that petition is rejected, as the ultimate outcome, during that interim period, has become contingent
26 on the ultimate response to that petition by the U.S. Supreme Court. In other words, once the Petition
27 for Writ of Certiorari was filed in the underlying case at issue herein, the possibility existed that the
28 judgment which caused the Plaintiff's malpractice damages could still be reversed, such that said

1 damages were not “certain” but were instead “contingent” on the outcome of that petition. The key
2 event for determining whether such an accrual-delaying contingency was in place, was not the issuance
3 of an unstayed (but readily recallable) remittitur, but, instead, the timely filing of the petition for writ
4 of certiorari.

5 These points (which have not been overcome by the Opposition), present a more than adequate,
6 “compelling legal” basis under NRCP 59(e) for this Court to vacate its Order of dismissal.

7 **B. There Exists No Basis to Treat a Petition for Writ of Certiorari as Anything Other than**
8 **the Equivalent of “an appeal” for Purposes of Applying the *Semenza* Rule.**

9 Defendants insist that a petition seeking a writ of certiorari from the U.S. Supreme Court is not
10 an “appeal” for purposes of the rule announced in *Semenza v. Nevada Med. Liability Ins Co.*, 104 Nev.
11 666, 668, 765 P.2d 184, 186 (1988) that “a legal malpractice action does not accrue until the Plaintiff’s
12 damages **are certain** and **not contingent** upon the outcome of **an appeal**.” [Emphasis added.]
13 Nothing in the *Semenza* decision, or in any other authorities cited by Defendants, however, supports
14 any such narrow reading of the term “appeal,” as used in the *Semenza* rule, to exclude a petition for
15 writ of certiorari from its scope. This is especially true where, as here, the word “appeal” must be read
16 and treated in a manner which allows for the rational application of the *Semenza* rule, examining
17 whether any uncertainty or contingency exists due to any such pending “appeal.”

18 Black’s Law Dictionary has defined an “Appeal” as simply:

19 **Resort** to a superior . . . court to review the decision of an inferior . . . court or
20 administrative agency. A **complaint** to a higher tribunal of an error or injustice
21 committed by a lower tribunal, in which the error or injustice is sought to be corrected
22 or reversed. . . . Also, **an appeal may be** as of right (e.g. from trial court to
23 intermediate appellate court) **or** only at the discretion of the appellate court (e.g. by
24 writ of certiorari to U.S. Supreme Court).

25 *Black’s Law Dictionary*, p. 96 (West 6th ed. 1990) [emphasis added].

26 Thus, the meaning of “an appeal” includes any “resort to a superior . . . court” whether or not
27 taken via a “Notice of Appeal” or via some other method, such as a petition or a “complaint” and an
28 “appeal” by definition includes *both* appeals of right **or** appeals at the discretion of the reviewing court,
such as via a petition for writ of certiorari to the U.S. Supreme Court. Indeed, Black’s Law Dictionary
explicitly includes such a petition to the U.S. Supreme Court as within the definition of what “**an**
appeal may be.” *Id.* Nor does *Semenza* make any distinction between an appeal as of right, or any

1 other type of appeal.

2 It is therefore clear, in the present case, that the petition for writ of certiorari filed by BB&T,
3 as a “resort to a superior court” was an appeal. This is especially true (whatever narrower definitions
4 might be applied in some different context) for purposes of defining that term under *Semenza*, under
5 which, the important question is not the name, mode, or method of taking “an appeal” but whether
6 an appeal existed and was pending during a certain period of time, which caused any uncertainty or
7 contingency, thereby delaying accrual of a legal malpractice claim.

8 This Black’s Law definition of an appeal has been utilized and approved by many courts. *See*,
9 *e.g.*, *Allen v. Friel*, 194 P.3d 903, 909 (Utah 2008) (“[A]n appeal is simply a resort to a superior court
10 to review the decision of a lower court.”); *Short v. State*, 929 S.W.2d 13, 14 at fn. 2 (Tex. Ct. App.
11 1996) (“Black’s law dictionary defines an ‘appeal’ as a ‘resort to a superior court to review the
12 decision of an inferior court [or] administrative agency.’”) *People v. Walters*, 700 N.W.2d 424, 429
13 (Mich. Ct. App. 2005) (“An ‘appeal’ is defined as ‘resort to a superior (*i.e.*, appellate) court to review
14 the decision of an inferior (*i.e.*, trial) court or administrative agency. A complaint to a higher tribunal
15 of an error or injustice committed by a lower tribunal, in which the error or injustice is sought to be
16 reversed.” [citation to earlier Michigan decision, quoting from Black’s Law Dictionary, omitted].);
17 *Christiana Care Health Services v. Palomino*, 74 A.3d 627, 632 (Del. 2013) (citing same edition of
18 Blacks Legal Dictionary definition to explain what an appeal involves and quoting aforesated
19 definition).

20 The true nature of an appeal is demonstrated in the California Supreme Court decision, *Powers*
21 *v. City of Richmond*, 839 P.2d 1160 (Cal. 1995), which reviewed a challenge to a provision in the
22 State’s public records statute, which required litigants bringing claims thereunder to seek appellate
23 court review via the filing of a petition for extraordinary review, rather than via the types of filings by
24 which a direct appeal is taken in California. The parties challenging the statute argued that these
25 requirements violated certain provisions of the State’s constitution, upholding a litigant’s appellate
26 rights. The California Supreme Court however rebuffed this challenge, in an opinion explaining that
27 terms such as “appeal” and “appellate jurisdiction” must be broadly understood as involving any resort
28 to a higher court, *regardless* of the mode or method by which such review is sought, or required to be

sought. In support of this ruling, the *Powers* Court noted that an “appeal” is a term of broad and general meaning, as follows:

[W]hen the delegates [to California’s Constitutional Convention] spoke of a “right of appeal,” they used **the term “appeal” to include all forms of appellate review**, including but not limited to direct appeal.

This would not be an unusual or improper use of the term “appeal.” As a legal term, “appeal” is generally defined as “[r]esort to a superior (*i.e.*, appellate) court to review the decision of an inferior (*i.e.*, trial) court or administrative agency” (Black’s Law Dictionary, *supra*, p. 96, Col. 2) or, in the words of Justice Story, as “a complaint to a superior court of an injustice done by an inferior one” (*U.S. v. Wonson* (1812) 28 Fed.Cas. 745, 748, citing 4 Blackstone’s Commentaries 312). Like the term “appellate jurisdiction,” **the word “appeal”** is not necessarily limited to direct appeals, but **may include also writ petitions** and other procedural devices.

Id. at 1166 [emphasis added]. According to this clear and cogent reasoning, a petition to the U.S. Supreme Court, seeking a writ of certiorari, is clearly included in the phrase “an appeal.” This is especially true as that term must be understood for present purposes under the *Semenza* test, as the petition was a resort to a superior tribunal, which rendered the losses claimed in the instant case to be contingent and uncertain, until that resort to the superior court was addressed and ruled upon by that superior court, when the petition for writ was denied.

The true distinction between an appeal and a non-appeal, as the *Powers* Court also explained, is not the name of the document by which resort to a superior court is taken, but whether the court to whom an appeal is taken is engaged in an original proceeding, or in reviewing an earlier proceeding originally initiated in a lower forum. The *Powers* case discussed and made this point as follows:

The ordinary meaning of “appellate jurisdiction” is broader than the meaning plaintiffs would ascribe to it. A legal dictionary defines “**appellate**” as “[p]ertaining to or having cognizance of appeals and other proceedings for the judicial review of adjudications.” (Black’s Law Dictionary (6th ed. 1990) p. 97, Col. 2, *italics added*.) The same dictionary defines “appellate jurisdiction” as “[t]he power vested in an appellate court to review and revise the judicial action of an inferior court” and as “**the power of review** and determination on appeal, writ of error, certiorari, or other similar process.” (*Id.* at p. 98, Col. 1, *italics added*.)

The United States Supreme Court has declared that the “**essential criterion of appellate jurisdiction**” is “**that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.**” (*Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 175, 2 L.Ed. 60.) Applying this definition, **the high court has concluded that appellate jurisdiction includes review by writ**, including the writ of habeas corpus. (*Ex parte Watkins* (1833) 32 U.S. (7 Peters) 567, 572.) Courts in other states have given similar definitions of the term “appellate jurisdiction.” (See, e.g., *Ward School Bus. Mfg., Inc. v. Fowler* (1977) 261 Ark. 100, 547 S.W.2d 394, 395 [“the review of an order or decree of an inferior court”]; *Lane v. State* (1944) 154 Fla. 853, 19 So.2d 366, 368 [“the power to take cognizance of and

review proceedings in an inferior court irrespective of the manner in which they are brought up, whether by appeal or writ of error”]; *In re Constitutionality of House Bill No. 222* (Ct.App.1936) 262 Ky. 437, 90 S.W.2d 692, 693 [quoting the Marbury definition of “appellate jurisdiction”]; *Rudnick v. City of Jamestown* (N.D.1990) 463 N.W.2d 632, 636 [“the power of a superior court to review and revise a decision that has been rendered by an inferior court or tribunal”]; *Carder v. Court of Criminal Appeals* (Okla.1978) 595 P.2d 416, 419 [“that power and jurisdiction to review and correct those proceedings of inferior courts brought for determination in the manner provided by law”]; *Waters–Pierce Oil Co. v. State* (1907) 107 Tex. 1, 106 S.W. 326, 331 [“the power and authority conferred upon a superior court to rehear and determine causes which have been tried in inferior courts”].)

As these authorities amply establish, *the ordinary and widely accepted meaning of the term “appellate jurisdiction” is simply the power of a reviewing court to correct error in a trial court proceeding. By common understanding, a reviewing court may exercise this power in the procedural context of a direct appeal, a writ petition, or otherwise.*

Powers, 893 P.2d at 1162-1163 [emphasis added].

Clearly, the Defendants in this matter are seeking to define an “appeal” in a much narrower fashion than common usage and applicable legal authorities would allow.

More importantly for present purposes, the Defendants’ narrow reading of the term, in the instant case, would require an outcome which is absurd, based on an application of the *Semenza* rule which would be irrational. That is to say, the Defendants’ reading of “an appeal” as that term is used in the *Semenza* rule, would require this Court to ignore the focus of that *Semenza* rule: whether or not a pending appeal created, during a certain time period, any uncertainty by rendering the Plaintiff’s losses “contingent on the outcome of” a pending “appeal.” This makes no sense. Rather, under a more rational approach to the *Semenza* rule, the question is not what any pending “appeal” (*i.e.*, any pending “resort to a superior court”) is called, or the method or mode by which it is taken, but whether or not that appeal (however undertaken) created an uncertainty during the time period it was pending, rendering the Plaintiff’s losses “contingent” on the outcome of that pending resort to a superior tribunal.

In the present case, it is simply an uncontestable fact that, due to and upon the *timely* filing of a Petition for Writ of Certiorari with a superior tribunal, namely the United States Supreme Court, the Plaintiff’s losses became contingent on the outcome of that Petition, and remained uncertain during the pendency thereof, and until such time as that Petition was ruled upon and denied. Based thereon, the only way to uphold the dismissal of this case would be to ignore the focus and point of the *Semenza*

1 rule. Where the rationale provided by Defendants for so ignoring that point and focus, namely an
2 overly narrow reading of the definition of an appeal, is simply inaccurate as that term is in fact legally
3 to be understood, and is irrational as applied to the *Semenza* rule, such an outcome, whether or not as
4 wrong as five-week-old dead fish, is certainly wrong enough to be vacated.

5 **C. The Remittitur Had no Final Effect Herein.**

6 The Defendants' other similar arguments, such as their discussion of when a judgment is
7 considered final for certain purposes, or their emphasis on a writ petition's denial not being a statement
8 on the merits, are all similarly besides the point, and all similarly evade and ignore the crux of the
9 relevant inquiry under the *Semenza* rule.

10 Defendants' arguments thus place form over substance, and procedural wording over actual
11 realities. Defendants want to apply procedural distinctions, which might be relevant in other contexts,
12 to questions where they were not meant to apply. The substantive question under *Semenza* is when an
13 earlier outcome has become "certain" and no longer "contingent," on the outcome of an appeal (*i.e.*,
14 on the outcome of a resort to a superior court). To answer this question, in the present case, one need
15 only determine whether the petition for writ of certiorari was timely filed, and, as it was, this rendered
16 the Plaintiff's damages, sought herein, uncertain and contingent, from that point until it was ruled
17 upon. The removal of that contingency did not occur upon the issuance of a remittitur, but upon the
18 denial of the Petition for Writ of Certiorari, at which point the outcome of the Plaintiff's "resort to a
19 superior tribunal" was known, and, under *Semenza*, its damages began to accrue.

20 It is the date on which such contingency was removed, not the name or mode of the resort to
21 a superior court in question, which this Court must determine under *Semenza*. The date of injury
22 "coincides with *the last possible date* when the attorney's negligence becomes *irreversible*." R.
23 Mallen and V. Levit *Legal Malpractice* §390, at 457 (1981), quoted with approval by *Neylan v. Moser*,
24 400 N.W.2d 538, 542 (Iowa 1987) [emphasis added]. As with civil judgments and criminal
25 convictions, that "irreversible" date is when the petition for writ of certiorari is denied, or an accepted
26 petition results in a decision upholding the State's highest court, and the issuance or non-issuance of
27 a remittitur simply has no bearing on that date whatsoever. In this case, that date was October 6, 2014,
28 less than two years before this suit was initiated.

1 In addition to the core *Semenza* rule that “a legal malpractice action does not accrue until the
2 Plaintiff’s damages **are certain** and **not contingent** upon the outcome of **an appeal**” (*Semenza*, 104
3 Nev. at 668, 765 P.2d at 186 – emphasis added), Defendants also reference the statement in *Semenza*
4 that “it is only after the underlying case has been affirmed on appeal that it is appropriate to assert
5 injury and maintain a legal malpractice cause of action for damages” to allege that the statute of
6 limitations begins to run from the initial date on which any affirmance is obtained. *Id.* at 668, 186.
7 This proposition would certainly be true in a case where no further requests for rehearing or other
8 appellate activity occurred, after an initial decision affirming the lower court’s ruling. However, where
9 such further appeal activity *does* occur, this statement is clarified and must be understood in the
10 context of the later expression in *Semenza* that, “[i]f an appeal is taken in the underlying case, it is
11 simply premature to proceed to trial on a legal malpractice claim **until the appeal** of the original
12 judgment on the underlying cause of action **has been finally resolved**. *Id.* [Emphasis added.]

13 In the present case, it is clear that no *final resolution* of the issues on appeal had truly taken
14 place until the timely-filed petition for rehearing had been denied, the timely-filed petition for en banc
15 reconsideration had been denied, *and* the timely petition for writ of certiorari to the U.S. Supreme
16 Court had also been denied, as, only then, was the underlying court’s judgment rendered fully certain
17 and no longer contingent on any outcome on “an appeal.” While a remittitur may mean that a
18 Judgment has in some sense and for certain purposes and in a certain context, been finalized, this is
19 not the type of finality that produces no further contingency under the *Semenza* test, given the real
20 world effects of a petition for writ of certiorari, and the readily recallable nature of a remittitur. That
21 is to say, the remittitur is not an irreversible, or a contingency-destroying event.

22 Nor have the Defendants argued that remittitur in this case resulted in some other judgment-
23 enforcing event which rendered Plaintiff’s losses in this case *de facto* irreversible, as a practical matter.
24 Nor would it be appropriate for such arguments to be raised in a Motion to Dismiss setting, or for this
25 Court to assume, on a Motion to Dismiss, that any such event had occurred. Rather, under the relevant
26 standards of review for a Motion to Dismiss, this Court should only dismiss if there is no possible set
27 of facts on which Plaintiff might prevail, and this Court must draw every fair intendment in favor of
28 the Plaintiff. *Vacation Village, Inc. v. Hitachi America, Ltd.*, 110 Nev. 481, 874 P.2d 744, 746 (1994).

Any factual assertions supporting some theory that the failure to stay the remittitur led to some real world practical event, rendering Plaintiff's losses no longer contingent, but *de facto* certain, would need to be made via a factually supported motion for summary judgment, which, upon information and belief, would be able to be opposed, based on events which occurred in other (bankruptcy court) proceedings that apparently prevented the necessity of staying the remittitur at that time. [See Plaintiff's NRCP 59(e) Motion at page 5, footnote 2]. The undersigned is not fully cognizant of all of the facts in regard to such matters, but merely points out that any such factual contention would not be properly considered on a Motion to Dismiss, in any event, and would be premature at this time.

D. Plaintiff's Motion Does Not Seek a Merely Advisory Ruling on a Hypothetical Scenario.

Finally, the Defendants' straw-man argument, that the Plaintiff's Motion seeks an advisory ruling on the basis of hypothetical speculation, must be rejected. In the present case, the facts are clear and are not hypothetical, as the dates and occurrence of the following events are not disputed:

July 23, 2010: "Final Judgment" entered (followed by a subsequent "Final Judgment" which included costs and fees awards entered on November 10, 2010). Had no appeal been taken, this July 23, 2010 date would have been the claim accrual date of Plaintiff's litigation malpractice claims filed in this suit.

August 12, 2010: **Notice of Appeal timely filed**, thus rendering the Plaintiff's losses uncertain and contingent, such that, under *Semenza*, the legal malpractice claim's accrual date was delayed.

May 31, 2013: Nevada Supreme Court 3-Judge Panel issues Order of Affirmance concluding "that the district court's decision to exclude two documents relating to BB&T's interest in the Construction Loan was not an abuse of discretion because the documents were not properly produced . . ." under disclosure rules, thereby confirming the Plaintiff's loss as a result of procedural omissions of its counsel. Had no further requests for rehearing been made, this date, not the subsequent remittitur date scheduled for 25 days later, would have been the malpractice claim accrual date, as there would then have been no further uncertainty and Plaintiff's losses would not have remained contingent on the outcome of an appeal.

June 18, 2013: **BB&T timely files a Petition for Rehearing** with the Nevada Supreme Court (which automatically stays remittitur under NRAP 41(b)), within 18 days as required by NRAP 40(a)(1), thereby rendering the Plaintiff's losses uncertain and contingent, such that, under *Semenza*, the legal malpractice claim's accrual date is again delayed.

September 26, 2013: Order Denying Petition for Rehearing issued by Nevada Supreme Court Panel. Had no further requests for en banc reconsideration been made, this date not the subsequent remittitur date, would have been the malpractice claim accrual date.

- 1 **October 8, 2013:** **Petition for en banc reconsideration timely filed** by BB&T with Nevada
2 Supreme Court (automatically delaying remittitur under NRAP 41(b)), in a
3 timely manner under NRAP 26(a) and NRAP 40A, thereby rendering the
4 ongoing validity of the Panel's decision to uphold its earlier ruling uncertain
5 and contingent, such that, under *Semenza*, the legal malpractice claim accrual
6 date is again delayed.
- 7 February 21, 2014: Nevada Supreme Court denies Petition for en banc reconsideration. Had no
8 further appeal been taken to the U.S. Supreme Court, this date, rather than the
9 subsequent remittitur date, would have been the claim accrual date.
- 10 **May 22, 2014:** **Petition for Writ of Certiorari timely filed with the U.S. Supreme Court,**
11 **and accepted as timely by the U.S. Supreme Court Clerk, within the 90 day**
12 **period allowed by U.S. Supreme Court Rule 13. Court clerk file-stamps this**
13 **Petition, rather than rejecting it for filing, as Rule 13 directs the Clerk to do for**
14 **Petitions filed too late. This filing renders the Plaintiff's losses uncertain and**
15 **contingent on the outcome of this resort to a superior court (i.e., on the**
16 **outcome of this appeal), thereby again delaying the claim accrual date under**
17 ***Semenza*.**
- 18 **October 6, 2014:** **U.S. Supreme Court denies BB&T's Petition for Writ of Certiorari,**
19 **thereby finally resolving all appeals and rendering the Plaintiff's losses no**
20 **longer uncertain, as no longer contingent on the outcome of any appeal,**
21 **such that, under *Semenza*, the claim accrual date is no longer delayed by any**
22 **such uncertainty or contingency, and the legal malpractice claim has now fully**
23 **accrued, as of this date. Even if the remittitur had been stayed while this**
24 **petition was pending, this date, not the date of any subsequent remittitur,**
25 **would still be the date of accrual of the claim, as the Plaintiff's claimed losses**
26 **were no longer uncertain or contingent on the outcome of any pending appeal.**
- 27 **October 5, 2016:** **Instant lawsuit filed in Clark County Nevada District Court, by BB&T,**
28 **against Gerrard and GC&L, for litigation malpractice arising out of their**
representation of BB&T in the underlying suit, within two years after the claim
accrual date which, under *Semenza*, occurred on the date of denial of the
Plaintiff's Petition for Writ of Certiorari.

The foregoing chronology and time-line of events is supported by the documents which have previously been submitted to this Court as attachments or exhibits to both sides' prior filings, including prior Requests for Judicial Notice filed herein, and the aforesaid dates are uncontested and undisputed herein. There is nothing hypothetical about the date of the foregoing filings, and only the legal effect thereof, as argued by Plaintiff above, is contested. Nor does the Plaintiff's NRCP 59(e) Motion, supported by these Reply Points and Authorities, seek an advisory opinion about what would have happened under some different set of facts.

Rather, the Motion asks this Court to correctly rule that, under *Semenza*, the legal malpractice claim accrued once the Plaintiff's damages, stemming from the outcome in the underlying trial court, were no longer uncertain, as contingent on the outcome of an appeal. The Plaintiff, the Defendants,

1 and this Court know the precise date on which that became true (October 6, 2014), and, given that the
2 Petition for a Writ of Certiorari was denied on that date certain, this Court need not speculate or engage
3 in hypotheticals in order to ascertain that date. The statute of limitations began to run upon that date,
4 under the *Semenza* rule, that a malpractice claim accrues once an adverse litigation outcome is certain
5 and not contingent on an appeal. This suit was then filed less than two years later. The issuance of
6 a remittitur simply did not render the Plaintiff's losses certain and non-contingent, and therefore had
7 no effect upon the October 6, 2014 date of claim accrual.

8 In order to illustrate and demonstrate this fact (concerning the date on which no further
9 contingencies existed, and the non-importance of the remittitur in determining that date), the Motion
10 for NRCP 59(e) relief necessarily pointed out what would have happened, despite that remittitur, if
11 the Supreme Court had granted the writ petition, and reversed. This analysis was provided in order
12 to show the date on which no further uncertainty contingent on the outcome of an appeal existed,
13 which final-resolution and last-contingency-removal date must be determined, under *Semenza*, in
14 order to apply the *Semenza* test. Thus, the Motion's discussion of what might have happened had the
15 petition been granted, was provided in order to demonstrate that a contingency still existed until
16 October 6, 2014, the date that any such possible alternative outcome was foreclosed, and could no
17 longer have occurred. That discussion of what possible outcomes existed during a prior interim
18 period, *was* a necessary component of the analysis required by *Semenza* (in order to determine whether
19 any appeal contingency existed and, if so, when it ended). As such, that discussion *was not* an attempt
20 to raise hypothetical arguments or seek an advisory opinion, as to what might have been. Rather, it
21 was a simple and straightforward application of the *Semenza* rule to the known and actual facts.
22 Defendants' straw-man contentions to the contrary are simply disingenuous.

23 The Plaintiff's current Motion to alter or amend by vacating the Order of dismissal, seeks a
24 correct ruling from this Court as to when the litigation malpractice claim made in this case became
25 certain, and non-contingent on the outcome of any appeal. That date is not hypothetical, but is known
26 to be October 6, 2014. Determining what that date was, is a required, not an advisory, step, necessary
27 to apply the *Semenza* test. Likewise, the relief sought in the subject Motion now before this Court is
28 not advisory, but substantive: as the Motion seeks to reinstate the instant case, and allow it to go

1 forward, by vacating this Court's prior Order of dismissal, on the basis of a corrected ruling on the
2 date of claim accrual.

3
4 **III.**

5 **CONCLUSION**

6 Based on the foregoing, and based on the points and authorities set forth in the Plaintiff's
7 original Motion supported by this Reply, Plaintiff respectfully requests, pursuant to NRCP 59(e), that
8 this Court vacate its Decision and Order dated May 25, 2017 in this matter. Plaintiff was completely
9 within its rights to timely petition the United States Supreme Court for a writ of certiorari without first
10 moving for a stay of the remittitur. No case law supports punishing a party for not obtaining a stay
11 of remittitur. To the contrary, as Plaintiff's prior briefing has shown, both federal and state cases exist
12 which recognize that, in those jurisdictions recognizing a delayed-accrual-pending-appeal rule the
13 statute of limitations on a litigation malpractice claim does not begin to run until after a ruling issues
14 on any timely filed petition to the U.S. Supreme Court seeking a writ of certiorari, which is treated
15 as an appeal, under that type of rule.

16 DATED this 28th day of June, 2017.

17 **ALBRIGHT, STODDARD, WARNICK & ALBRIGHT**

18 

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 28th day of June, 2017, service was made by the following mode/method a true and correct copy of the foregoing **REPLY POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO ALTER OR AMEND, BY VACATING, ORDER OF DISMISSAL, PURSUANT TO NRCP 59(e)** to the following person(s):

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An employee of Albright, Stoddard, Warnick & Albright

REGISTER OF ACTIONS

CASE No. A-16-744561-C

Branch Banking & Trust Company, Plaintiff(s) vs. Douglas Gerrard, ESQ, Defendant(s)

§
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§
§
§

Case Type: Legal Malpractice
Date Filed: 10/05/2016
Location: Department 27
Cross-Reference Case Number: A744561
Supreme Court No.: 73848

PARTY INFORMATION

		Lead Attorneys
Defendant	Gerrard, Douglas D., ESQ	Craig J. Mariam Retained 7025779300(W)
Plaintiff	Branch Banking & Trust Company	George Mark Albright Retained 7023847111(W)

EVENTS & ORDERS OF THE COURT

07/19/2017	Motion (9:00 AM) (Judicial Officer Alf, Nancy) <i>Plaintiff's Motion to Alter or Amend, by Vacating, Order of Dismissal, Pursuant to NRCP 59(e)</i>
	Minutes 07/19/2017 9:00 AM - Arguments by counsel regarding the merits of and opposition to the pending motion. Court stated it findings and ORDERED, Plaintiff's Motion to Alter or Amend, by Vacating, Order of Dismissal, Pursuant to NRCP 59(e) DENIED. Mr. Larsen to prepare the order and submit it to opposing counsel for approval as to form.
	Parties Present Return to Register of Actions



RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST
COMPANY,

Plaintiff(s),

vs.

DOUGLAS GERRARD, ESQ.,

Defendant(s).

CASE NO. A-16-744561-C

DEPT. NO. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

WEDNESDAY, JULY 19, 2017

**TRANSCRIPT OF PROCEEDINGS RE:
PLAINTIFFS' MOTION TO ALTER OR AMEND, BY VACATING, ORDER OF
DISMISSAL, PURSUANT TO NRCP 59(e)**

APPEARANCES:

For the Plaintiff(s):

CHRIS D. ALBRIGHT, ESQ.

For the Defendant(s):

ROBERT S. LARSEN, ESQ.
WING YAN WONG, ESQ.

RECORDED BY: BRYNN GRIFFITHS, COURT RECORDER

1 **LAS VEGAS, NEVADA, WEDNESDAY, JULY 19, 2017,**

2 [Case called at 9:11 a.m.]

3 MR. ALBRIGHT: Good morning, Your Honor. Chris Albright on behalf
4 of the plaintiff, Branch Banking & Trust.

5 THE COURT: Thank you.

6 MR. LARSEN: Good morning, Your Honor. Rob Larsen on behalf of
7 the defendants. With me is Wing Wong, also on behalf of the defendants.

8 MS. WONG: Good morning, Your Honor.

9 THE COURT: Thank you.

10 And this is the Plaintiff's Motion to Alter, Amend, or to Vacate -- or to
11 Vacate the order of dismissal.

12 Mr. Albright?

13 MR. ALBRIGHT: Your Honor, it's never pleasant being in front of a
14 judge to say that I think you got it wrong.

15 THE COURT: Okay. I'm never offended.

16 MR. ALBRIGHT: But this is our Motion to Vacate your order --

17 THE COURT: Don't --

18 MR. ALBRIGHT: -- of dismissal.

19 THE COURT: Don't ever worry about that. Never offended.

20 MR. ALBRIGHT: Okay. I -- I think the key rule that -- that everyone,
21 Your Honor's order, the briefs on -- from both parties seems to be focused on is
22 that -- is the rule from the *Semenza* case that a legal malpractice action does not
23 accrue -- this is for purposes of a statute of limitations beginning to run -- until the
24 plaintiff's damages are certain and not contingent upon the outcome of an appeal.
25 And I think in applying that rule, there's really two things that we need to get right.

1 First of all, the question of whether or not the plaintiff's losses are
2 certain or they're contingent. And I think the argument that has been made to Your
3 Honor, which seemed to be emphasized in your order, was the idea that upon the
4 issuance of a remittitur by the Nevada Supreme Court, the losses suddenly became
5 noncontingent and -- and certain.

6 And I guess what we've pointed out in our motion, Your Honor, is that,
7 in fact, the real question is once the Petition for Writ of Certiorari was filed, at that
8 point was there any contingency existing? At that point was there any uncertainty
9 existing? And we would argue certainly there was. And in fact -- and we've cited
10 cases on this -- a remittitur is -- is readily recallable in the state of Nevada, one of
11 the reasons why states will recall a remittitur, as we pointed out in the California
12 *Long Beach* case, is if, in fact, Petition for Writ of Certiorari is granted, and the
13 supreme court of the state is reversed, at which point on remand the state supreme
14 court says first thing we do is we recall our remittitur.

15 And so the -- the fact of the matter is that the issuance of a remittitur,
16 although it seems to be an important event and -- and it might have been an
17 important event in -- in some cases if it had resulted in, you know, the sale of
18 something to a bona fide purchaser or something, in this case, there's simply
19 nothing in the allegations of the complaint or actual facts that are out there that
20 would suggest that the remittitur really finalized or really made anything
21 noncontingent.

22 And -- and I think the second thing that -- that the court needs to get
23 right in -- in applying that *Semenza* rule, is this court needs to -- to figure out and --
24 and decide what really is an appeal. And what I would argue, Your Honor, is that
25 context matters. And, you know, I understand that there may be situations where a

1 very narrow reading of what an appeal is would be appropriate if I'm in front of the
2 Nevada Supreme Court and I'm trying to figure out which rules of appellate
3 procedure apply to my proceeding in front of the Nevada Supreme Court, it's going
4 to be important for me to decide is this a Petition for Writ or is this is a -- a notice of
5 appeal kind of a case.

6 But more generally speaking, an appeal is simply any resort to a higher
7 tribunal. And I think that more general definition of an appeal is what makes sense
8 in the context of applying the *Semenza* rule. Because the *Semenza* rule focuses
9 on, you know, are the plaintiff's losses certain or are they contingent? And once
10 that Petition for Writ of Certiorari was timely filed, the losses that BB&T had
11 suffered from the alleged litigation malpractice in the -- in the underlying case, we're
12 not yet certain. They were still contingent on what the U.S. Supreme Court did with
13 that petition. And we've cited cases from around the country, we've cited *Black's*
14 *Law Dictionary*, the general meaning of the term appeal is simply resort to a higher
15 tribunal. And that's the meaning that really needs to be applied in the context of the
16 *Semenza* rule.

17 Because otherwise what you're saying is, okay, even though the
18 question under *Semenza* is are the plaintiff's losses certain? are the plaintiff's
19 losses contingent? I'm just going to sort of ignore that and I'm going to say unless
20 what you filed was called a Notice of Appeal -- if it was called anything else, I'm not
21 going to say that it was an appeal. Which -- which just doesn't seem to be a
22 rational way to define appeal for purposes of the context of the *Semenza* rule.

23 And, you know, we've cited a lot of case law on what a remittitur does
24 and doesn't do. Various courts that have held that for general purposes, an appeal
25 is a resort to a higher tribunal. We think those are the definitions that should apply.

1 THE COURT: Thank you, Mr. Albright.

2 Mr. Larsen.

3 MR. LARSEN: So, obviously, we have a differing opinion of what two
4 points are. What is the effect of the remittitur and what does the term appeal mean.

5 But first, I think a couple of points confundamental [phonetic] that are
6 important. This is a question of law. There are no facts related to the state of
7 limitations in dispute. We know the dates, we know when the decision from the
8 appeals court issued. We know when the remittitur issued. We know when the
9 petition to the U.S. Supreme Court was issued and then denied. We know when
10 the complaint was up. Those are the only facts that matter with this.

11 So any -- the reason why a stay for remittitur, one of the allegations or
12 contentions in the brief was an explanation of why the remittitur -- a stay for the -- a
13 Motion to Stay the remittitur wasn't filed. It doesn't matter. It wasn't done.

14 So we -- we have those facts. This is a pure question of law. Question
15 of law on what is the effect of a remittitur and what does the definition of appeal
16 mean?

17 The second part is kind of a fundamental element of a Rule 59 motion,
18 is what standard are -- is the court supposed to be looking at this -- this motion?
19 And the first thing you've looked at is we agree with the plaintiffs. This -- Your
20 Honor has a tremendous amount of discretion. But courts have also issued
21 guidelines. What are you supposed to do with a Rule 59 motion? It is an
22 extraordinary remedy that's supposed to be used sparingly. Only for manifest,
23 clear errors of law or fact. We don't have fact errors here, we don't have new
24 evidence, we don't have a change in controlling law. Everything that was raised in
25 this brief was out there before, some of which was raised in the supplemental brief

1 on the statute of limitations that Your Honor requested. Other is new analysis. But
2 all of this is the same. It -- it -- there's nothing new here at all.

3 And so if you go back and look, Your Honor's order we believe was
4 correct. It was based in existing law and interpretations by -- of the rules in the
5 Nevada Supreme Court's own language. There is no "clear error of law." And we
6 put in the brief and it's kind of a funny description, but I think it's very apt, that
7 Judge Hunt from the Federal Court said a clear error of law is not one that might be
8 wrong, probably wrong; it's one that is so wrong that it smells like five-week-old
9 unrefrigerated dead fish. That's not here. So that is a fundamental start. That --
10 that's the context that you're supposed to evaluate their request to set aside the
11 order.

12 We turn to your order itself it -- it really is about two -- two main
13 questions. What is the effect of the remittitur and what is the meaning of appeal.
14 And we know -- we -- we cited several cases in our supplemental brief and this brief
15 that a writ petition to the United States Supreme Court is not an appeal. It's a
16 discretionary review. It is not an appeal of right. And there is a distinction there.
17 Your Honor recognized that in your order. The case law that we -- we cited a
18 bunch of cases that demonstrate that that is the case.

19 And we know that Nevada, if you look at the case law related to
20 remittitur and -- and appeals, is Nevada takes a -- draws a distinction between the
21 two. Because what Nevada says is when the remittitur issues, the appeal is over.
22 The appeal. And that's the term that's used in the *Semenza* case, is appeal. Not
23 all reviews of the case. They -- they chose their words very carefully; it's not all
24 reviews of the case, it's an appeal. And the appeal ended when the remittitur
25 issued.

1 And the brief from BB&T characterizes kind of the -- and what they say
2 is the remittitur's a benign, irrelevant, potentially meaningless and readily recallable
3 event. That is a complete mischaracterization of what a remittitur is. And the
4 importance that our own Supreme Court has -- has demonstrated.

5 Number one, we have a rule specifically on remittitur. And it talks
6 about when it shall issue. And the case law interpreting that says what happens;
7 when the remittitur issues, the appeal is over. That is the divesting the appeals
8 court of jurisdiction and concluding the appeal.

9 And I think if you -- if you take that definition from -- from the -- the
10 case law from our own Nevada Supreme Court, it really sets the -- the context of
11 the order that Your Honor made in context. And keep in mind, this was an order
12 that your court wrote. This wasn't a -- an order drafted by the parties. Your Honor
13 took the briefs, read the briefs, analyzed the law. There's -- and -- and drafted the
14 order. There's no dispute over, well, did -- did the court actually mean -- mean this.
15 You were very clear. And you got it right. The -- it's completely -- it's completely
16 based on the appropriate standards.

17 So if you take the definition of appeal that BB&T is -- is -- and not really
18 appeal, but this contingent liability, anytime there's contingent liability, the statute of
19 limitations continues. You run into -- if you take that and put it into an application,
20 and granted, this will be an extreme example, but it's the logical step, is what
21 happens with a Rule 60(b) motion? Either one that's made after a judgment, let's
22 say not appeal, you got six months, does that mean the statute of limitations don't
23 accrue until Rule 60(b) time's gone? What about the part of Rule 60(b) which
24 extends that indefinitely for an independent action for fraud on the court? There's
25 always the potential of a contingency happening that could change -- change an

1 outcome.

2 What we know in this case is none of the contingent events that the
3 plaintiffs request happened. None of them. In this case, it was -- they -- the
4 remittitur issued, the appeal was over.

5 And if we go back to Rule 41, and this is an important point that Your
6 Honor put in the order, Nevada Rule of Appellate Procedure is there was a -- there
7 was a mechanism for BB&T to keep the appeal open. They chose not to do it. And
8 that is to file a motion with the Nevada Supreme Court to stay issuance of the
9 remittitur. It's very clear. It was in the version of Rule 41 that was in effect in 2014,
10 it's in the revised rule -- the revised Rule 41, which went into effect after the Nevada
11 Court of Appeals decision was issued. Or create -- the Court of Appeals was
12 created.

13 They had the mechanism to keep the appeal open. They chose not to.
14 They have to live with that consequence, and that consequence meant the appeal
15 closed, the *Semenza* rule applied, statute of limitations began to accrue at that
16 point, at the absolute latest. It -- there is even an argument that accrued sooner,
17 when the appeals court actually issued its decision. But the remittitur would be the
18 absolute latest. The complaint was filed more than two years later. It's untimely.

19 So unless Your Honor has any questions for me, I think that's good.

20 THE COURT: Thank you.

21 And the reply, please.

22 MR. ALBRIGHT: Just briefly, Your Honor.

23 You know, my kids always love the scene in -- in *Kung Fu Panda* when
24 Jack Black says, I'm not -- I'm not just a big, fat panda, I'm the big, fat panda. And
25 articles matter. Indefinite articles, and definite articles. And what the *Semenza*

1 case says is it says that -- that the statute of limitations does not begin to run until
2 or the cause of action does not accrue until the plaintiff's damages are -- are not
3 contingent upon the outcome of -- on appeal. It doesn't say the appeal before this
4 court, doesn't say the state's supreme court appeal, doesn't say the issuance of a
5 remittitur. Says on appeal.

6 And -- and I think that, you know, the only way to rationally define an
7 appeal in a way that makes sense of the rest of that sentence, whether or not
8 there's a contingency, whether or not there's a condition that existed for -- for some
9 period of time or uncertainty that existed for some period of time is to ask, you
10 know, was there some form of proceeding to a higher tribunal that rendered the
11 outcome uncertain? And -- and the fact that that uncertainty eventually goes away,
12 that's not what matters under *Semenza*. The question under *Semenza* is was there
13 a period of time in which there was uncertainty as to whether or not the plaintiffs'
14 losses were going to continue to be sustained.

15 And there clearly was, as long as that petition was pending, the
16 remittitur really didn't alter that fact. To really know the effect of the remittitur, you
17 have to ask the question what would have happened if the supreme court had
18 accepted the petition. And -- and what would have happened under lots of other
19 cases that have gone on in Nevada is the Nevada Supreme Court would simply
20 recalled the remittitur at that point and would have given the U.S. Supreme Court
21 the record and -- and on we would have gone.

22 And the question is not to look back with 20/20 hindsight and say, well,
23 that didn't happen, so therefore you don't get to make that argument. No, the whole
24 point is was there a period of time when there was uncertainty, when there was a
25 contingency? The fact that that no longer exists doesn't matter. What matters is

1 when did that no longer exist?

2 And I would agree with -- with counsel for the defendant that the facts
3 are not really in dispute. We know the timeline, we know the dates, and we know
4 the date on which the Petition for Writ of Certiorari was denied, and it was denied
5 on October 6th. And less than two years later on October 5th, this suit was filed
6 within the two years.

7 THE COURT: Thank you.

8 This is the Plaintiff's Motion to Alter or Amend by vacating an order of
9 dismissal pursuant to NRCP 59(e). Motion will be denied for the following reasons:

10 All of the matters brought up in this motion are things that the court
11 considered previously in dismissing the case. I don't find that there are any
12 manifest errors of law or fact. There's no newly discovered information. I don't find
13 that the result was manifestly unjust to either party, and there's been no change of
14 law in the meantime.

15 The standard under 59(e) is so high to alter or amend, and given the
16 fact that I considered all of the arguments raised here previously, the motion will be
17 denied.

18 Mr. Larsen will prepare the order.

19 Mr. Albright, I assume you wish to sign off on the form of that order?

20 MR. ALBRIGHT: Yes, Your Honor.

21 THE COURT: Very good. Thank you.

22 MR. LARSEN: Thank you, Your Honor.

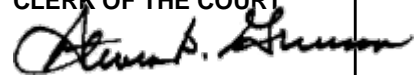
23 THE COURT: Thank you both.

24 [Court recessed at 9:28 a.m.]

1
2 ATTEST: I do hereby certify that I have truly and correctly transcribed
3 the audio/video proceedings in the above-entitled case to the best of my ability.
4

5 

6 _____
7 Shawna Ortega, CET*562
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*Attorneys for Defendants Douglas D.
Gerrard, Esq. and Gerrard Cox Larsen*

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a
North Carolina corporation,

Plaintiff,

vs.

DOUGLAS D. GERRARD, ESQ., individually; and
GERRARD COX & LARSEN, a Nevada
professional corporation, JOHN DOES I-X; and
ROE BUSINESS ENTITIES XI-XX,

Defendant.

Case No.: A-16-744561-C
Dept. No.: 27

**ORDER DENYING PLAINTIFF
BRANCH BANKING & TRUST
COMPANY'S MOTION TO
ALTER OR AMEND, BY
VACATING, ORDER OF
DISMISSAL, PURSUANT TO
NRCP 59(e)**

This matter came before the Honorable Nancy L. Allf on July 19, 2017 on Plaintiff Branch Banking & Trust Company's Motion to Alter or Amend, by Vacating, Order of Dismissal, Pursuant to NRCP 59(e) ("Motion"), filed on June 5, 2017. Defendants Douglas D. Gerrard, Esq. and Gerrard Cox Larsen filed an Opposition on June 22, 2017, to which Plaintiff filed a Reply on June 28, 2017. D. Chris Albright, Esq. of Albright, Stoddard, Warnick & Albright appeared on behalf of Plaintiff; Robert S. Larsen, Esq. of Gordon Rees Scully Mansukhani, LLP appeared on behalf of Defendants.

1 Having reviewed the Motion, Opposition, and Reply, and good cause appearing
2 therefore, the **COURT HEREBY FINDS** as follows:

3 A NRCP 59(e) motion to alter or amend the judgment may be granted under limited
4 circumstances. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193
5 (2010). The motion may be granted to "correct[] manifest errors of law or fact," to account for
6 "newly discovered or previously unavailable evidence," "to prevent manifest injustice," or based
7 on a "change in controlling law." *Id.*

8 After reviewing Plaintiff's Motion, the Court determines that the Court had previously
9 considered all the issues presented in Plaintiff's Motion. The Court finds that there has been no
10 new evidence and no change in the law. The Court further finds that this Court's Decision and
11 Order, entered on May 25, 2017, was not a manifest error of law and did not result in manifest
12 injustice.

13 **THE COURT HEREBY ORDERS** that Plaintiff's Motion is **DENIED**.

14 Date: This 4 day of August, 2017.

15
16 
17 **DISTRICT COURT JUDGE** DC

18 Dated: August 1, 2017.

Dated: July 31, 2017.

19 Respectfully Submitted by:

Approved as to form and content by:

20 GORDON REES SCULLY MANSUKHANI,
21 LLP

ALBRIGHT, STODDARD, WARNICK &
ALBRIGHT

22 

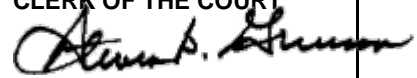


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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a)	Case No.: A-16-744561-C
North Carolina corporation,	)	Dept. No.: 27 XXVII
)	
Plaintiff,)	
)	
vs.)	
)	
DOUGLAS D. GERRARD, ESQ., individually; and)	
GERRARD COX & LARSEN, a Nevada)	
professional corporation, JOHN DOES I-X; and)	
ROE BUSINESS ENTITIES XI-XX,)	
)	
Defendant.)	

**NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF BRANCH BANKING &
TRUST COMPANY'S MOTION TO ALTER OR AMEND, BY VACATING, ORDER OF
DISMISSAL, PURSUANT TO NRCP 59(e)**

PLEASE TAKE NOTICE that, on August, 7th 2017, the Court entered the **ORDER
DENYING PLAINTIFF BRANCH BANKING & TRUST COMPANY'S MOTION TO
ALTER OR AMEND, BY VACATING, ORDER OF DISMISSAL, PURSUANT TO NRCP
59(e)** in this matter.

///

///

1 A copy of the Court's Order is attached hereto as Exhibit "1."

2 DATED this 8th day of August, 2017.

3 Respectfully submitted,

4 GORDON REES SCULLY
5 MANSUKHANI, LLP

6 /s/ Robert S. Larsen

7 Craig J. Mariam, Esq.

8 Nevada Bar No. 10926

9 Robert S. Larsen, Esq.

10 Nevada Bar No. 7785

11 Wing Yan Wong, Esq.

12 Nevada Bar No. 13622

13 300 South Fourth Street, Suite 1550

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15 *Attorneys for Defendants Douglas D.*
16 *Gerrard, Esq. and Gerrard Cox & Larsen*

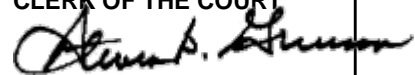
CERTIFICATE OF SERVICE

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I hereby certify under penalty of perjury that I am an employee of GORDON REES SCULLY MANSUKHANI, LLP, and that on the 8th day of August, 2017, the foregoing **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF BRANCH BANKING & TRUST COMPANY'S MOTION TO ALTER OR AMEND, BY VACATING, ORDER OF DISMISSAL, PURSUANT TO NRC** **59(e)** was served upon those persons designated by the parties in the E-Service Master List in the Eighth Judicial District court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-1 and the Nevada Electronic Filing and Conversion Rules, upon the following:

G. Mark Albright, Esq.
D. Chris Albright, Esq.
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106

/s/ Gayle Angulo
An Employee of GORDON & REES, LLP

EXHIBIT “1”



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*Attorneys for Defendants Douglas D.
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CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a
North Carolina corporation,

Plaintiff,

vs.

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ROE BUSINESS ENTITIES XI-XX,

Defendant.

Case No.: A-16-744561-C
Dept. No.: 27

**ORDER DENYING PLAINTIFF
BRANCH BANKING & TRUST
COMPANY'S MOTION TO
ALTER OR AMEND, BY
VACATING, ORDER OF
DISMISSAL, PURSUANT TO
NRCP 59(e)**

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1 Having reviewed the Motion, Opposition, and Reply, and good cause appearing
2 therefore, the **COURT HEREBY FINDS** as follows:

3 A NRCP 59(e) motion to alter or amend the judgment may be granted under limited
4 circumstances. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193
5 (2010). The motion may be granted to "correct[] manifest errors of law or fact," to account for
6 "newly discovered or previously unavailable evidence," "to prevent manifest injustice," or based
7 on a "change in controlling law." *Id.*

8 After reviewing Plaintiff's Motion, the Court determines that the Court had previously
9 considered all the issues presented in Plaintiff's Motion. The Court finds that there has been no
10 new evidence and no change in the law. The Court further finds that this Court's Decision and
11 Order, entered on May 25, 2017, was not a manifest error of law and did not result in manifest
12 injustice.

13 **THE COURT HEREBY ORDERS** that Plaintiff's Motion is **DENIED**.

14 Date: This 4 day of August, 2017.

15
16 
17 **DISTRICT COURT JUDGE** DC

18 Dated: August 1, 2017.

Dated: July 31, 2017.

19 Respectfully Submitted by:

Approved as to form and content by:

20 GORDON REES SCULLY MANSUKHANI,
21 LLP

ALBRIGHT, STODDARD, WARNICK &
ALBRIGHT

22 

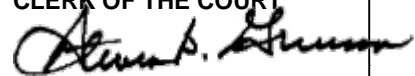


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Attorneys for Appellant/Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a
North Carolina corporation,

CASE NO. A-16-744561-C

Appellant/Plaintiff,

DEPT NO. XXVII

vs.

DOUGLAS D. GERRARD, ESQ., individually;
and GERRARD & COX, a Nevada professional
corporation, d/b/a GERRARD COX & LARSEN;
JOHN DOE INDIVIDUALS I-X; and ROE
BUSINESS ENTITIES XI-XX,

NOTICE OF APPEAL

Respondents/Defendants.

NOTICE is hereby given that BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, the Plaintiff in this Case No. A-16-744561-C, hereby appeals to the Supreme Court of the State of Nevada from the following dispositive Order, entered against it and in favor of the Defendants DOUGLAS D. GERRARD, ESQ., individually; and GERRARD & COX, a Nevada professional corporation, d/b/a GERRARD COX & LARSEN, in these proceedings: "Decision and Order Granting Defendants Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen's Motion to Dismiss First Amended Complaint and Denying Plaintiff's Countermotion for Leave to Amend" entered by the District Court on May 25, 2017, with Notice

///

1 of Entry thereon being filed and electronically served on May 26, 2017.

2 DATED this 22nd day of August, 2017.

3 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

4 

5 G. MARK ALBRIGHT, ESQ.

6 Nevada Bar No. 001394

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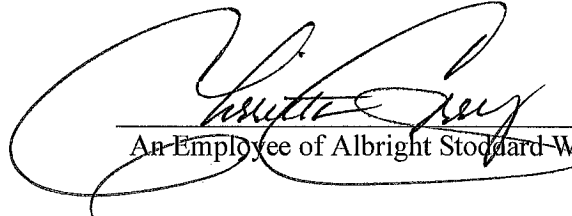
14 Counsel for Appellant/Plaintiff

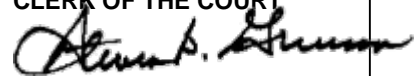
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 22ND day of August, 2017, service was made by the following mode/method of a true and correct copy of the foregoing **NOTICE OF APPEAL** to the following person(s):

Craig J. Mariam, Esq., #10926
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☒ Regular U.S. Mail


An Employee of Albright Stoddard Warnick & Albright



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13 *Attorneys for Appellant/Plaintiff*

14 **DISTRICT COURT**

15 **CLARK COUNTY, NEVADA**

16 **BRANCH BANKING & TRUST COMPANY, a**
17 **North Carolina corporation,**

CASE NO. A-16-744561-C

18 **Appellant/Plaintiff,**

DEPT NO. XXVII

19 **vs.**

20 **DOUGLAS D. GERRARD, ESQ., individually;**
21 **and GERRARD & COX, a Nevada professional**
22 **corporation, d/b/a GERRARD COX & LARSEN;**
23 **JOHN DOE INDIVIDUALS I-X; and ROE**
24 **BUSINESS ENTITIES XI-XX,**

CASE APPEAL STATEMENT

25 **Respondents/Defendants.**

26 1. The name of the Appellant filing this Case Appeal Statement is: **BRANCH**
27 **BANKING & TRUST COMPANY, a North Carolina corporation, qualified and registered to do**
28 **business in Nevada.**

2. The following Judge issued the decision and order appealed from: The Honorable
Nancy L. Allf, District Court Judge, Department 27, Clark County, Nevada.

3. The identity of each Appellant and the name and address of counsel for each
Appellant is as follows:

APPELLANT: Branch Banking & Trust Company, a North
Carolina corporation

1 APPELLANT'S COUNSEL: G. Mark Albright, Esq.
2 Nevada Bar No. 001394
3 D. Chris Albright, Esq.
4 Nevada Bar No. 004904
5 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
6 801 South Rancho Drive, Suite D-4
7 Las Vegas, Nevada 89106
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11 dca@albrightstoddard.com

12 4. The identify of each Respondent and the name and address of anticipated appellate
13 counsel, which was also District Court counsel, for each Respondent, is as follows:

14 RESPONDENTS: DOUGLAS D. GERRARD, ESQ.;

15 GERRARD & COX, a Nevada professional
16 corporation, d/b/a GERRARD COX & LARSEN

17 RESPONDENTS' COUNSEL: Craig J. Mariam, Esq., #10926
18 Robert S. Larsen, Esq., #7785
19 Wing Yan Wong, Esq., #13622
20 GORDON & REES LLP
21 300 South Fourth Street, Suite 1550
22 Las Vegas, Nevada 89101
23 Tel: 702.577.9310
24 Fax: 702.255.2858
25 cmariam@gordonrees.com
26 rlarsen@gordonrees.com
27 wwong@gordonrees.com

28 5. All counsel identified in paragraphs 3 and 4 above are licensed to practice law in
the State of Nevada.

6. Appellant was represented by retained counsel in the District Court.

7. Appellant is represented by retained counsel on appeal.

8. Appellant has not sought nor has it been granted leave to proceed in forma
pauperis.

9. The proceedings commenced in the District Court on October 5, 2016.

10. A brief description of the nature of the action and result in the District Court,
including the type of order being appealed from and the relief granted by the District Court is as
follows:

1 This action is a legal malpractice suit against attorney Douglas D. Gerrard ("Gerrard") and
2 his law firm Gerrard & Cox, a Nevada professional corporation d/b/a Gerrard Cox & Larsen
3 ("GC&L"), stemming from those Defendants' representation of Plaintiff/Appellant Branch
4 Banking & Trust Company ("BB&T") in an earlier Clark County, Nevada case, which was known
5 as Case Number A-08-574852, consolidated with Case No. A-09-594512 (hereinafter the
6 "underlying priority suit"). The underlying priority suit adjudicated the priority of two competing
7 deeds of trust against commercial real property located in Henderson Nevada. Said suit was tried
8 before the Honorable Elizabeth Gonzalez in 2010. BB&T lost the underlying priority suit, and this
9 loss was appealed to this Nevada Supreme Court (Nev. Sup. Ct. Case No. 56640) which upheld
10 the lower court's decision. Thereafter, the outcome in the underlying priority suit was the subject
11 of a Petition for Writ of Certiorari to the United States Supreme Court (the "Petition"), which
12 ultimately denied that Petition.

13 Within two years of that denial, by the U.S. Supreme Court, of the Petition, this lawsuit
14 was filed. This lawsuit is a legal malpractice claim against the attorneys who represented
15 Plaintiff/Appellant BB&T before the trial court in the underlying priority suit. The loss suffered by
16 BB&T in that suit was, it is alleged herein, not on the merits, but due to procedural and other
17 errors, constituting legal malpractice, by the Defendants/Respondents. The Defendants in this
18 legal malpractice suit filed an NRCP 12(b)(5) Motion to Dismiss, arguing among other
19 contentions that this suit was time-barred under Nevada's statute of limitations for legal
20 malpractice. That Motion was granted and this action has now been dismissed based on a Decision
21 and Order dismissing this suit as barred by the applicable statute of limitations.

22 This is an appeal from that Order of Dismissal, as the Appellant BB&T avers that this suit
23 was timely brought within two years of the U.S. Supreme Court's rejection of the Petition, which
24 should be treated as an appeal for purposes of applying this Court's litigation malpractice appeal
25 tolling and delayed claim accrual rules.

26 11. This instant case has not previously been the subject of an appeal to or original writ
27 proceeding to this Court. (The underlying priority suit was the subject of such a prior proceeding
28 [Case No. 56640], as indicated above, but not this legal malpractice case.)

12. This appeal does not involve child custody or visitation.

13. This appeal may involve the possibility of settlement.

DATED this 22nd day of August, 2017.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT



G. MARK ALBRIGHT, ESQ.

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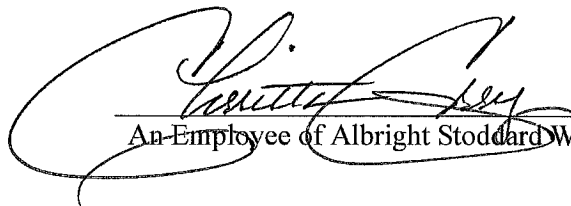
Counsel for Appellant/Plaintiff

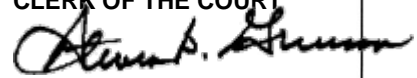
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 22nd day of August, 2017, service was made by the following mode/method a true and correct copy of the foregoing **CASE APPEAL STATEMENT** to the following person(s):

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*Attorneys for Defendants Douglas D.
Gerrard, Esq. and Gerrard Cox Larsen*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a
North Carolina corporation,

Plaintiff,

vs.

DOUGLAS D. GERRARD, ESQ., individually; and
GERRARD COX & LARSEN, a Nevada
professional corporation, JOHN DOES I-X; and
ROE BUSINESS ENTITIES XI-XX,

Defendant.

Case No.: A-16-744561-C
Dept. No.: 27

JUDGMENT

This action came on for hearing before the Court, the Honorable Nancy L. Allf presiding, and the issues having been duly heard. On May 25, 2017, the Court entered its Decision and Order Granting Defendants Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen's Motion to Dismiss First Amended Complaint and Denying Plaintiff's Countermotion for Leave to Amend. On June 5, 2017, Defendants filed their Memorandum of Costs for costs in the amount of \$8,769.28. Plaintiff has not filed any objections or oppositions. On August 7, 2017, the Court entered its Order Denying Plaintiff Branch Banking & Trust Company's Motion to Alter or Amend, by Vacating Order of Dismissal, Pursuant to NRCP 59(e).

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

<input type="checkbox"/> Voluntary Dismissal	<input type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Judgment
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input checked="" type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

The Decision and Order entered on May 25, 2017, attached hereto as Exhibit A, is hereby expressly incorporated herein in full by this reference. In accordance with the Decision and Order entered on May 25, 2017 and the Defendants' Memorandum of Costs filed on June 5, 2017, the Court enters the following Judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT Plaintiff takes nothing by way of its operative complaint in this matter, that the action be dismissed with prejudice, and that Defendants recover of the Plaintiff Branch Banking & Trust Company their costs in the amount of \$8,769.28.

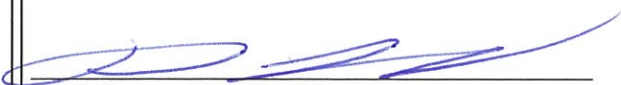
IT IS SO ORDERED, ADJUDGED AND DECREED.

DATED: Aug 29/17


DISTRICT COURT JUDGE 

Respectfully Submitted By:

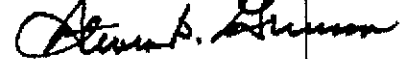
GORDON REES SCULLY MANSUKHANI, LLP


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*Attorneys for Defendants Douglas D.
Gerrard, Esq. and Gerrard Cox Larsen*

EXHIBIT A

EXHIBIT A



DISTRICT COURT
CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST
COMPANY, a North Carolina
corporation,

Plaintiff(s)

vs

Case No.: A-16-744561-C

DOUGLAS D. GERRARD, ESQ.,
individually; and GERRARD & COX, a
Nevada professional corporation, d/b/a
GERRARD COX & LARSEN; JOHN
DOE INDIVIDUALS I-X; and ROE
BUSINESS ENTITIES XI-XX,
Defendants.

Department 27

**DECISION AND ORDER GRANTING DEFENDANTS DOUGLAS D. GERRARD, ESQ. AND
GERRARD COX & LARSEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT
AND DENYING PLAINTIFF'S COUNTERMOTION FOR LEAVE TO AMEND**

This is a legal malpractice suit against attorney Douglas D. Gerrard ("Gerrard") and his law firm, Gerrard Cox & Larsen (individually "GCL") (collectively the "Defendants"). This case stems from the Defendants' representation of Plaintiff Branch Banking & Trust Company ("BBT") in an earlier underlying case tried before the Honorable Elizabeth Gonzalez in 2010. The underlying case involved the adjudication of the priority of two deeds of trust encumbering approximately thirty-eight acres of real property in Henderson, Clark County, Nevada. Colonial Bank, N.A. ("Colonial") originally held the beneficial interest under one of the deeds of trust, but its interest was acquired during the underlying litigation by BBT when Colonial was placed into receivership with the FDIC. It should be noted that

1 Defendants were originally retained to represent Colonial, but such representation transferred
2 to BBT as Colonial's successor in interest.

3 In its Findings of Fact and Conclusions of Law entered June 23, 2010, the District
4 Court in the underlying case ruled against BBT on the basis that BBT failed to establish, as a
5 necessary prerequisite to its claims, that it had been assigned and owned the former Colonial
6 Deed of Trust on which the claims it was pursuing were based. *See* Defendants' Request for
7 Judicial Notice in Support of Defendants Motion to Dismiss First Amended Complaint,
8 Exhibit B—Findings of Fact and Conclusions of Law, Case #08-A-574852. BBT asserts
9 that this ruling was based on the District Court's refusal to allow BBT's attorneys, the
10 Defendants, to present evidence at trial relative to the assignment of the Colonial Deed of
11 Trust to BBT due to the Defendants' alleged failure to timely disclose the pertinent
12 documents prior to trial.
13
14

15 BBT initiated this legal malpractice suit against Defendants on October 5, 2016.
16 BBT filed its First Amended Complaint on February 22, 2017, asserting a single cause of
17 action for Professional Negligence/Legal Malpractice.

18 Now before the Court is Defendants' Motion to Dismiss First Amended Complaint
19 ("Motion") filed on March 8, 2017 concurrently with Defendants' Request for Judicial
20 Notice, wherein Defendants asked this Court to take judicial notice of numerous documents
21 related to the underlying dispute. BBT filed its Opposition to Defendants' Motion to Dismiss
22 on March 21, 2017, along with a Counter-Request for Judicial Notice. The Court set
23 Defendants' Motion to Dismiss for a hearing on motions calendar on April 19, 2017 at 10:00
24 a.m., wherein this Court denied Defendants' Motion to Dismiss as to standing, but took the
25 issue as to whether the statute of limitations has expired under advisement. The Court
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1 continued the matter to Chambers Calendar on May 16, 2017 for a decision as to the running
2 of the statute of limitations.

3
4 After having read the pleadings and papers on file, including the supplemental briefs
5 filed by both parties, and for good cause appearing therefore:
6

7 **THE COURT FINDS** after review, in Nevada, an action for legal malpractice does
8 not begin to accrue until the "plaintiff's damages are certain and not contingent upon the
9 outcome of an appeal." *Semenza v. Nevada Med. Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d
10 184, 186 (1988). "It is only after the underlying case has been affirmed on appeal that it is
11 appropriate to assert injury and maintain a legal malpractice cause of action for damages." *Id.*
12 The statute of limitations for legal malpractice claims is four years from the damages or two
13 years from when the plaintiff discovers, or could discover, the damages, whichever is earlier.
14 N.R.S. 11.207.
15

16 **THE COURT FURTHER FINDS** after review that on March 31, 2013, the Nevada
17 Supreme Court affirmed the district court's ruling in the underlying case, and issued its
18 remittitur. "The reversal and remittitur comprise the judgment by which the parties and the
19 district court are thereafter bound." *In re Estate & Living Trust of Miller*, 125 Nev. 550, 553,
20 216 P.3d 239, 242 (2009). The remittitur "terminated the case below as to all issues settled
21 by the judgment" and formally informs the district court of appellate court's final resolution
22 of the appeal. *Cerminara v. Eighth Jud. Distr. Ct.*, 104 Nev. 663, 665, 765 P.2d 182, 184
23 (1988); *Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1134 (1998).
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1 **THE COURT FURTHER FINDS** after review, that Nevada Rules of Appellate
2 Procedure 41(a)(3)(A) provides that “[a] party may file a motion to stay the remittitur
3 pending application to the Supreme Court of the United States for a writ of certiorari.”
4

5 **THE COURT FURTHER FINDS** after review, that a writ of certiorari is separate
6 and distinct from an appeal. While an appeal to an appellate court is a matter of right, a writ
7 of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10.

8 **THE COURT FURTHER FINDS** after review that because BBT did not have a
9 right to a writ of certiorari to the United States Supreme Court, and because BBT failed to
10 file a motion to stay the remittitur under NRAP 41(a)(3)(A), the Nevada Supreme Court’s
11 May 31, 2013 decision to affirm the district court’s ruling and its remittitur to the district
12 court, constitutes an final adverse appellate ruling for BBT. Therefore, the statute of
13 limitations was not tolled when BBT filed a petition for a writ of certiorari to the United
14 States Supreme Court. Accordingly, the statute of limitations began to run on or about May
15 31, 2013, making BBT’s deadline under the statute of limitations for its legal malpractice
16 claim two years later on or about May 31, 2015.
17

18 **THE COURT FURTHER FINDS** after review BBT filed its Complaint in this case
19 on October 5, 2016, some 493 days past the expiration of the statute of limitations.
20

21 **THEREFORE, THE COURT ORDERS** for good cause appearing and for the
22 reasons stated above, Defendants Motion to Dismiss First Amended Complaint is
23 **GRANTED** as the statute of limitations ran on or about May 31, 2015.

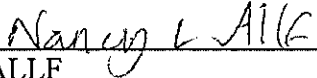
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2 **COURT FURTHER ORDERS** for good cause appearing and after review that
3 Plaintiff's Countermotion for Leave to Amend is likewise **DENIED. HEARING** set for
4 **CHAMBERS CALENDAR** on May 16, 2017, **VACATED.**

5
6 Dated: May ²⁵ 23, 2017 ^{MLA}

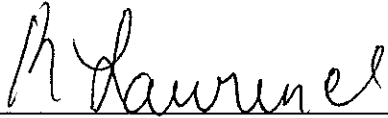
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8 
9 NANCY ALLF
District Court Judge, Department 27

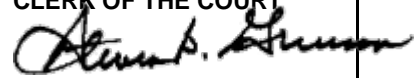
10
11 **Certificate of Service**

12 I hereby certify that on or about the date signed I caused the foregoing document to be
13 electronically served pursuant to EDCR 8.05(a) and 8.05(f), through the Eighth Judicial
14 District Court's electronic filing system, with the date and time of the electronic service
substituted for the date and place of deposit to: *anb by email to.*

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17 Gordon & Rees LLP
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20
21 
22 Karen Lawrence
23 Judicial Executive Assistant
24
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26
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5 Nevada Bar No. 7785
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15 rlarsen@grsm.com
16 wwong@grsm.com

17 *Attorneys for Defendants Douglas D.*
18 *Gerrard, Esq. and Gerrard Cox & Larsen*

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a)	Case No.: A-16-744561-C
North Carolina corporation,	)	Dept. No.: 26 XXVII
)	
Plaintiff,)	
	)	NOTICE OF ENTRY OF
vs.	)	JUDGMENT
)	
DOUGLAS D. GERRARD, ESQ., individually; and)	
GERRARD COX & LARSEN, a Nevada)	
professional corporation, JOHN DOES I-X; and)	
ROE BUSINESS ENTITIES XI-XX,)	
)	
Defendant.)	

PLEASE TAKE NOTICE that, on August 29, 2017 the Court entered the JUDGMENT
in this matter.

///

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///

///

///

1 A copy of the Court's filed Judgment is attached hereto as Exhibit "1."

2 DATED this 30th day of August, 2017.

3 Respectfully submitted,

4 GORDON REES SCULLY
5 MANSUKHANI, LLP

6 /s/ Wing Yan Wong
7 Craig J. Mariam, Esq.
8 Nevada Bar No. 10926
9 Robert S. Larsen, Esq.
10 Nevada Bar No. 7785
11 Wing Yan Wong, Esq.
12 Nevada Bar No. 13622
13 300 South Fourth Street, Suite 1550
14 Las Vegas, Nevada 89101

15 *Attorneys for Defendants Douglas D.*
16 *Gerrard, Esq. and Gerrard Cox & Larsen*

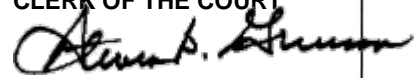
CERTIFICATE OF SERVICE

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I hereby certify under penalty of perjury that I am an employee of GORDON & REES LLP, and that on the 30th day of August, 2017, the foregoing **NOTICE OF ENTRY OF JUDGMENT** was served upon those persons designated by the parties in the E-Service Master List in the Eighth Judicial District court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-1 and the Nevada Electronic Filing and Conversion Rules, upon the following:

G. Mark Albright, Esq.
D. Chris Albright, Esq.
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106

/s/ Gayle Angulo
An Employee of GORDON REES SCULLY
MANSUKHANI, LLP

EXHIBIT “1”



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Nevada Bar No. 10926
ROBERT S. LARSEN, ESQ.
Nevada Bar No. 7785
WING YAN WONG, ESQ.
Nevada Bar No. 13622
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*Attorneys for Defendants Douglas D.
Gerrard, Esq. and Gerrard Cox Larsen*

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a North Carolina corporation,	)	Case No.: A-16-744561-C
	)	Dept. No.: 27
Plaintiff,)	
vs.	)	JUDGMENT
DOUGLAS D. GERRARD, ESQ., individually; and GERRARD COX & LARSEN, a Nevada professional corporation, JOHN DOES I-X; and ROE BUSINESS ENTITIES XI-XX,)	
Defendant.)	

This action came on for hearing before the Court, the Honorable Nancy L. Allf presiding, and the issues having been duly heard. On May 25, 2017, the Court entered its Decision and Order Granting Defendants Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen's Motion to Dismiss First Amended Complaint and Denying Plaintiff's Countermotion for Leave to Amend. On June 5, 2017, Defendants filed their Memorandum of Costs for costs in the amount of \$8,769.28. Plaintiff has not filed any objections or oppositions. On August 7, 2017, the Court entered its Order Denying Plaintiff Branch Banking & Trust Company's Motion to Alter or Amend, by Vacating Order of Dismissal, Pursuant to NRCP 59(e).

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

<input type="checkbox"/> Voluntary Dismissal	<input type="checkbox"/> Summary Judgment
<input type="checkbox"/> Involuntary Dismissal	<input type="checkbox"/> Stipulated Dismissal
<input type="checkbox"/> Stipulated Dismissal	<input type="checkbox"/> Default Judgment
<input checked="" type="checkbox"/> Motion to Dismiss by Deft(s)	<input type="checkbox"/> Judgment of Arbitration

Gordon Rees Scully Mansukhani, LLP
300 S. 4th Street, Suite 1550
Las Vegas, NV 89101

The Decision and Order entered on May 25, 2017, attached hereto as Exhibit A, is hereby expressly incorporated herein in full by this reference. In accordance with the Decision and Order entered on May 25, 2017 and the Defendants' Memorandum of Costs filed on June 5, 2017, the Court enters the following Judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT Plaintiff takes nothing by way of its operative complaint in this matter, that the action be dismissed with prejudice, and that Defendants recover of the Plaintiff Branch Banking & Trust Company their costs in the amount of \$8,769.28.

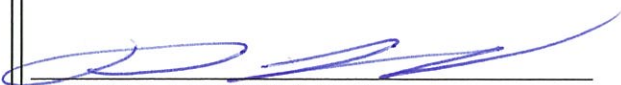
IT IS SO ORDERED, ADJUDGED AND DECREED.

DATED: Aug 29/17


DISTRICT COURT JUDGE 

Respectfully Submitted By:

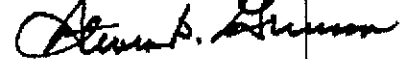
GORDON REES SCULLY MANSUKHANI, LLP


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ROBERT S. LARSEN, ESQ.
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*Attorneys for Defendants Douglas D.
Gerrard, Esq. and Gerrard Cox Larsen*

EXHIBIT A

EXHIBIT A



DISTRICT COURT
CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST
COMPANY, a North Carolina
corporation,

Plaintiff(s)

vs

Case No.: A-16-744561-C

DOUGLAS D. GERRARD, ESQ.,
individually; and GERRARD & COX, a
Nevada professional corporation, d/b/a
GERRARD COX & LARSEN; JOHN
DOE INDIVIDUALS I-X; and ROE
BUSINESS ENTITIES XI-XX,
Defendants.

Department 27

**DECISION AND ORDER GRANTING DEFENDANTS DOUGLAS D. GERRARD, ESQ. AND
GERRARD COX & LARSEN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT
AND DENYING PLAINTIFF'S COUNTERMOTION FOR LEAVE TO AMEND**

This is a legal malpractice suit against attorney Douglas D. Gerrard ("Gerrard") and his law firm, Gerrard Cox & Larsen (individually "GCL") (collectively the "Defendants"). This case stems from the Defendants' representation of Plaintiff Branch Banking & Trust Company ("BBT") in an earlier underlying case tried before the Honorable Elizabeth Gonzalez in 2010. The underlying case involved the adjudication of the priority of two deeds of trust encumbering approximately thirty-eight acres of real property in Henderson, Clark County, Nevada. Colonial Bank, N.A. ("Colonial") originally held the beneficial interest under one of the deeds of trust, but its interest was acquired during the underlying litigation by BBT when Colonial was placed into receivership with the FDIC. It should be noted that

1 Defendants were originally retained to represent Colonial, but such representation transferred
2 to BBT as Colonial's successor in interest.

3 In its Findings of Fact and Conclusions of Law entered June 23, 2010, the District
4 Court in the underlying case ruled against BBT on the basis that BBT failed to establish, as a
5 necessary prerequisite to its claims, that it had been assigned and owned the former Colonial
6 Deed of Trust on which the claims it was pursuing were based. *See* Defendants' Request for
7 Judicial Notice in Support of Defendants Motion to Dismiss First Amended Complaint,
8 Exhibit B—Findings of Fact and Conclusions of Law, Case #08-A-574852. BBT asserts
9 that this ruling was based on the District Court's refusal to allow BBT's attorneys, the
10 Defendants, to present evidence at trial relative to the assignment of the Colonial Deed of
11 Trust to BBT due to the Defendants' alleged failure to timely disclose the pertinent
12 documents prior to trial.
13
14

15 BBT initiated this legal malpractice suit against Defendants on October 5, 2016.
16 BBT filed its First Amended Complaint on February 22, 2017, asserting a single cause of
17 action for Professional Negligence/Legal Malpractice.

18 Now before the Court is Defendants' Motion to Dismiss First Amended Complaint
19 ("Motion") filed on March 8, 2017 concurrently with Defendants' Request for Judicial
20 Notice, wherein Defendants asked this Court to take judicial notice of numerous documents
21 related to the underlying dispute. BBT filed its Opposition to Defendants' Motion to Dismiss
22 on March 21, 2017, along with a Counter-Request for Judicial Notice. The Court set
23 Defendants' Motion to Dismiss for a hearing on motions calendar on April 19, 2017 at 10:00
24 a.m., wherein this Court denied Defendants' Motion to Dismiss as to standing, but took the
25 issue as to whether the statute of limitations has expired under advisement. The Court
26
27
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1 continued the matter to Chambers Calendar on May 16, 2017 for a decision as to the running
2 of the statute of limitations.

3
4 After having read the pleadings and papers on file, including the supplemental briefs
5 filed by both parties, and for good cause appearing therefore:
6

7 **THE COURT FINDS** after review, in Nevada, an action for legal malpractice does
8 not begin to accrue until the "plaintiff's damages are certain and not contingent upon the
9 outcome of an appeal." *Semenza v. Nevada Med. Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d
10 184, 186 (1988). "It is only after the underlying case has been affirmed on appeal that it is
11 appropriate to assert injury and maintain a legal malpractice cause of action for damages." *Id.*
12 The statute of limitations for legal malpractice claims is four years from the damages or two
13 years from when the plaintiff discovers, or could discover, the damages, whichever is earlier.
14 N.R.S. 11.207.
15

16 **THE COURT FURTHER FINDS** after review that on March 31, 2013, the Nevada
17 Supreme Court affirmed the district court's ruling in the underlying case, and issued its
18 remittitur. "The reversal and remittitur comprise the judgment by which the parties and the
19 district court are thereafter bound." *In re Estate & Living Trust of Miller*, 125 Nev. 550, 553,
20 216 P.3d 239, 242 (2009). The remittitur "terminated the case below as to all issues settled
21 by the judgment" and formally informs the district court of appellate court's final resolution
22 of the appeal. *Cerminara v. Eighth Jud. Distr. Ct.*, 104 Nev. 663, 665, 765 P.2d 182, 184
23 (1988); *Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1134 (1998).
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1 **THE COURT FURTHER FINDS** after review, that Nevada Rules of Appellate
2 Procedure 41(a)(3)(A) provides that “[a] party may file a motion to stay the remittitur
3 pending application to the Supreme Court of the United States for a writ of certiorari.”
4

5 **THE COURT FURTHER FINDS** after review, that a writ of certiorari is separate
6 and distinct from an appeal. While an appeal to an appellate court is a matter of right, a writ
7 of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10.

8 **THE COURT FURTHER FINDS** after review that because BBT did not have a
9 right to a writ of certiorari to the United States Supreme Court, and because BBT failed to
10 file a motion to stay the remittitur under NRAP 41(a)(3)(A), the Nevada Supreme Court’s
11 May 31, 2013 decision to affirm the district court’s ruling and its remittitur to the district
12 court, constitutes an final adverse appellate ruling for BBT. Therefore, the statute of
13 limitations was not tolled when BBT filed a petition for a writ of certiorari to the United
14 States Supreme Court. Accordingly, the statute of limitations began to run on or about May
15 31, 2013, making BBT’s deadline under the statute of limitations for its legal malpractice
16 claim two years later on or about May 31, 2015.
17

18 **THE COURT FURTHER FINDS** after review BBT filed its Complaint in this case
19 on October 5, 2016, some 493 days past the expiration of the statute of limitations.
20

21 **THEREFORE, THE COURT ORDERS** for good cause appearing and for the
22 reasons stated above, Defendants Motion to Dismiss First Amended Complaint is
23 **GRANTED** as the statute of limitations ran on or about May 31, 2015.

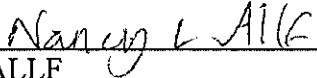
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1
2 **COURT FURTHER ORDERS** for good cause appearing and after review that
3 Plaintiff's Countermotion for Leave to Amend is likewise **DENIED. HEARING** set for
4 **CHAMBERS CALENDAR** on May 16, 2017, **VACATED.**

5
6 Dated: May ²⁵23, 2017 ^{MLA}

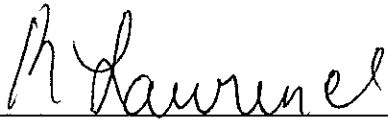
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9 NANCY ALLF
District Court Judge, Department 27

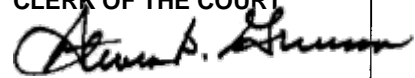
10
11 **Certificate of Service**

12 I hereby certify that on or about the date signed I caused the foregoing document to be
13 electronically served pursuant to EDCR 8.05(a) and 8.05(f), through the Eighth Judicial
14 District Court's electronic filing system, with the date and time of the electronic service
substituted for the date and place of deposit to: *anb by email to.*

15 Albright, Stoddard, Warnick & Albright
16 G. Mark Albright, Esq. – gma@albrightstoddard.com
D. Chris Albright, Esq. – dca@albrightstoddard.com

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19 Robert S. Larsen, Esq. – rlarsen@gordonrees.com
Wong Yan Wong, Esq. – wwong@gordonrees.com

20
21 
22 Karen Lawrence
23 Judicial Executive Assistant
24
25
26
27
28



ANOA
G. MARK ALBRIGHT, ESQ.
Nevada Bar No. 001394
D. CHRIS ALBRIGHT, ESQ.
Nevada Bar No. 004904
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
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gma@albrightstoddard.com
dca@albrightstoddard.com
Attorneys for Appellant/Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

BRANCH BANKING & TRUST COMPANY, a
North Carolina corporation,

Appellant/Plaintiff,

vs.

DOUGLAS D. GERRARD, ESQ., individually;
and GERRARD & COX, a Nevada professional
corporation, d/b/a GERRARD COX & LARSEN;
JOHN DOE INDIVIDUALS I-X; and ROE
BUSINESS ENTITIES XI-XX,

Respondents/Defendants.

CASE NO.: A-16-744561-C
DEPT NO.: XXVII

AMENDED NOTICE OF APPEAL

Nevada Supreme Court Case No.: 73848

NOTICE is hereby given that BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, the Plaintiff in this Case No. A-16-744561-C, and the appellant in Nevada Supreme Court Case No. 73848, hereby appeals to the Supreme Court of the State of Nevada from the following Orders and Judgments which have been entered against it in the above-captioned matter:

A. That certain dispositive "Decision and Order Granting Defendants Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen's Motion to Dismiss First Amended Complaint and Denying Plaintiff's Countermotion for Leave to Amend" entered by the district court on May 25,

AA1009

1 2017, with Notice of Entry thereof being filed and electronically served on May 26, 2017; and
2 Plaintiff/Appellant also hereby appeals from:

3 B. That certain "Judgment" entered by the district court on August 29, 2017, which
4 reiterated and incorporated the district court's prior dispositive Decision and Order, and which also
5 contained a costs award included therein, with Notice of Entry thereof having been filed and
6 electronically served on August 30, 2017.

7 DATED this 30th day of August, 2017.

8 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

9
10 
11 G. MARK ALBRIGHT, ESQ.

12 Nevada Bar No. 001394

13 D. CHRIS ALBRIGHT, ESQ.

14 Nevada Bar No. 004904

15 801 South Rancho Drive, Suite D-4

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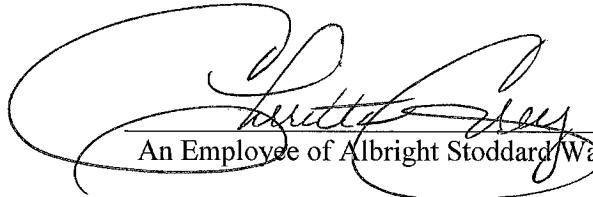
20 *Counsel for Appellant/Plaintiff*
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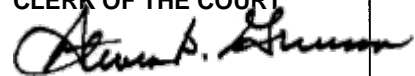
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 30th day of August, 2017, service was made by the following mode/method of a true and correct copy of the foregoing **AMENDED NOTICE OF APPEAL** to the following person(s):

Craig J. Mariam, Esq., #10926
Robert S. Larsen, Esq., #7785
Wing Yan Wong, Esq., #13622
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wwong@gordonrees.com
Attorney for Defendants

☐ Certified Mail
☒ Electronic Filing/Service
☐ Email
☐ Facsimile
☐ Hand Delivery
☐ Regular U.S. Mail


An Employee of Albright Stoddard Warnick & Albright



1 **ACAS**
2 G. MARK ALBRIGHT, ESQ.
3 Nevada Bar No. 001394
4 D. CHRIS ALBRIGHT, ESQ.
5 Nevada Bar No. 004904
6 **ALBRIGHT, STODDARD, WARNICK & ALBRIGHT**
7 801 South Rancho Drive, Suite D-4
8 Las Vegas, Nevada 89106
9 Tel: (702) 384-7111
10 Fax: (702) 384-0605
11 gma@albrightstoddard.com
12 dca@albrightstoddard.com
13 *Attorneys for Appellant/Plaintiff*

8
9
10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 BRANCH BANKING & TRUST COMPANY, a
13 North Carolina corporation,

CASE NO. A-16-744561-C

14 Appellant/Plaintiff,

DEPT NO. XXVII

15 vs.

16 DOUGLAS D. GERRARD, ESQ., individually;
17 and GERRARD & COX, a Nevada professional
18 corporation, d/b/a GERRARD COX & LARSEN;
19 JOHN DOE INDIVIDUALS I-X; and ROE
20 BUSINESS ENTITIES XI-XX,

**AMENDED CASE APPEAL
STATEMENT**

21 Respondents/Defendants.

22 1. The name of the Appellant filing this Amended Case Appeal Statement is:
23 BRANCH BANKING & TRUST COMPANY, a North Carolina corporation, qualified and
24 registered to do business in Nevada.

25 2. The following Judge issued the Decision and Order and the Judgment appealed
26 from: The Honorable Nancy L. Allf, District Court Judge, Department 27, Clark County, Nevada.

27 3. The identity of each Appellant and the name and address of counsel for each
28 Appellant is as follows:

APPELLANT:

Branch Banking & Trust Company, a North
Carolina corporation

AA1012

1 APPELLANT'S COUNSEL: G. Mark Albright, Esq.
2 Nevada Bar No. 001394
3 D. Chris Albright, Esq.
4 Nevada Bar No. 004904
5 ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
6 801 South Rancho Drive, Suite D-4
7 Las Vegas, Nevada 89106
8 Tel: 702.384.7111
9 Fax: 702.384.0605
10 gma@albrightstoddard.com
11 dca@albrightstoddard.com

12 4. The identity of each Respondent and the name and address of anticipated appellate
13 counsel, which was also district court counsel, for each Respondent, is as follows:

14 RESPONDENTS: DOUGLAS D. GERRARD, ESQ.;

15 GERRARD & COX, a Nevada professional
16 corporation, d/b/a GERRARD COX & LARSEN

17 RESPONDENTS' COUNSEL: Craig J. Mariam, Esq., #10926
18 Robert S. Larsen, Esq., #7785
19 Wing Yan Wong, Esq., #13622
20 GORDON & REES LLP
21 300 South Fourth Street, Suite 1550
22 Las Vegas, Nevada 89101
23 Tel: 702.577.9310
24 Fax: 702.255.2858
25 cmariam@gordonrees.com
26 rlarsen@gordonrees.com
27 wwong@gordonrees.com

28 5. All counsel identified in paragraphs 3 and 4 above are licensed to practice law in
the State of Nevada.

6. Appellant was represented by retained counsel in the district court.

7. Appellant is represented by retained counsel on appeal.

8. Appellant has not sought nor has it been granted leave to proceed in forma
pauperis.

9. The proceedings commenced in the district court on October 5, 2016.

10. A brief description of the nature of the action and result in the district court,
including the type of order being appealed from and the relief granted by the district court is as
follows:


1 This action is a legal malpractice suit against attorney Douglas D. Gerrard ("Gerrard") and
2 his law firm Gerrard & Cox, a Nevada professional corporation d/b/a Gerrard Cox & Larsen
3 ("GC&L"), stemming from those Defendants' representation of Plaintiff/Appellant Branch
4 Banking & Trust Company ("BB&T") in an earlier Clark County, Nevada case, which was known
5 as Case Number A-08-574852, consolidated with Case No. A-09-594512 (hereinafter the
6 "underlying priority suit"). The underlying priority suit adjudicated the priority of two competing
7 deeds of trust against commercial real property located in Henderson Nevada. Said suit was tried
8 before the Honorable Elizabeth Gonzalez in 2010. BB&T lost the underlying priority suit, and this
9 loss was appealed to this Nevada Supreme Court (Nev. Sup. Ct. Case No. 56640) which upheld
10 the lower court's decision. Thereafter, the outcome in the underlying priority suit was the subject
11 of a Petition for Writ of Certiorari to the United States Supreme Court (the "Petition"), which
12 Court ultimately denied that Petition.

13 Within two years of that denial, by the U.S. Supreme Court, of the Petition, this lawsuit
14 was filed. This lawsuit is a legal malpractice claim against the attorneys who represented
15 Plaintiff/Appellant BB&T before the trial court in the underlying priority suit. The loss suffered by
16 BB&T in that suit was, it is alleged herein, not on the merits, but due to procedural and other
17 errors, constituting legal malpractice, by the Defendants/Respondents. The Defendants in this legal
18 malpractice suit filed an NRCP 12(b)(5) Motion to Dismiss, arguing among other contentions that
19 this suit was time-barred under Nevada's statute of limitations for legal malpractice. That Motion
20 was granted and this action has now been dismissed based on a Decision and Order entered on
21 May 25, 2017 dismissing this suit as barred by the applicable statute of limitations. A subsequent
22 Motion to Alter or Amend, by vacating the Decision and Order of dismissal, was denied. The
23 Decision and Order of dismissal also resulted in a Judgment, entered on August 29, 2017,
24 incorporating the Decision and Order, and awarding costs.

25 This is an appeal from the May 25, 2017 Decision and Order of dismissal, and from the
26 August 29, 2017 Judgment thereon, as the Appellant BB&T avers that this suit was timely brought
27 within two years of the U.S. Supreme Court's rejection of the Petition, which Petition should be
28 treated as an appeal for purposes of applying Nevada's litigation malpractice appeal tolling and
delayed claim accrual rules, as recognized by this Nevada Supreme Court.

DATED this 30th day of August, 2017.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT


G. MARK ALBRIGHT, ESQ.
Nevada Bar No. 001394
D. CHRIS ALBRIGHT, ESQ.
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Counsel for Appellant/Plaintiff

CERTIFICATE OF SERVICE

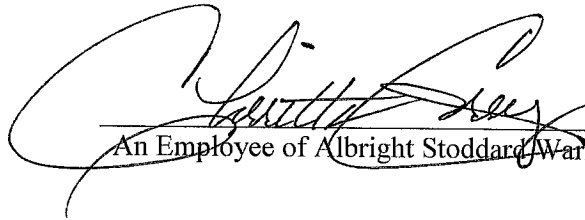
Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on this 30th day of August, 2017, service was made by the following mode/method a true and correct copy of the foregoing **AMENDED CASE APPEAL STATEMENT** to the following person(s):

Craig J. Mariam, Esq., #10926
Robert S. Larsen, Esq., #7785
Wing Yan Wong, Esq., #13622
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Attorneys for Respondents/Defendants

☐ Certified Mail
☒ Electronic Filing/Service
☐ Email
☐ Facsimile
☐ Hand Delivery
☐ Regular Mail


An Employee of Albright Stoddard Warnick & Albright