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.	Supreme Court No. 73848 District Court Case No. A-16-744361-C

RESPONDENTS' ANSWERING BRIEF

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RULE 26.1 DISCLOSURE STATEMENT

I certify that the following are persons and entities described in NRAP 26.1 that must be disclosed: Respondent Douglas D. Gerrard, Esq. is an individual. Respondent Gerrard & Cox d/b/a Gerrard Cox & Larsen is a Nevada professional corporation. There is no publicly held company that owns 10% or more of its stock.

The attorneys who have represented Respondents in this Court and in the District Court are:

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These representations are made in order that the Justices of the Court may evaluate possible disqualification or recusal.

DATED this 7th day of May, 2018.

GORDON REES SCULLY MANSUKHANI, LLP

/s/ Robert S. Larsen

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ISSUES PRESENTED

1. Whether the District Court correctly ruled that this legal malpractice action is barred by the statute of limitations under NRS 11.207.[1]

2. Whether the District Court's dismissal of the action was nevertheless proper because Branch Banking & Trust Company ("BB&T") cannot prove that it suffered damage as a result of the alleged malpractice as a matter of law.

II.

STATEMENT OF THE CASE

BB&T filed this legal malpractice action against Douglas D. Gerrard, Esq. and Gerrard Cox & Larsen (collectively, "Gerrard Cox"), BB&T's former counsel, more than two years after this Court affirmed a trial court's judgment against BB&T in a separate, prior litigation ("Priority Litigation"). Gerrard Cox was litigation counsel for BB&T in the Priority Litigation while it was in district court but did not represent BB&T in any part of the transactions which gave rise tot eh claims in the Priority Litigation or in the appeal of the district court's decision.

A. This Malpractice Action Arose from the Priority Litigation, the Appeal for Which Concluded in March 2014.

The Priority Litigation concerned the competing priority claims of two separate deeds of trust against a parcel of real property located in Clark County. (I. AA0173.) BB&T argued that it was the beneficiary of one of the deeds of trust, as

[1] BB&T identifies five issues for appeal. All of those issues are really a single issue: did BB&T file its Complaint before the statute of limitations expired?

successor in interest of Colonial Bank, N.A. ("Colonial") due to BB&T's alleged purchase of substantially all assets of Colonial through the FDIC's receivership over Colonial. (*Id*.) BB&T further argued that its deed of trust was senior to an earlier recorded deed of trust through equitable subrogation or replacement, among other legal theories. (*Id*.)

In its Findings of Facts and Conclusions of Law ("FFCL"), the trial court found against BB&T on multiple grounds, including that 1) BB&T was not the owner of the beneficiary interest under the deed of trust, and 2) BB&T's purported deed of trust was junior to the competing deed of trust. (I. AA 0187; II. AA0223; II. AA0273.) The trial court issued two Judgments, on July 23, 2010 and on November 10, 2010. (I. AA0191.)

With new counsel, BB&T appealed the Judgment and FFCL, but only with respect to BB&T's ownership interest. (I. AA191.) On May 31, 2013, this Court issued its Order of Affirmance. (I. AA0191.) On February 21, 2014, this Court denied BB&T's petition for an *en banc* rehearing. (I. AA0192.) On March 18, 2014, this Court issued the remittitur and closed the appeal. (II. AA0223-24.) After the appeal was closed, BB&T filed a petition for a writ of certiorari to the United States Supreme Court ("USSC"), which was denied on October 6, 2014. (I. AA0192.)

B. The District Court Granted Gerrard Cox's Motion to Dismiss.

On October 5, 2016, more than two years after the affirmance and issuance of the remittitur, and more than six years after the alleged malpractice had occurred, BB&T filed this lawsuit. (I. AA0007-35.) BB&T alleged that Gerrard Cox committed malpractice by failing to submit sufficient evidence to support BB&T's ownership interest in the Colonial deed of trust. (I. AA0019.) BB&T subsequently filed its First Amended Complaint ("FAC"). (I. AA0165-96.) Gerrard Cox filed a motion to dismiss the FAC, arguing that the claim was time-barred, but also failed because the trial court in the Priority Litigation found against BB&T on the merits of the priority dispute which was unrelated to the alleged malpractice. (I. AA0205-11, AA0212-15.) The District Court requested supplemental briefing related to the statutes of limitation. (I. AA0784.)

After considering the supplemental briefs, the District Court issued its Decision and Order ("Order of Dismissal"), granting Respondents' Motion to Dismiss the FAC. (IV. AA0849-53.) The District Court found that this Court's affirmance of the trial court's decision and remittitur "constitute[d] a final adverse appellate ruling for BBT." (IV. AA0852.) The District Court further found that the statute of limitations began to run on or about May 31, 2013, the date the order of affirmance was issued. (*Id*.) BB&T then had two years, or until May 31, 2015,

to file this malpractice claim. (*Id*.) Since BB&T filed its Complaint on October 5, 2016, BB&T's claim was untimely. (*Id.*)

BB&T subsequently filed a Motion to Alter or Amend, by Vacating, Order of Dismissal, Pursuant to NRCP 59(e) the District Court's Order of Dismissal ("Motion to Alter"). (IV. AA0913-29.) The District Court denied BB&T's Motion to Alter. (V. AA0973-74.) BB&T then appealed the Order of Dismissal and denial of the Motion to Alter. (V. AA0981-83, AA1009-11.)

III.

STATEMENT OF THE FACTS

A. BB&T's Predecessor, Colonial, Failed to Obtain a Reconveyance of an Earlier Recorded Deed of Trust, Prior to Closing a Refinance Loan Secured by Its Own New Deed of Trust, Causing Colonial's Security Interest to Lose Its Senior Status.

To initially purchase a piece of real estate in Henderson, Nevada ("Property"), R&S St. Rose ("R&S St. Rose") borrowed $29,305,250.00 from Colonial ("First Colonial Loan"). (I. AA167.) The First Colonial Loan was secured by a deed of trust against the Property, recorded on August 26, 2005 ("First Colonial DOT") in a first priority position. (*Id*.)

R&S St. Rose borrowed $12,000,000 from R& Lenders, LLC ("R&S Lenders") and secured this loan with a deed of trust against the Property, recorded on September 16, 2005 ("R&S Lenders DOT"). (I. AA0168.)

To fully pay off the First Colonial Loan and to further develop the Property, R&S St. Rose entered into a second loan with Colonial on for $43,980,000.00 ("Construction Loan"). (*Id.*) The Construction Loan was secured by a deed of trust in favor of Colonial against the Property, recorded on July 27, 2007 ("Second Colonial DOT"). (I. AA0169.) The First Colonial DOT was released through this transaction, and Colonial failed to obtain a reconveyance or subordination of the R&S Lenders DOT before closing the Construction Loan, leaving the Second Colonial DOT in a junior position to the R&S Lenders DOT.

Gerrard Cox did not represent any of the entities in these financing transactions and had nothing to do with creating the priority issue.

1. R&S Lenders Defaulted on Loans It Had Taken to Raise the Money Lent to R&S St. Rose, Which Led to the Priority Litigation.

Two investors in R&S Lenders ("R&S Investors") commenced a lawsuit against R&S St. Rose and R&S Lenders as well as individual directors and executives of R&S St. Rose to collect money they had lent to R&S Lenders which was in turn lent by R&S Lenders to R&S St. Rose. (I. AA0171.) Colonial was later added as a defendant. (*Id.*)

Meanwhile, Colonial filed its own litigation, seeking a determination that the Second Colonial DOT had priority over R&S Lender's DOT based on replacement and modification, equitable subrogation, and other legal theories. (I. AA0172.)

The two lawsuits were consolidated into the Priority Litigation. (*Id.*) Gerrard Cox represented Colonial in the Priority Litigation. (*Id*.)

2. BB&T Was Substituted as Party Following Colonial's Receivership.

In August 2009, the Alabama State Banking Department closed Colonial, naming the FDIC as its receiver. (*Id.*) On August 14, 2009, BB&T executed with the FDIC a "Purchase and Assumption Agreement, Whole Bank All Deposits" ("PAA"), purporting to transfer substantially all of Colonial's financial assets to BB&T. (*Id*.) As not all assets of Colonial were to be transferred to BB&T, the PAA described the loans which were being purchased and assigned to BB&T by reference to schedules of loans and assets that were supposed to be attached as exhibits to the PAA. (*Id.*) There were no schedules of assets or loans actually attached to the document. (*Id*.) Gerrard Cox was not involved in the drafting of the PAA or BB&T's acquisition of Colonial.

Following the transfer of Colonial's assets, BB&T substituted into the Priority Litigation in place of Colonial. (I. AA0173.) BB&T filed a Second Amended Complaint, asserting causes of action for declaratory relief for contractual subrogation, declaratory relief for quiet title and replacement, equitable and promissory estoppel, unjust enrichment, fraudulent misrepresentation, and civil conspiracy. (II. AA0219, AA0229-45.)

3. The Trial Court Determined That the PAA Did Not Transfer the Second Colonial DOT to BB&T and That the R&S Lenders DOT Was Never Reconveyed.

In the Priority Litigation, Colonial's representatives testified that Colonial only entered into the Construction Loan under the condition that the Second Colonial DOT, and thereby Colonial, would have a first priority lien against the Property. (I. AA0169; II. AA0220; II. AA0259.) This financing arrangement required an agreement by R&S Lenders to reconvey or subordinate the R&S Lenders DOT so that Colonial's new loan could be secured by a first priority lien. (II. AA0220-21.) Colonial drafted a loan commitment letter dated July 24, 2007 ("Loan Commitment Letter") and supposedly faxed it to R&S St. Rose. Colonial intended to obtain a commitment from R&S St. Rose to obtain a reconveyance of the R&S Lenders DOT as a condition of receiving the new loan. (II. AA0220-21, AA00259-60.) Colonial closed the Construction Loan on July 31, 2007 without receiving the signed Loan Commitment Letter. (II. AA0221, AA0262.)

At trial, R&S St. Rose's representatives denied ever receiving the Loan Commitment Letter, and Colonial's representatives were unable to produce any copy of the letter executed by R&S St. Rose. (II. AA0221, AA0259, AA0260.)

In the FFCL, the Court considered the PAA deficient "as inconsistent and incomplete" for, in part, failing to attach the schedules referenced therein. (I. AA0187; II. AA0222; II. AA0266; II. AA0269.)

Rather than deciding the Priority Litigation solely on that basis, the trial court made specific factual findings to support its alternative ruling that irrespective of who owned the Second Colonial DOT, the Second Colonial DOT did not have first position priority over the R&S Lenders DOT. Because Colonial never received confirmation that R&S St. Rose would require or agree to reconvey the R&S Lenders DOT, the trial court found that Colonial "did not have a reasonable expectation that it would receive a reconveyance of the [R&S Lenders DOT] following closing of the Construction loan transaction[,] only that it would receive a policy of title insurance, which it did receive." (II. AA0221, AA0273.) Thus, Colonial did not require St. Rose to reconvey or subordinate the R&S Lenders DOT as a condition of making the new loan. (II. AA0220, AA0273.) The trial court determined BB&T's priority claims failed.

The trial court entered two Judgments against BB&T and in favor of the R&S investors: on July 23, 2010 – incorporating the June 23, 2010 FFCL in its entirety – and on November 10, 2010. (I. AA0191; II. AA0223; II. AA0276-78.)

B. On Appeal, This Court Affirmed the Trial Court's Judgment against BB&T and Issued a Remittitur Which Finalized the Appeal.

BB&T appealed the trial court's findings to this Court, which affirmed the ruling on **May 31, 2013**. (I. AA0191.) BB&T's request for an *en banc* rehearing of the appeal was denied on or about **February 21, 2014**. (I. AA0192.)

This Court then issued the remittitur and closed the appeal on **March 18, 2014**. (II. AA0223-24.) After this Court's affirmance, BB&T petitioned the USSC for a discretionary writ of certiorari. (I. AA0192.) The USSC denied BB&T's petition on October 6, 2014. (I. AA0193.)

Before or even while the petition for a writ of certiorari was pending, BB&T never sought a stay of the issuance or recall of the remittitur. (II. AA0223-24.) Instead, BB&T allowed the appeal to close on March 18, 2014, when the remittitur issued. (II. AA0224.) BB&T then waited until more than two years after the appeal closed to file this malpractice action against Gerrard Cox.

In its Opening Brief, BB&T spends considerable time arguing all of the things that allegedly constitute malpractice. *See* Opening Brief at pp. 9-17. Gerrard Cox disputes those factual characterizations, most of which ignore the obvious problems created by BB&T and its predecessor before Gerrard Cox was ever involved. However, none of those facts matter to the single legal question at issue in this appeal: did BB&T file its malpractice complaint before the statute of limitations expired? As explained below, the answer is no.

IV.

SUMMARY OF THE ARGUMENTS

The District Court correctly ruled that BB&T's malpractice claim is time-barred. In Nevada, a litigation legal malpractice claim accrues once the adverse

judgment is "affirmed on appeal." *Semenza v. Nev. Med. Liab. Ins*., 104 Nev. 666, 668, 765 P.2d 184, 196 (1988). At that point, the plaintiff's damages become certain and are no longer "contingent upon the outcome of an appeal." *Id.* In this case, BB&T's alleged damages became final once this Court issued its Order of Affirmance on **May 31, 2013**. This Court issued the remittitur and closed the appeal on **March 18, 2014**. At the latest, BB&T had two years from **March 18, 2014** to file this malpractice lawsuit. It failed to do so.

In Nevada, the timeline for an appeal is simple. It begins when the notice of appeal is filed. It ends when this Court issues the remittitur. Absent a stay of the remittitur, the filing of a petition for a writ of certiorari to the USSC does not toll the statute of limitations for malpractice. BB&T had a mechanism to prevent the appeal from becoming final: by moving for a stay of the remittitur. BB&T did not do so, allowing its appeal to become final on March 18, 2014.

The District Court correctly distinguished the differences between an appeal and a writ petition for discretionary review. In 2010, the Nevada Supreme Court was required to hear all appeals of matters decided in district court. As a result, this Court was guaranteed to give a plaintiff an answer: either the case was overturned or remanded in some fashion, and the attorney's conduct was vindicated; or the case was affirmed, and the plaintiff's injury rooted in legal malpractice was final. In contrast, a petition for a writ of certiorari to the USSC is

not an appeal or even review of right.

Nevada has not treated writ petitions as an "appeal." Once this Court affirms the judgment and issues the remittitur, the appeal is complete. Other jurisdictions agree that once a judgment has been affirmed on appeal and the remittitur (or mandate) is issued, the action is no longer "alive" even if a writ petition to the USSC is pending. The USSC's denial of a petition for certiorari is not a determination of the merits of the case. Therefore, the finality of this Court's affirmance does not depend on the outcome of a petition for a writ of certiorari.

Importantly, tolling the period pending a petition for certiorari subverts Nevada's public policy behind statutes of limitations, which favors finality of judgment and diligent prosecution of claims. The USSC grants discretionary review for very specific types of cases which does not include state law claims involving strictly evidentiary issues. Denial of the petition in the Priority Litigation was near guaranteed. For that reason, a petition for certiorari does not serve the purpose behind the litigation malpractice rule, which focuses on certainty of damage. The events surrounding the Priority Litigation occurred over a decade ago. The severe risks of lost evidence, disappearing witnesses, and fading memories heavily weigh *against* any benefits from tolling based on uncertainty of damage, especially after this Court already affirmed the Judgment and closed the appeal.

Even if this Court were to consider BB&T's untimely claim, the dismissal was nevertheless proper because BB&T cannot prove that it suffered damage as a result of the alleged malpractice. In the Priority Litigation, the trial court found that BB&T did not have any interest in the Second Colonial DOT. The trial court also found that the Second Colonial DOT did not have priority over the R&S Lenders DOT irrespective of the ownership of this trust deed. Regardless of whether BB&T could prove it had any interest in the Second Colonial DOT, BB&T still could not have prevailed on the priority issue. BB&T cannot show that any conduct by Gerrard Cox proximately caused BB&T's damage. This Court should affirm the District Court's dismissal of the FAC.

V.

LEGAL ARGUMENTS

A. This Court Reviews the Order of Dismissal *De Novo*.

The district court may properly "dismiss a complaint for failure to state a claim upon which relief can be granted [when an] action is barred by the statute of limitations." *Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture, LLC*, 129 Nev. Adv. Rep. 18, 300 P.3d 124, 128 (2013) (citations and quotations omitted). Dismissal is proper for failure to state a claim under NRCP 12(b)(5) when "it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief."

Vacation Village v. Hitachi America, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). This Court reviews issues of statutory interpretation and issues involving a purely legal question *de novo*. *Stalk v. Mushin*, 125 Nev. 21, 31, 199 P.3d 838, 841 (2009); *Wyeth v. Rowatt*, 126 Nev. 446, 460, 244 P.3d 765, 775 (2010). The application of the statute of limitations is a question of law that this Court reviews *de novo*. *Holcomb Condo. Homeowners' Ass'n, Inc.*, 300 P.3d at 128 (citations omitted).

"Ordinarily, an order denying a motion for reconsideration is not substantively appealable." *Rico v. Rodriguez*, 121 Nev. 695, 120 P.3d 812, n. 1 (2015). When the order denying the reconsideration was entered before the appeal was taken, this Court may also consider the order denying reconsideration to the extent it clarifies the Order of Dismissal. *Id*.

B. BB&T's Alleged Damages Were Certain Once This Court Affirmed the Priority Litigation on Appeal.

In Nevada, a party's damages for litigation malpractice become certain once "the underlying case has been **affirmed on appeal**." *Semenza v. Nev. Med. Liability Ins*., 104 Nev. 666, 668, 765 P.2d 184, 186 (1988) (emphasis added). This is because when "there has been **no final adjudication** of the client's case in which the malpractice allegedly occurred, the element of injury or damage remains speculative and remote, thereby making premature the cause of action for professional negligence.'" *Id*. (emphasis added). As soon as "the underlying case

has been affirmed on appeal… it is appropriate to assert injury and maintain a legal malpractice cause of action for damages." *Id*. at 668.

This tolling principle, also known as the litigation malpractice rule, is codified as part of the two-year statute of limitations in NRS 11.207(1). *Brady v. New Albertson's, Inc.*, 130 Nev. Adv. Rep. 68, 333 P.3d 229, 235 (2014) ("we affirm the ongoing validity and application of the litigation malpractice tolling rule to the two-year statute of limitations in NRS 11.207(1)"). Under 11.207(1), "[a]n action against an attorney… to recover damages for malpractice, whether based on a breach of duty or contract, must be commenced within 4 years after the plaintiff sustains damage or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier."

One purpose of tolling is to avoid "interlocutory-type actions for legal malpractice." *Semenza*, 104 Nev. at 668, 765 P.2d at 186. "If an **appeal** is taken in the underlying case, it is simply premature to proceed to trial on a legal malpractice claim until the **appeal** of the original judgment on the underlying cause of action has been finally resolved." *Id.* (emphasis added). While this Court has applied the litigation malpractice rule to toll statutes of limitation pending

exhaustion of appeals to the Nevada Supreme Court[2], this Court has never treated speculative and discretionary reviews as an appeal for purposes of tolling.

C. In Nevada, Judgment Is Final Once Affirmed by This Court and Upon Issuance of the Remittitur.

Once the Nevada Supreme Court issues a remittitur, the appeal is over and the judgment is final. *In re Estate of Miller*, 125 Nev. 550, 553, 216 P.3d 239, 242 (2009) ("the reversal and remittitur comprise the judgment by which the parties and the district court are thereafter bound"). At that time, a plaintiff can no longer claim that its damages are uncertain.

The remittitur "terminate[s] the case below as to all issues settled by the judgment." *Cerminara v. Eighth Judicial Dist. Court*, 104 Nev. 663, 665, 765 P.2d 182, 184 (1988) ("Upon receipt of this court's remittitur, it was the duty of the district court to comply with the mandate of this court without variation"). A remittitur is "[a] certified copy of the judgment and opinion of the court." NRAP 41(a)(2). "The purpose of a remittitur, aside from returning the record on appeal to the district court, is twofold: it divests this court of jurisdiction over the appeal and returns jurisdiction to the district court, and it formally informs the district court of this court's **final resolution of the appeal**." *Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1134 (1998) (emphasis added); *see In re Estate of Miller*,

[2] *See e.g., Hewitt v. Allen*, 118 Nev. 216, 221, 43 P.3d 345, 348 (2002) ("the malpractice action does not accrue while an appeal from the adverse ruling is pending"),

125 Nev. at 553, 216 P.3d at 242 (the offer of judgment rule "connotes a final judgment," which is satisfied by the reversal and remittitur by the Nevada Supreme Court); NRS 177.305 (in the context of criminal cases, "After the certificate of judgment has been remitted, the appellate court of competent jurisdiction shall have no further jurisdiction of the appeal or of the proceedings thereon, and all orders which may be necessary to carry the judgment into effect shall be made by the court to which the certificate is remitted.").

The remittitur carries the same finality in other jurisdictions. *See e.g., Robbins v. Pfeiffer*, 407 So.2d 1016, 1017 (Fla. Dist. Ct. App. 1981) (judgment affirmed on appeal was final upon issuance of mandate); *Brandon v. Caisse*, 172 Ill.App.3d 841, 122 Ill. Dec. 746 (1988) (appellate judgment is final when entered); *Begley v. Vogler*, 612 S.W.2d 339, 341 (Ky. 1981) (remittitur merely a revesting of jurisdiction with further action required by the trial court). Across these jurisdictions, one effect remains in common: the remittitur "gives the trial court such jurisdiction as it needs to implement the appellate court's decision in the matter" and the judgment is final upon issuance of the remittitur. *Chase Manhanttan Bank v. Principal Funding Corp*., 2004 UT 9, 111, 89 P.3d 109 (2004); *Robbins*, 407 So.2d at 1017 (compliance with mandate "by the lower court is a purely ministerial act").

Reinforcing the idea that the remittitur constitutes final judgment and not some other act, this Court expressly rejected a party's argument to treat a petition for writ of mandamus as an appeal for purposes of NRCP 41(e). *Monroe v. Columbia Sunrise Hosp*., 123 Nev. 96, 102, 158 P.3d 1008, 1012 (2007) (party "was not entitled to an additional three years to bring her case to trial after we granted her petition for a writ of mandamus"). NRCP 41(e), also known as the "five-year rule," mandates dismissal when a plaintiff fails to bring an action to trial within five years from commencement of the action. However, when a judgment has been appealed and reversed with cause remanded for new trial, the action must be "brought to trial within 3 years from the date upon which remittitur[3] is filed by the clerk of the trial court." NRCP 41(e); *Monroe*, 123 Nev. at 102, 158 P.3d at 1011-12. In *Monroe*, a party argued that the Nevada Supreme Court's "grant of mandamus falls within the 'appeal extension' of NRCP 41(e), allowing her an additional three years to bring her case to trial." 123 Nev. at 102, 158 P.3d at 1012.

This Court rejected that argument, explaining that the statute was clear that the extension applies only to appeals following judgments. *Id*. Refusing to equate a writ of mandamus as an appeal, this Court found, "Here, no appeal was taken,

[3] Neither NRCP 41(e) nor this Court used "after a petition for certiorari" to describe when the appeal ends. Rather, "remittitur" is the precise term used to conclude the appeal.

and this court did not issue a remittitur, it issued a writ of mandamus and a notice in lieu of remittitur." *Id*. Therefore, Nevada does not treat a writ petition as an appeal. While the remittitur marks the finality of a judgment, a writ petition itself does not.

D. BB&T Could Have Sought Stay or Recall of the Remittitur, but Did Not Do So.

The Nevada Rules of Appellate Procedure ("NRAP") at the time had (and still has) a built-in mechanism by which BB&T could have kept the Priority Litigation alive pending its petition for a writ of certiorari to the USSC. NRAP 41 specifically allowed a party to move for stay of the remittitur:

> (b) Stay of remittitur pending application for certiorari
>
> (1) A party may file a motion to stay the remittitur pending application to the Supreme Court of the United States for a writ of certiorari. The motion must be served on all parties.
>
> (2) The stay shall not exceed 120 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the Supreme Court of Nevada a notice from the clerk of the Supreme Court of the United States that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court of the United States.
>
> …
>
> (4) The court shall issue the remittitur immediately when a copy of a United States Supreme Court order denying the petition for writ of certiorari is filed.

NRAP 41 (Amend. 12-31-08, eff. 7-1-09); *see Gonzales v. State*, 118 Nev. 590, 53 P.3d 901 (2002) (staying remittitur pending petition for writ of certiorari to USSC);

Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg., Case No. 68435, Doc. No. 17-04543 (filed Aug. 17, 2015) (remittitur stayed pending petition for writ of certiorari with the USSC).[4]

After this Court affirmed the judgment, BB&T did not request for stay of the issuance of the remittitur pursuant to NRAP 41(b)(3)(A). BB&T did not move to stay the issuance of the remittitur before it filed its petition for certiorari. It did not move to recall the remittitur while the petition for certiorari was pending. The remittitur "terminated the case below as to all issues settled by the judgment." *Cerminara*, 104 Nev. at 665, 765 P.2d at 184. Once the remittitur issued, the appeal of the Priority Litigation was complete, and BB&T's alleged damage was "affirmed on appeal." *Semenza*, 104 Nev. at 668, 765 P.2d at 186. The District Court correctly determined that BB&T's malpractice claim accrued once this Court affirmed the trial court's adverse judgment against BB&T.

Even if the statute of limitations began on the date this Court issued the remittitur rather than the date of affirmance, BB&T's claim is still untimely. BB&T briefly referenced that the issuance of the remittitur was delayed by two rehearing petitions after this Court's affirmance. Opening Brief at n.14. The District Court concluded that the statute of limitations began running as of this

[4] If a party seeks rehearing or *en banc* reconsideration, the remittitur is automatically stayed. NRAP 41(a)(1) (2008).

Court's "May 31, 2013 decision to affirm the district court's ruling," not the date the remittitur was issued. (AA0852.) Even assuming that the statute of limitations should have been found to begin on the remittitur date of **March 18, 2014**, BB&T would have to file this action by **March 18, 2016**. BB&T's **October 5, 2016** Complaint would have still been untimely. *McClendon v. Collins*, 132 Nev. Av. Op. 28, 372 P.3d 492 (2016) (this Court may properly affirm a district court's error when such error is harmless, *i.e.*, "but for the alleged error, a different result might reasonably have been reached").

E. BB&T's Claim Accrued When the Remittitur Issued Because the Remittitur Was Never Recalled or Stayed in the Priority Litigation.

While the stay of the remittitur may not affect the timeliness of a writ petition to the USSC, the remittitur does signify the completion of the appeal. That is why the issuance of the remittitur is significant in this case. BB&T asks the Court to consider all sorts of hypotheticals as to what if the USSC had granted certiorari. Opening Brief, at 41-42. However, this Court does not need not make those determinations because that did not happen. The remittitur was not stayed or recalled in the Priority Litigation. These are not the actual "facts" before the Court. *Herbst Gaming, Inc. v. Sec'y of State*, 122 Nev. 877, 889, 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 among other authority *Nat'l*

Collegiate Athletic Ass'n v. Univ. of Nev., 97 Nev. 56, 624 P.2d 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 abstract propositions, or to declare principles of law which cannot affect the matter in issue before it.").

BB&T's reliance on many of the cases cited its Opening Brief is misplaced because none of the circumstances of those cases occurred in this case. In *Bass-Davis v. Davis*, this Court recalled the remittitur only after the respondent "petitioned this court for *en banc* reconsideration of the panel's decision" and the court wished to resolve the issues presented therein. 133 P.3d 251, 251 (2005). While not specifically stated in the *Davis* decision, NRAP 41(a)(1) automatically stayed the remittitur upon the filing of a timely petition for rehearing. In contrast, the remittitur was not automatically stayed pending a petition for certiorari to the USSC. *See* NRAP 41(b)(1) ("A party may file a motion to stay the remittitur pending application to the Supreme Court of the United States for a writ of certiorari."). BB&T did not request a recall of the remittitur, and no circumstances prompted this Court to recall the remittitur on its own accord.

In *City of Long Beach v. Bozek*, the USSC granted a petition for writ of certiorari and vacated the Supreme Court of California's judgment. 33 Cal. 3d 727, 727, 661 P.2d 1072, 1072 (1983). The California Supreme Court recalled the

remittitur on April 25, 1983, reexamined its prior decision, and affirmed the same on the same day. *Id*. at 727-28, 661 P.2d at 1072 ("Pursuant to [the U.S. Supreme Court's mandate,] the remittitur is recalled…. Because we deem it unnecessary to modify our prior opinion, we reiterate that opinion in its entirety…. Let the remittitur issue forthwith."). The remittitur appeared to have been recalled and re-issued on the same day. *Id*. In the Priority Litigation, the USSC did not grant the petition for writ of certiorari, and this Court did not recall the remittitur. This Court does not need to address how a recalled remittitur could affect the calculation of the statute of limitations in this case since that did not happen.

In *Gradsky v. United States*, the issuance of the mandate was stayed while the appellants petitioned the USSC. 376 F.2d 993 (5th Cir. 1967). The Fifth Circuit recalled the mandate for the non-petitioning defendants because of "the unusual circumstances of this case, [including] the government's expression of non-opposition, and [the court's] desire to avoid further protracted litigation by appellants not presently participating in this remand action. *Id*. at 995. The Fifth Circuit was careful to note, however, "Usually the issuance of a mandate by this court means that the litigation has come to an end." *Id*. (citing *Hines v. Royal Indemnity Co*., 253 F.2d 111 (6th Cir. 1958)). Unlike *Gradsky*, the remittitur in this case was not stayed pending BB&T's petition to the USSC. This Court also

did not find any "unusual circumstances" to recall of the remittitur on its own accord.

There is no dispute that the remittitur was never recalled by this Court in the Priority Litigation. BB&T never even made a request to stay the remittitur. The District Court properly took these factors into consideration to reach its well-informed conclusion that the statute of limitations had expired. BB&T had the opportunity to request a stay of the remittitur, but it never did that before filing or while the petition for writ of certiorari was pending. There is no reason for this Court to consider all these hypothetical scenarios when BB&T simply did not request to stay or recall the issuance of the remittitur.

F. The Tolling of the Limitations Deadline BB&T Requests Is Not the *Semenza* Standard.

BB&T believes that this Court's focus on the "resolution" and "conclusion" of the litigation in the decisions following *Semenza* extends tolling beyond the conclusion of the appeal to include the time during which a discretionary petition for a writ of certiorari is pending. *E.g.*, *Hewitt v. Allen*, 118 Nev. 216, 43 P.3d 345 (2002) ("damages do not begin to accrue until the underlying legal action has been resolved"); *KJB, Inc. v. Drakulich*, 107 Nev. 367, 370, 811 P.2d 1305 (1991) ("the statute of limitations in NRS 11.207(1) does not commence to run against a cause of action for attorney malpractice until the conclusion of the underlying litigation wherein the malpractice allegedly occurred"). BB&T's interpretation is wrong.

This Court in *Semenza* already identified the time of accrual: when the adverse judgment is "affirmed on appeal." *Semenza*, 104 Nev. at 668, 765 P.2d at 186.

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." *Id*. That is the precise definition of a resolution or conclusion of the litigation that the *Semenza* Court adopted. Of course, the *Semenza* standard makes perfect sense because once the appeal of right has been concluded, the damages for the alleged malpractice are fixed. The trial court's judgment was "affirmed on appeal" once this Court issued its order of affirmance and the remittitur. This Court did not leave open the definition of an "appeal" in the context of statute of limitations of a malpractice claim. As cited above and below, Nevada case law consistently holds that the remittitur ends the appeal. BB&T's malpractice claims accrued no later than that date.

The legal authorities cited by BB&T 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 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)).[5] 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. This directly supports the District Court's ruling that BB&T's complaint was untimely.

Nika v. State of Nevada is also not persuasive. 124 Nev. 1272, 198 P.3d 839 (2008). *Nika* dealt with the question of retroactivity, whether an intervening change of criminal law applied to pending criminal cases. *Id*. at 1276, 198 P.3d at 842. The Nevada Supreme Court in *Nika* was drawing from the USSC's guidance,

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[5] The USSC decision in *Griffith v. Kentucky*, cited by the Fifth Circuit in *Thomas*, also recognizes the distinctions between an appeal and a petition for certiorari. 479 U.S. 314, 107 S.Ct. 708, 712, n.6 (1987) (conviction was final when "the availability of appeal [has been] exhausted, and the time for filing a petition for certiorari lapsed").

addressing the federal constitutional due process implications stemming from the application of newly declared constitutional rule to pending criminal cases. *Id*. at 1287, 198 P.3d at 850. The federal due process considerations are not the same as Nevada's own statute of limitations on a state law claim.

In fact, Nevada case law defines a civil judgment as being "final" upon issuance of the remittitur. *In In re Estate of Miller*, the Nevada Supreme Court clarified:

> We conclude that the word "judgment" in this context connotes a ***final judgment***. The trial and appellate stages are naturally related, and if an appeal is taken, the final outcome may change depending on the outcome on appeal. When this court 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***.

125 Nev. 550, 553, 216 P.3d 239, 242 (2009) (emphasis added).

"Final judgment" may carry different meanings in different contexts, but that term's meanings in other contexts do not change *Semenza*'s ruling—once a judgment is "affirmed on appeal," the statute of limitations begins. 104 Nev. at 668, 765 P.2d at 186. The District Court was correct: the statute of limitations on BB&T's claim began on May 31, 2013, when the Nevada Supreme Court affirmed the trial court's judgment (or at the latest on March 18, 2014, when the remittitur was issued).

G. A Petition for Writ of Certiorari to the USSC Is Not an "Appeal."

Courts across the country have found that a petition for writ of certiorari and an appeal are different legal concepts. *See, e.g., People v. Quick*, 321 Ill. App. 3d 392, 396, 748 N.E.2d 1227, 1230 (2001) ("petition for writ of certiorari is not an 'appeal' within the meaning that term is given in the Supreme Court Rules."); *Damsky v. Univ. of Miami*, 152 So. 3d 789, 791-792 (Fla. 3d DCA 2014) ("a petition for writ of certiorari is not an appeal."); *Muscatell v. North Dakota Real Estate Comm'n*, 546 N.W.2d 374, 378 (N.D. 1996) ("a petition for writ of certiorari for discretionary review before the United States Supreme Court is not an 'appeal.'"); *U.S. v. Snyder*, 946 F.2d 1125, 1126 n.4 (5th Cir. 1991) ("[A] petition for a writ of certiorari technically is not an appeal.").

A petition for a writ of certiorari is "a request for discretionary review." *People*, 321 Ill. App. 3d at 396, 748 N.E.2d at 1230 (*citing Hammerstein v. Superior Court of California*, 341 U.S. 491 (1951)); *see also* 28 U.S.C. § 1257 ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, *may be* reviewed by the Supreme Court by writ of certiorari [. . . .]"). Likewise, a petition is defined as "[a] formal written request presented to a court or other official body." *Wilson v. Comm'r*, 705 F.3d 980, 1008, fn. 12 (9th Cir. 2013) (*quoting* Black's Law Dictionary 1261 (9th ed. 2009)).

On the other hand, an "appeal" is defined as "[a] proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal." *Wilson,* 705 F.3d at 1008, n.12 (*quoting* Black's Law Dictionary 112 (9th ed. 2009)). Contrary to BB&T's argument, the timeliness of a petition for a writ of certiorari does not transform a writ petition for extraordinary relief into an "appeal." USSC Rule 13 governs the timeliness of filing petitions for writs of certiorari to the USSC, as such petitions are only available "after entry of the judgment." This Rule is a jurisdictional provision and does not affect the merits of the issues presented for review on a petition for writ of certiorari. *See* Sup. Ct. R. 13(2) ("The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time."). Instead, the more applicable rules address the USSC's discretion to grant or deny petitions for writs of certiorari in the first place, distinguishing them from traditional appeals. *See* Sup. Ct. R. 10; R. 18. "Direct appeals" to the USSC originate in a narrow category of cases appealed *only* from United States District Courts or Courts of Appeal, and *only* concerning "interlocutory or permanent injunction" decisions in civil cases where an act of Congress requires it "to be heard and determined by a district court of three judges." *See* 28 U.S.C. § 1253; *see also* Sup. Ct. R. 18.

The distinction between a petition for writ for certiorari and an appeal is substantive and not merely semantics. For example, a writ for certiorari may be issued in some cases on the merits before that case has reached final judgment. *See Dames & Moore v. Regan, 45*3 U.S. 654, 668 (1981) (granting a petition for writ of certiorari in case concerning executive orders over funds of the government of Iran where "the issues presented here are of great significance and demand prompt resolution."); *see also* Sup. Ct. R. 11 (rule concerning a petition for a writ of certiorari to review a case pending in a United States Court of Appeals before judgment). A final judgment or order is generally a prerequisite to an appeal unless specifically provided for by operation of law. *See* NRAP 3A(b) (noting judgments and orders where appeals may be taken under Nevada law).

The USSC itself distinguishes a writ proceeding from an appeal. USSC Rules 10 to 16 address the court's "Jurisdiction on Writ of Certiorari" while Rule 18 addresses "Appeal from a United States District Court." A petition for writ of certiorari does not guarantee an "appellate" review. *See* Sup. Ct. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion."). "Supreme Court review is discretionary, not an appeal of right, and Petitions for Writ of Certiorari are rarely granted." *United States v. Rivera-Moreno*, 8:04CR118, 2007 U.S. Dist. LEXIS 45192, *45 (D. Neb. June 11, 2007).

Because a petition for certiorari is not an appeal, *Semenza*'s tolling principle does not extend to the period when such a petition is pending before the USSC. The purpose of the litigation malpractice rule is to toll the running of the limitations period during the time that "the element of injury or damage remains speculative and remote, thereby making premature the cause of action for professional negligence." *Semenza*, 104 Nev. at 668, 765 P.2d at 186. Following an adverse appeal affirmed by the Nevada Supreme Court, a party has no further appeals available and is on sufficient notice of harm as to remove the "speculative and remote" character of the attorney's alleged malpractice. BB&T could have kept the appeal open while its petition for a writ of certiorari was pending. It chose to allow the appeal to become final.

H. A Writ Petition Is Not Synonymous With an "Appeal" in Nevada's Jurisprudence.

Had this Court intended to apply tolling to all possible reviews of a judgment, this Court could have so stated. In *Semenza*, this 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.

This 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, this Court ruled that a writ for habeas corpus was "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*. This Court rejected this argument and 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 appeals. *See Jarstad v. Nat'l Farm. U. Prop. & Cas. Co*., 92 Nev. 380, 552 P.2d 49 (1976) (an order quashing service of process is not appealable, but the court would review the "appeal" as a petition for mandamus); *Monroe*., 123 Nev. at102, 158 P.3d at 1012 (petition for writ of mandamus is not an appeal).

Even Nevada's Rules of Appellate Procedure recognize the distinctions between an appeal and a writ. *E.g.,* NRAP 8(c) (the appellate courts generally consider the following when deciding whether to issue a stay or injunction: (1) "whether the object of the appeal ***or*** writ petition will be defeated if the stay or injunction is denied.") (emphasis added); NRAP 17(a) (The Supreme Court shall hear and decide the following: "(2) All direct appeals, postconviction appeals, ***and*** writ petitions in death penalty cases.") (emphasis added).

Thus, Nevada does not equate a writ petition to an appeal. The case law is clear that malpractice causes of action accrue at the time of a final judgment from

"an" adverse ruling "on appeal." *Semenza*, 104 Nev. at 668, 765 P.2d at 186. Since a petition for writ of certiorari is *not* an appeal, the litigation malpractice rule does not extend to a petition for writ of certiorari.

I. A Petition for Writ of Certiorari Does Not Keep an Action Alive.

Numerous jurisdictions have also determined that petition for writ of certiorari to the USSC does not toll state statute of limitations because the review is discretionary. *Owens v. Hewell*, 222 Ga. App. 563, 565, 474 S.E.2d 740, 742 (Ga. 1996) (the Owens' "unsuccessful pursuit of a discretionary appeal to the United States Supreme Court did not extend their right to renew their action under [Georgia's renewal statute] absent a stay"); *Clark v. Velsicol Chem. Corp*., 431 S.E.2d 227, 229-231, 110 N.C. App. 803, 807-810 (N.C. Ct. App. 1993); *Kendrick v. City of Eureka*, 82 Cal. App. 4th 364, 371, 98 Cal. Rptr.2d 153 (Cal. Ct. App. 2000) ("a petition for a writ of certiorari to the United States Supreme Court does not affect the finality of the judgment below nor does it act to stay the mandate of the court below.").

The North Carolina case *Clark v. Velsicol Chem. Corp*. is illustrative of this point. There, the specific question concerned whether commencing an action in federal court tolled the statute of limitations for a state law-based negligence claims. *Id*. at 229-231, 110 N.C. App. at 807-10. The North Carolina court allowed the statute of limitations to be tolled during the period that the federal

action was active, but stopped short of tolling the time pending a petition for writ of certiorari to the USSC. *Id*. In so holding, the court explained

> A petition for writ of certiorari is not an appeal of right, and no review is guaranteed once the petition is filed. The treatment of the case after a petition is filed, including whether or not it will be heard on its merits, is uncertain. Therefore, **for the purpose of tolling the statute of limitations, we do not consider the action alive while a decision to grant or deny the petition was pending**. Because the federal action was not alive when plaintiff filed in state court, the statute of limitations was no longer tolled, and plaintiff's action was not timely filed.

Id. (emphasis added).

Though this case concerns accrual of the statute of limitations for legal malpractice, the logic from the *Clark* case is analogous. Because a petition for writ of certiorari is 1) not an appeal and 2) not an appeal of right, the Priority Litigation was not "alive while a decision to grant or deny the petition [is] pending." *Clark*, 431 S.E.2d at 229-231, 110 N.C. App. at 807-810. If not alive during the pending a petition for discretionary review, the case has only one other possible status--dead.

The decision in *Golden v. McNeal* from the Texas Court of Appeals, identified by BB&T, is unique and distinguishable because the underlying litigation involved criminal defense. 78 S.W. 3d 488, 494 (Tex. Ct. App. 2002). The *Golden* court recognized the principle set forth under the Texas precedent that the statute of limitations for litigation malpractice was tolled until "'the last action

of right'" that plaintiff could take. *Id*. at 494 (quoting *Hughes v. Mahaney & Higgins*, 821 S.W. 2d 154 at n.6 (Tex. 1996)). In *Hughes*, "the applicable statute was tolled until the [state] Supreme Court overruled the motion for rehearing because that was 'the last action of right that they could take and did take on the underlying case." *Hughes*, 821 S.W.2d at 158 n. 6. However, the *Golden* court delayed accrual of the malpractice claim until after the writ petition to the USSC was denied even though such review was entirely discretionary. *Golden*, 78 S.W.3d at 494. That departure was due to the policy considerations underlying a criminal conviction, a circumstance not present here.

In Texas, a plaintiff who brings a legal malpractice claim must demonstrate that but-for the malpractice, the plaintiff would not have been convicted. *Id*. at 492 (citing *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995)). This requirement is in place to prohibit "convicts from profiting from their illegal conduct… [and] allowing civil recovery for convicts impermissibly shifts responsibility for the crime away from the convict." *Peeler*, 909 S.W.2d at 498.

Because the plaintiff under this standard must be exonerated to pursue a malpractice claim, the "tolling" rule is extended to all post-conviction reviews to minimize the risk of shifting "responsibility for the crime away from the convict." *Id*. at 497-98. "This opportunity to shift much, if not all, of the punishment assessed against convicts for their criminal acts to their former attorneys,

drastically diminishes the consequences of the convicts' criminal conduct and seriously undermines our system of criminal justice." *Id*.

The Priority Litigation did not involve any criminal offense. The need to prevent shifting of punishment from the convicts to defense attorneys does not apply in this case. Delaying accrual in this case simply does not serve any of the policy concerns raised in *Golden*.

J. The Finality of the Nevada Supreme Court's Affirmance Is Not Dependent on the USSC's Discretionary Review.

BB&T's argument renders the Nevada Supreme Court's affirmance and remittitur entirely meaningless until sanctioned by the USSC, *i.e*., when the writ petition is denied or when the time for filing such petition expires. This position has no legal basis. Denial of the petition for writ of certiorari to the USSC is ***not*** an affirmance of the judgment on the merits. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919, 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 the petition 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.

The USSC time and again cautioned that denial of even a timely-filed petition for writ of certiorari is **not** an affirmance of the lower court's decision. *Hamilton-Brown Shoe Co. v. Wolf Bros & Co*., 240 U.S. 251, 258, 36 S. Ct. 269, 271 (1916) ("It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed."); *United States v. Carver*, 260 U.S. 482, 490 (1923) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case[.]"). The granting or denial of petitions for writ of certiorari is not a reflection of the Court's positions on the merits of the issues presented. A petition for writ of certiorari is not an opportunity for another appeal:

> Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that **such 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**. The Court has said this again and again; again and again the admonition has to be repeated.
>
> The one thing that can be said with certainty about the Court's denial of Maryland's petition in this case is that it does not remotely imply approval or disapproval of what was said by the Court of Appeals of Maryland.

Maryland v. Baltimore Radio Show, 338 U.S. 912, 919, 70 S. Ct. 252, 255 (1950) (emphasis added). In contrast, for example, the granting or denying of a rehearing within Nevada's appellate system is substantive:

> **(c) Scope of Application; When Rehearing Considered.**
>
> ….
>
> (2) The court may consider rehearings in the following circumstances:
>
> (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
>
> (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

NRAP 40(c)(2); *Matter of Estate of Herrmann*, 100 Nev. 1, 17, 677 P.2d 594, 604 (1984) (issue of "little practical consequence" does not warrant rehearing); *Matter of Dunleavy*, 104 Nev. 784, 769 P.2d 1271 (1988) (denying motion for rehearing as it failed to establish basis under NRAP 40(c)).

A motion for rehearing and a petition for certiorari have different effects on the issuance of the remittitur, which again demonstrates the finality of an appellate proceeding before the Nevada Supreme Court. Because a motion for rehearing is decided on substantive grounds, the remittitur is automatically stayed pending a motion for rehearing. NRAP 41(a). In contrast, because the granting or denial of the petition cannot be construed as a substantive ruling on this Court's affirmance, a remittitur is not automatically stayed pending a party's petition for a writ of certiorari to the USSC. NRAP 41(b). A motion for rehearing is granted or denied based on the merits of the arguments, which warrants stay of the remittitur to prevent the appeal from being final. In comparison, a petition for certiorari is not

decided on the merits. Therefore, the remittitur may be properly issued absent a stay requested by a party.

The purpose of delayed accrual or tolling as set forth in *Semenza* is to allow final adjudication of the litigation in which the malpractice occurred. *Semenza*, 104 Nev. at 668, 765 P.2d at 185-86 ("[w]here there has been no final adjudication of the client's case in which the malpractice allegedly occurred, the element of injury or damage remains speculative and remote"). A petition for a writ of certiorari to the USSC does not serve this purpose because this Court's affirmance of the judgment and issuance of the remittitur is final adjudication of the case. At that time, a party's damage is certain even pending a petition for certiorari. Extending equitable tolling to the pendency of a petition for writ of certiorari erroneously equates the denial of the petition to an affirmance of the underlying decision.

K. The Limited Scope of Discretionary Review by the USSC Does Not Further the Policy Behind the Litigation Malpractice Rule.

The discretionary review by the USSC is extremely limited in scope and rarely granted. The limitation essentially all but guarantees the denial of the writ petition, especially on a claim involving strictly state law claims and evidentiary issues like those in the Priority Litigation.

28 U.S.C. § 1257 provides that, while the USSC may review, through a petition for writ of certiorari, "[f]inal judgments or decrees rendered by the highest

court of a State in which a decision could be had," that power is limited to the following specific circumstances:

- "where the validity of a treaty or statute of the United States is drawn in question"
- "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States," or
- "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

BB&T's petition for writ of certiorari in the Priority Litigation did not involve any of these circumstances. The issues identified by BB&T for review in its writ petition to the USSC included strictly evidence-based questions, specifically:

> I. WHETHER THE DISTRICT COURT ERRED IN DETERMINING WITH THE EVIDENCE PRESENTED AND STATUTORILY REQUIRED PRESUMPTIONS, THAT BB&T DID NOT HAVE STANDING TO ASSERT ITS EQUITABLE CLAIMS.
>
> II. WHETHER THE DISTRICT COURT ERRED BY FAILING TO ALLOW ADMISSION OF THE 2009 ASSIGNMENT OF SECURITY INSTRUMENTS (PROPOSED EXHIBIT 58) AND THE 2010 ASSIGNMENT OF DEED OF TRUST (PROPOSED EXHIBIT 59).

III. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT ALLOWING THE FDIC TO BE SUBSTITUTED IN AS A REAL PARTY IN INTEREST OR IN THE ALTERNATIVE BY RENDERING ITS DECISION WITHOUT NAMING AN INDISPENSABLE PARTY.

(III. AA0632; AA0687.) These issues do not concern 1) "the validity of a treaty or statute of the United States", 2) "the validity of a statute of any State", or 3) "any title, right, privilege, or immunity is specially set up or claimed under the Constitution" or federal law.

The USSC has long rejected petitions concerning a state court's discretion on evidence. *See Pennsylvania R. Co. v Keystone Elevator & Warehouse Co*., 237 US 432, 433 (1915) (Supreme Court had no jurisdiction to review writ of error concerning ruling on evidence that did not present a federal question); *see also Missouri, K. & T. R. Co. v West*, 232 U.S. 682, 692-693 (1914) (Decision of state was not controlled by federal statute, involved no denial of any asserted federal right, and thus, was not reviewable by Supreme Court). Given that none of the issues identified by BB&T's writ petition were potential subjects within the scope of review by the USSC, it was practically guaranteed that the USSC would deny certiorari.

BB&T argues that its damage was not irreversible until the USSC denied its writ petition. *Neylan v. Moser*, 400 N.W.2d 538, 542, 1987 Iowa Sup. LEXIS 1070, *10 (Iowa 1987) (malpractice claim accrued upon state's highest court's

affirmance); *see also Amfac Distribution Corp.*, 138 Ariz. at 158, 673 P.2d at 798 (legal malpractice action is tolled until "the time the damage has become irremedial[.]"). However, in *Semenza*, this Court already made clear that the damage was certain and no longer contingent once the adverse judgment is "affirmed on appeal." 104 at 668, 765 P.2d at 186. That is the point when damage became "irreversible" and "irremedial" under *Semenza*. Whether or not the USSC will grant a petition for writ of certiorari is itself a speculative and uncertain act. Delaying accrual to denial of a petition for writ of certiorari – which is uncertain, speculative, and entirely discretionary – does not further the principle that the discovery of damages should be based on certainty.

L. BB&T's Reliance on *Kopicko v. Young* Is Misplaced Because That Case Did Not Involve Tolling.

BB&T argues that exhaustion of appeals is not the only way by which the statute of limitations may be tolled. As support, BB&T relies on *Kopicko v. Young*, in which this Court found that the malpractice claim did not accrue until the dismissal of a second litigation. 114 Nev. 1333, 971 P.2d 789 (1998). However, *Kopicko* did not involve or apply the litigation malpractice rule at issue in this case. Instead, *Kopicko* focused on NRS 11.207(1)'s four-year statute of limitation regarding when "plaintiff sustains damage." *Id.* at n. 2.

In *Kopicko*, this Court found that the plaintiff did not suffer any legal damage until the second lawsuit was dismissed because plaintiff's claim was *per se*

viable until dismissal. *Id*. at 1337, 971 P.2d at 791. The attorney filed the first lawsuit based on products liability against the wrong defendant manufacturers. *Id*. at 1335, 971 P.2d at 790. Realizing the error, the attorney filed a stipulation to dismiss all defendants, with prejudice. *Id*. The attorney moved to amend, which was denied by the district court as the case was already dismissed. *Id*. On February 13, 1991, the attorney notified the Kopickos of the error and advised that any chance for success through possible alternatives was poor. *Id*. The attorney later filed a second lawsuit against the proper manufacturer. *Id*. On October 12, 1993, the court dismissed the second lawsuit on statute of limitations grounds. *Id*. On October 16, 1995, the Kopickos filed a legal malpractice suit against the attorney. The attorney argued the suit was barred under the four-year limitation under NRS 11.207(1). *Id*. The lower court agreed, finding the Kopickos' claim accrued on February 13, 1991, when he informed the Kopickos of the error, which was the time of discovery of the act of malpractice. *Id*.

On appeal, this Court reversed the dismissal, concluding that the Kopickos did not sustain "legal damages… until the federal [second] action against Dow was dismissed on statute of limitations grounds." *Id*. at 1336, 971 P.2d at 791. This Court determined that the matter should **not** have been disposed "upon 'discovery' of the claim for legal injury." *Id*. Instead, "this matter should have been resolved based upon the fact that the cause of action for professional negligence did not

accrue until the federal district court dismissed the underlying matter on October 12, 1993." *Id*. Specifically, the Court reasoned that the Kopickos' case "was per se viable until the limitation defense was affirmatively alleged and the matter resolved on that basis." *Id*. The statute of limitations defense could be waived if not raised, and other affirmative defenses for tolling could also have prevented the second lawsuit from dismissal. *Id*. This Court specifically noted, "The applicability of the two-year limitation period of NRS 11.207(1) is not at issue."[6] *Id*. at n.2.

Kopickos is clearly distinguishable from the case at bar. Unlike the Kopickos' case which did not involve application of tolling, BB&T argues the statute of limitations should have been tolled until the USSC denied its writ petition. The Kopickos' case against the proper manufacturer was not tested or rejected until the dismissal of the second lawsuit. For that reason, this Court determined that the Kopickos' legal damage did not occur until the dismissal of the

[6] This Court has not yet extended tolling to the four-year statute of limitations under NRS 11.207(1). Even if this Court were to extend tolling to the four-year period, BB&T's claim would still be untimely. NRS 11.207(1) dictates that the first period to expire controls. NRS 11.207(1) ("within 4 years after the plaintiff sustains damage or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier.").

Assuming that both the two-year and four-year periods are subject to tolling, the two-year period would necessarily be the first to expire.

second lawsuit. *Id*. at 1336, 971 P.2d at 791. Contrary to BB&T's assertion, this Court did not treat the second lawsuit as "an attempt to reverse his client's apparent loss." Opening Brief at pp. 33-34. There was no tolling in that case.

Importantly, the Court did not find that the accrual date was delayed until the time for appeal had passed. To the extent *Kopickos* is applicable, the statute of limitations still bars BB&T's malpractice claim. The Kopickos' case was *per se* viable until the second lawsuit was dismissed. In *Kopickos*, the statute of limitations began when the lower court dismissed the action, not when the time for appeal ran. Here, BB&T's case was no longer viable upon the trial court's findings against BB&T. If this Court were to apply *Kopickos'* reasoning, the necessary conclusion is that the statute of limitations began when the trial court entered Judgment against BB&T in the Priority Litigation on July 23, 2010. That means the statute of limitations ran in July 2014. BB&T would still be time-barred.

M. BB&T's Position Threatens Nevada's Public Policies in Favor Finality of Judgment, Diligent Prosecution of Claims, and Stability of Human Affairs.

BB&T argues that the date of injury "coincides with the last possible date when the attorney's negligence becomes irreversible." Opening Brief at 32. While such articulation is theoretically sound, it lacks practicability. Theoretically, a judgment may still be overturned even after affirmance by this Court or the USSC.

See NRCP 60(b) (no specified deadline before which a party may seek relief from a final judgment if the judgment is void).

BB&T's position also runs afoul of Nevada's public policy, which favors finality of judgment and resolution of claims. *Berkson v. LePome*, 126 Nev. 492, 501, 245 P.3d 560, 566 (2010) (the Nevada judiciary has "authority to manage the litigation process and… to provide finality through the resolution of a matter on appeal"); *Peteren v. Bruen*, 106 Nev. 271, 273, 792 P.2d 18, 19 (1990) (quoting *Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944)) (the purpose of statutes of limitations is to prevent "surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared").

"[S]tatutes of limitation are generally adopted for the benefit of individuals rather than public policy concerns." *Petersen*, 106 Nev. at 273, 792 P.2d at 19. However:

> Viewed broadly, ... statutes of limitation embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. Thus, statutes of limitation rest upon reasons of sound public policy in that they tend to promote the peace and welfare of society, safeguard against fraud and oppression, and compel the settlement of claims within a reasonable period after their origin and while the evidence remains fresh in the memory of the witnesses.

Id. 273, 792 P.2d at 19-20. In exceptional cases, the discovery rule may apply because "the policies served by statutes of limitation do not outweigh the equities

reflected in the proposition that plaintiffs should not be foreclosed from judicial remedies before they know that they have been injured and can discover the cause of their injuries." *Id*.

The concern for preservation of evidence and memory of witnesses is particularly important in the context of litigation malpractice. Legal malpractice requires the plaintiff to prove breach of a duty to exercise such skill, prudence, and diligence as lawyers of ordinary skill and capacity, which causes the plaintiff's damage. *Day v. Zubel*, 112 Nev. 972, 976, 922 P.2d 536, 538 (1996). It requires plaintiff to prosecute, and the lawyer to defend, "a-case-within-a-case." *Sherry v. Diercks*, 29 Wash. App. 433, 437, 682 P.2d 1336 (1981). That becomes problematic because the potential witnesses include not only persons with knowledge of the alleged malpractice but also the events leading up to the underlying action. By the time an appeal is complete with this Court, years would have passed since the relevant events leading to the underlying lawsuit.

In this particular case, the competing deeds of trust were executed in 2005 and 2007, over a decade before this malpractice suit was even filed. The trial in the Priority Litigation took place in early 2010, over eight years ago. The appeal before this Court took four years after the trial to complete, with the remittitur issued on March 18, 2014. By this time, under the litigation malpractice rule, the

defendant lawyer already faces severe risk and prejudice of fading memories of witnesses, disappearing witnesses, and potentially lost evidence.[7]

Against such severe prejudice, extending the statute of limitations for any longer period of time, particularly when the USSC was near guaranteed to deny the writ petition, the policy concern for certainty of damage is drastically diminished. The primary reason behind equitable tolling in a legal malpractice action is that "where there has been no final adjudication of the client's case in which the malpractice allegedly occurred, the element of injury or damage remains speculative and remote." *Semenza*, 104 Nev. at 668, 765 P.2d at 186.

Furthermore, the policy favoring delay of accrual does not exist when a plaintiff allowed his appeal to close and the action is no longer alive. It defies logic for a party to argue that its damages were not certain even after this Court issued an order of affirmance and remittitur to close the case and where that party chose not to avail itself of the ability to keep the appeal from becoming final. In this case, BB&T chose not to request a stay of the issuance of the remittitur as allowed under NRAP 41. The remittitur is notice to the world that the appeal was

[7] In cases involving some type of fraud or concealment by the defendant lawyer, the policy concerns would be drastically different. In fact, NRS 11.207(2) specifically tolls the time "for any period during which the attorney… conceals any act, error or omission upon which the action is founded." In such cases, the defendant arguably cannot complain of the fruit of his own making. No fraud or concealment is at issue in this case.

complete. Had BB&T sought a stay of the remittitur, that would have notified the potential parties involved that the matter was still alive and subject to further litigation. Had BB&T elected to move for a stay of the remittitur, it would have accomplished any public policy to avoid having to simultaneously litigate an appeal and to prosecute a claim for legal malpractice because it may request for a stay of the remittitur. BB&T's current position is a result of its own inaction. Balancing of the countervailing policy concerns weighs heavily against extending tolling to a petition for a writ of certiorari for discretionary review by the USSC. The District Court correctly determined that the petition to the USSC did not toll the statute of limitations.

N. Dismissal Was Also Proper Because BB&T Cannot Prove Causation.

Even if this Court were to determine that BB&T's claim was timely, the dismissal in this case was nevertheless proper because BB&T cannot prove an essential element of its claim: that but-for the alleged malpractice, BB&T would have obtained a better result. This Court may affirm the lower court's dismissal even if the lower court relied upon the wrong reasons as long as this Court has other grounds to affirm the dismissal. *Del Papa v. Board of Regents*, 114 Nev. 388, 402, 956 P.2d 770, 780 (1998). Gerrard Cox also sought to dismiss the FAC based on the trial court's alternative and express finding that the Second Colonial DOT did not have priority over the R&S Lenders DOT. (I. AA0205-11.) The trial

court refused to limit her ruling solely to the evidentiary issue involving whether Colonial was ever transferred to BB&T. (IV. AA0849-53.)

Legal malpractice requires BB&T to prove that a breach of the defendant's duty owed to the client resulted in BB&T's damage. *Day*, 112 Nev. at 976, 922 P.2d at 538.

BB&T cannot prove any breach which proximately caused its damages. Causation is a required element for a legal malpractice claim. *See id*. Proximate cause means "that cause which, in natural and continuous sequence and unbroken by any efficient, intervening cause, produces the injury complained of and without which the result would not have occurred." *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 1105, 864 P.2d 796, 801 (1993). "Proximate cause, or legal cause, consists of two components: cause in fact and foreseeability." *Id.*; *Taylor v. Silva*, 96 Nev. 738, 741, 615 P.2d 970, 971 (1980) ("A negligent defendant is responsible for all foreseeable consequences proximately caused by his or her negligent act.").

The trial court found that the Second Colonial DOT did not have priority over the R&S Lenders' DOT. Therefore, the alleged malpractice was not the proximate cause of the judgment against BB&T. BB&T would have the District Court and this Court believe that, but for the alleged failure to timely present additional evidence to demonstrate BB&T's interest in the Second Colonial DOT, BB&T would have prevailed at trial. This assumption ignores the actual findings

of fact and conclusions of law made by the trial court which were also affirmed by this Court during the appeal.

Colonial, then BB&T, sought equitable subrogation and/or replacement[8] to step into the shoes of the First Colonial DOT for up to the amount paid to satisfy the original loan, placing it ahead of the R&S Lenders DOT. As an equitable concept, equitable subrogation is not a legal remedy, and even if a party successfully establishes all the elements of the claim, the court carries the discretion to decide whether equity permits the remedy to be applied. *Am. Sterling Bank v. Johnny Mgmt.*, 126 Nev. 423, 433, 245 P.3d 535, 542 (2010).

In the Priority Litigation, the trial court found that Colonial had no reasonable expectation it would receive a reconveyance of the intervening R&S Lenders DOT. As stated by the trial court, Colonial "did not have a reasonable expectation that it would receive a reconveyance of the [R&S Lenders DOT] following closing of the Construction loan transaction[,] only that it would receive a policy of title insurance, which it did receive." (II. AA0221, AA0273.) After hearing extensive evidence during six days of trial from all Colonial's employees

[8] Equitable subrogation permits a person who pays off an encumbrance to assume the same priority position as the holder of the previous encumbrance. *Houston v. Bank of America Fed. Sav. Bank*, 119 Nev. 485, 488, 78 P.3d 71, 73 (2003). The equitable doctrine of replacement is functionally identical to equitable subrogation but deals with the substitution in which a lender pays off its own deed of trust with a new loan secured by a new deed of trust. *See Freedom Mortg. Corp. v. Tovare Homeowners Ass'n*, 2:11-cv-01403-MMD-GWF, 2012 U.S. Dist. LEXIS 169638 at * 9-11 (D. Nev. Nov. 28, 2012).

and attorney, the trial court made the following express findings of fact which precluded equitable subrogation or replacement:

> 51. As a condition to the Construction Loan, Colonial Bank did not request that St. Rose Lenders reconvey or subordinate the St. Rose Lenders Deed of Trust or convert the same to equity.
>
> 71. Colonial Bank never communicated to Rad, Nourafchan [principals of R&S St. Rose], R&S or St. Rose Lenders that it required a first priority deed of trust for the Construction Loan.
>
> 86. Colonial Bank did not condition its extension of the Construction Loan on its receipt of a first deed of trust.
>
> 87. Colonial Bank did not convey any intent to receive a first deed of trust to either R&S, St. Rose Lenders, Rad or Nourafchan.
>
> 89. Colonial Bank did not negotiate the requirement for a first deed of trust in the Construction Loan Agreement, Deed of Trust or Promissory Note Secured by Deed of Trust.
>
> 100. Reconveyance of the St. Rose Lenders Deed of Trust was not a condition for closing the Construction Loan transaction.

(II. AA0221-22, AA0260-65). As a result of these findings, the trial court expressly ruled that:

> 28. The Court will grant the declaratory relief requested in St. Rose Lenders' First Cause of Action.
>
> 29. St. Rose Lenders' Deed of Trust should retain its priority over the 2007 Colonial Bank Deed of Trust.

(II. AA0223, AA0273.)

The trial court determined that Colonial and Nevada Title Company created Colonial's own harm. Because Colonial closed the Construction Loan without

properly ensuring the reconveyance of the R&S Lenders DOT, the trial court was not willing to grant equitable subrogation. Even if the trial court had found BB&T owned Colonial's interest, BB&T nonetheless could not have prevailed on the merits because the trial court ruled that Colonial's interest was subordinate. Therefore, the alleged malpractice did not and could not have caused BB&T's injury—the loss of the Second Colonial DOT's first priority position. Gerrard Cox had no part in the failures by Colonial which created this priority issue (closing the refinance loan without the reconveyance of the R&S Lenders DOT), and it was these failures which the trial court relied upon in denying the equitable subrogation/replacement relief sought by BB&T.

As to Colonial's remaining claims of Fraudulent Misrepresentation and Civil Conspiracy, Nevada case law holds that tort causes of action, such as fraud claims, are not assignable. *See Hansen v. State Farm Mut. Auto. Ins. Co*., 2015 U.S. Dist. LEXIS 143061, *17, (D. Nev. October 21, 2015); *see also Prosky v. Clark*, 32 Nev. 441, 445, 109 P. 793, 794 (1910) ("Rights of action based on fraud . . . . are held by the courts to be not assignable, but are personal to the one defrauded."). As a result, BB&T could not assert Colonials' tort claims.

In sum, BB&T could not have obtained a better result at trial. BB&T blames Gerrard Cox for the trial court's finding that BB&T did not own the Second Colonial DOT and thereby causing it to lose first priority. But, the alleged

malpractice did not cause BB&T to lose priority. Rather it was BB&T and its predecessor's own actions. Both the facts and law were simply not in BB&T's favor. BB&T was never going to succeed (and actually didn't succeed) on its claims at trial. The trial court's ruling is dispositive on this issue.

Therefore, the District Court properly dismissed BB&T's FAC.

VI.

CONCLUSION

The District Court properly dismissed BB&T's malpractice claim because BB&T's claim is time-barred. A party's alleged damages are no longer speculative once the Nevada Supreme Court affirms the lower court's decision on appeal, issues the remittitur, and the party has no further appeal of right. A petition for a writ of certiorari to the United Supreme Court is merely a request for discretionary review and not an appeal. It does not negate the finality of this Court's affirmance. None of the public policies which may otherwise justify delaying accrual pending a petition for certiorari before the USSC, such as in criminal defense, are present in this case. BB&T's purported damage was final once the adverse judgment was "affirmed on appeal." *Semenza*, 104 Nev. at 668, 765 P.2d at 186.

BB&T had two years from the close of the appeal to file this action but failed to do so. The District Court correctly determined that BB&T's malpractice action is time-barred. However, even if this Court were to find BB&T's claim

timely, the dismissal was still proper because BB&T could not have prevailed in the Priority Litigation absent the alleged malpractice, as demonstrated by the trial court's findings.

Gerrard Cox respectfully requests that this Court affirm the District Court's dismissal of this case.

DATED this 7th day of May, 2018.

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ATTORNEY'S RULE 28.2 CERTIFICATE

I hereby certify that I have read the foregoing Respondents' Answering Brief; that to the best of my knowledge, information, and belief, the Answering Brief is not frivolous or interposed for any improper purpose.

I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number of the appendix where the matter relied is to be found.

The brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and uses a 14 point proportionally spaced Times New Roman font and consists of 54 pages and 13,740 words.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this7th day of May, 2018.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I hereby certify that I am an employee of GORDON REES SCULLY MANSUKHANI, LLP, and that on this 7TH day of May, 2018, the foregoing **RESPONDENTS' ANSWERING BRIEF**, was E-filed/E-Served 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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