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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.	**Case No. 73848** **APPELLANT'S PETITION FOR REHEARING**

Pursuant to NRAP 40(c)(2)(A) and (B), Appellant petitions for rehearing, and hereby requests withdrawal of *Branch Banking & Trust Co. v. Gerrard*, 134 Nev. Adv. Op. 106 (December 27, 2018) (hereinafter the "Decision") and entry of a new opinion that reverses the trial court's order dismissing the First Amended Complaint, on the grounds that the Court's Decision misapprehended a material

question of law in the case, or misapplied or failed to consider certain of its controlling prior decisions.

I.

INTRODUCTION AND OVERVIEW

This Court's Decision holds that the Appellant's Petition for Writ of Certiorari to the U.S. Supreme Court (the "Writ Petition") in the underlying litigation which forms the basis of this litigation malpractice suit, "could" have delayed the date of accrual, and thus tolled the running of the statute of limitations. Decision at p. 7. However, this Court has ruled it is "a bridge too far" to reach such a decision in the absence of a stay of the remittitur, during the period that the Writ Petition was pending. *Id*. The Decision suggests that, had a motion to stay the remittitur been filed and granted, staying remittitur while the Writ Petition was pending, then the statute of limitations would not have begun to run, as the claim would not have accrued, until the U.S. Supreme Court rejected the Petition. Decision at p. 2.

However, this ruling ignores or misapprehends the reasoning of this Court in the first Nevada case to establish a delayed malpractice claim accrual rule, *Semenza v. Nevada Medical Liability Insurance Co.,* 104 Nev. 666, 765 P.2d 184 (1988), and thereby needlessly undermines that longstanding precedent. Under the reasoning of *Semenza*, the date of accrual should be the date on which the Appellant's damages became certain, and no longer contingent on the outcome of any appellate attempts to reverse the outcome. Issuance of the remittitur did not, however, remove any such uncertainty or contingency, and any suggestion that it did so misapprehends the facts of this matter. Rather, as long as the Writ Petition

was pending, damages were uncertain, and contingent on the outcome of that Writ Petition, until it was rejected.

This is true for two reasons: *First of all*, a remittitur can and will be withdrawn, upon the granting of a petition for a writ of certiorari, such that its issuance had no substantive effect upon the contingent nature of BB&T's damages, which remained contingent and uncertain so long as BB&T's Writ Petition was pending. Secondly, no stay of the remittitur was necessary in this particular case, pending the outcome of the Writ Petition, given the filing of an intervening bankruptcy by the debtor who had granted the two deeds of trust whose priority was disputed in the underlying litigation, which stayed the proceedings below. This prevented any further action by the district court to enforce the judgment or allow the holder of the prevailing deed of trust to foreclose thereon, notwithstanding the issuance of the remittitur.

This Court's Decision focused on the need for a bright line statute of limitations deadline, but in doing so misapprehended the significance of the remittitur and either treated that remittitur as creating a far higher degree of finality than it actually did, especially in this case; or misapprehended, and thereby undermined the longstanding rationale of *Semenza* and its progeny. Such undermining of this Court's prior precedents was however unnecessary, given that rejection of a timely filed Writ Petition to the U.S. Supreme Court would provide an equally bright line test as that provided by this Court's ruling (which would in most cases arrive earlier than the new bright line adopted by this Court's Decision).

II.

ANALYSIS

1. This Court's Decision misapprehends, and thereby needlessly rejects thirty years of precedent upholding the rationale of the *Semenza* opinion. The central question to be determined in adjudicating the date on which a legal malpractice statute of limitations begins to run, under the original case creating Nevada's delayed malpractice claim accrual rule, namely *Semenza v. Nevada Medical Liability Ins. Co.*, 765 P.2d 184, 186, 104 Nev. 666, 668 (1989), is the date on which damages become certain. As *Semenza* stated: "a legal malpractice action does not accrue until the plaintiff's damages are certain and not contingent" in that particular case, "upon the outcome of an appeal."

The *Semenza* Court did not arrive at this conclusion from whole cloth, but did so as an application of other longstanding principles long recognized in this State: "In Nevada, legal malpractice is premised upon an attorney-client relationship, a duty owed to the client by the attorney, breach of that duty, and the breach **as proximate cause of the client's damages**. . . . Such an action **does not accrue** until the plaintiff knows, or should know, all facts relevant to the foregoing elements **and damage has been sustained**. . . . [W]here **damage** has not been sustained **or where it is too early to know whether damage has been sustained**, a legal malpractice action **is premature** and should be dismissed. . . . **[N]o one has a claim against another without having incurred damages."** *Semenza*, 104 Nev. at 667-68, 765 P.2d at 185-86 (1989). [Emphasis added. Internal citations and quotations omitted]. Similar reasoning has been followed in other states. *See, e.g.*, *Drake v. Simons*, 583 So. 2d 1074-1075 (Fla. Ct. App. 1991) (stating the threshold

question is whether, if the lower court's ruling were reversed on appeal, would the client still have a legal malpractice claim, and if not, calling for a tolling of the limitations period.

As a case relied upon in *Semenza* explained: "In civil actions for damages, two elements must coalesce before a cause of action can exist: (a) a breach of some legally recognized duty . . .; (b) which causes the plaintiff some legally cognizable damage." *Woodruff v. Tomlin*, 511 F.2d 1019, 1021 (6th Cir. 1975). Therefore, as long as "the element of injury or damage remains speculative and remote" a cause of action for professional negligence is "premature." *Semenza* at 186, 668. Stated otherwise, the date of injury "coincides with the last possible date when the attorney's negligence becomes irreversible." *Neylan v. Moser*, 400 N.W.2d 538, 542 (Iowa 1987) (quoting R. Mallen and V. Levit *Legal Malpractice* §390, at 457 (1981 ed.)) (emphasis added).

This Court's subsequent cases on this subject have continued to not only uphold *Semenza*, but to emphasize its well-reasoned rationale, as to the necessity for damages to have become certain, before a claim will accrue, for the statute of limitations to begin to run. *See, e.g., K.J.B. Inc. v. Dakulich*, 107 Nev. 367, 811 P.2d 305 107 Nev. 367, 369, 811 P.2d 1305, 1306 (1991) (quoting from and reiterating *Semenza's* concern that suits not be filed while "the element of injury or damage remains speculative and remote" in holding that statute of limitations does not begin to run while underlying suit is still pending); *Kopicko v. Young*, 114 Nev. 1333, 1336-37, 971 P.2d 789, 792 (1998) (litigation malpractice claim did not accrue, for purposes of the statute of limitations, until lawyer's attempt to prevent

the damages resulting from flawed initial litigation, through the filing of a second and separate lawsuit, had also failed.)

This Court's Decision in this case would only be consistent with the foregoing analysis, which has been followed and upheld in Nevada for almost 30 years, if the remittitur somehow caused damages to become certain and non-contingent on the outcome of the Writ Petition. But this is simply not the case, either generally speaking, or under the particular facts which would have been developed during discovery in this case.[1] Thus, the Decision misapprehends the rationale of (and thereby ignores and undermines) *Semenza*, and it also misapprehends and exaggerates the legal and factual significance of the remittitur.

As explained in Appellant's prior briefs (*see* AOB at pp. 38-43), but seemingly misapprehended (and not directly addressed) in this Court's Decision, the issuance of a remittitur (also known as a "mandate" in federal appeals -- FRAP 41) simply does not impact the efficacy of a timely petition for a writ of certiorari. As the U.S. Supreme Court's Clerk's office explains:

> You must file your petition for a writ of certiorari within 90 days from the date of the entry of the final judgment in the United States court of appeals or highest state appellate court or 90 days from the denial of a timely filed petition for rehearing. **The issuance of a mandate or remittitur after judgment has been entered has no bearing on the computation of time** and does not extend the time for filing. *See* Rules 13.1 and 13.3.

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[1] Although a minority position, Nevada's delayed claim accrual analysis is also followed by other jurisdictions. And those which follow this rule, and have also reached the question, uniformly apply that rule to the time period during which a petition to the U.S. Supreme Court is pending, if timely filed. *See, e.g.,* the Texas case cited at page 7 of this Court's Decision, together with *Barker v. Miller*, 918 S.W.2d 749, 752 (Ky. Ct. App. 1996); and *MacKenzie v. Leonard*, *Collins and Gillespie, P.C.*, 2009 WL 2383013 at 3 (D. Ariz. 2009).

Guide for Prospective Indigent Petitioners for Writs of Certiorari, issued by the Office of the Clerk, Supreme Court of the United States (available at https://www.supremecourt.gov/casehand/guideforifpcases.pdf) [emphasis added].

In the present case, the Writ Petition was timely filed within the 90 day deadline arising under U.S. Supreme Court Rule 13, once Branch Banking's final allowed request for rehearing before this Nevada Supreme Court had been denied. IV AA0802-809.

The issuance of a remittitur by a state supreme court and its remand and transmission of the record to the trial court, does not impair an appellant's ability to thereafter present a petition to the Supreme Court of the United States for a writ of certiorari, nor to maintain such a petition which was filed before remittitur issued. *See, e.g., Miller v. Southern Pac. Co.,* 24 P.2d 380, 382 (Ut. 1933), citing *Merrill v. Nat'l Bank of Jacksonville,* 173 U.S. 131, 19 S.Ct. 360, 43 L.Ed. 640 (1899), also citing 8 Hughes' Federal Practice, § 6261: "A **stay is not essential to the issuance of certiorari**, for the writ may issue even though the mandate [or remittitur] of the court below has gone down." *Id*. [Emphasis added.]

This Court also recognizes that, after remittitur issues, a motion to recall the remittitur may be filed and granted, upon any showing of good cause. *Wood v. State*, 60 Nev. 139, 141, 104 P.2d 187, 188 (1940). The issuance of a timely writ of certiorari by the U.S. Supreme Court would obviously meet this test. *See, e.g., Bass-Davis v. Davis*, 133 P.3d 251 (Nev. 2005) (remittitur recalled after order for *en banc* reconsideration), *Walters v. State*, 108 Nev. 186, 825 P.2d 1237 (1992) (remittitur had been recalled to accommodate a new hearing by the Nevada Supreme Court).

It cannot be claimed that a state supreme court could simply ignore the U.S. Supreme Court's issuance of a writ of certiorari, or any reversal of the state supreme court, simply because a remittitur had previously issued. Rather, in such a circumstance, the state supreme court simply recalls any unstayed remittitur which might in the interim have issued, for the purpose of acting on that development. The case of *City of Long Beach v. Bozek,* 661 P.2d 1072, 1073 (Cal. 1983), detailed just such a procedural history.

In addition to a state's supreme court recalling a remittitur, the trial court to which the case was remanded may respond to the U.S. Supreme Court writ, if it has the record now required by the U.S. Supreme Court clerk. *Miller v. Southern Pac. Co.*, 24 P.2d 380, 382 (Ut. 1933); *Dept. of Banking, State of Nebraska v. Pink*, 317 U.S. 264, 267 63 S.Ct. 233, 87 L.Ed. 254 (1942) (it "is . . . immaterial whether the record is physically lodged in the one court or the other, since we have ample power to obtain it from either."). Thus, whether or not a remittitur has issued is entirely irrelevant to the U.S. Supreme Court's ability to issue a writ of certiorari, and then decide whether or not to reverse the highest court of a state, in reviewing the case on the merits. Based thereon, the timely filed Writ Petition created a contingency under the *Semenza* rule, causing damages to be "uncertain" until it was rejected. Issuance of the remittitur by this Court simply did not prevent that from being the case herein. However, this Court's Decision seems to misapprehend, or ignore, these legal principles, in a manner which also misapprehends, or needlessly undermines, almost 30 years of precedent recognizing and applying the fundamental underlying rationale of the *Semenza* opinion.

This Court's Decision rejected this analysis in search of an arbitrary bright line rule for determining when the statute of limitations begins to run. However, the date on which a petition to the U.S. Supreme Court is rejected or, if accepted, ultimately adjudicated, is just as bright a line as the date of issuance of a remittitur. Moreover, using any writ petition's adjudication date as the bright line deadline, would have the added benefit of allowing this Court to remain consistent in its application of the fundamental and underlying claim accrual principles on which *Semenza* and its progeny have all been based, instead of simply ignoring, misapprehending, or implicitly rejecting those principles, as the Court's Decision does instead.

Moreover, this Court's new bright-line rule will still delay the running of the statute of limitations on any cases which are followed by a writ petition to the U.S. Supreme Court, given that, as a practical matter, litigants will now know of the need to obtain a stay of remittitur during that process, such that the deadline will continue to be extended for just as long as Branch Banking sought to extend it herein, in any event. Indeed, the delay will be even longer than it would have been under Branch Banking's arguments, as the Court's new bright line rule for cases involving a writ petition, now requires not only adjudication of that writ petition, but the subsequent issuance of the theretofore stayed remittitur, for the limitations period to begin to run, even though the damages would immediately become certain if and when the writ petition were denied.

2. <u>In the present case, the remittitur did not cause any further events which rendered the BB&T loss irreversible.</u> In the present case, the underlying litigation in which the malpractice occurred involved two notes signed by R&S St.

Rose LLC, which were secured by two separate deeds of trust, one of which was in favor of Branch Banking's predecessor-in-interest Colonial Bank, and the other of which was in favor of another lender, R&S St. Rose Lenders. AOB at pp. 7-9. The underlying litigation involved the question of which of these two deeds of trust had priority over the other. *See*, AOB at pp. 8-11.

Had the remittitur resulted in the district court allowing the prevailing R&S St. Rose Lenders' Deed of Trust to be foreclosed upon, and sold to a bona fide purchaser, notwithstanding Branch Banking's then pending Writ Petition, it might have become the case under the right set of facts, that Branch Banking's damages from its loss of the priority dispute litigation might have arguably become final and irreversible, notwithstanding the pendency of the Writ Petition. However, if that possibility had existed, there would have been every reason for Branch Banking to file a motion to stay the remittitur, pending the outcome of the Writ Petition.

But, in this case, that possibility did not exist, and there were instead perfectly rational reasons why Branch Banking did not see any need to obtain a stay of the remittitur after filing the Writ Petition, or pending the outcome thereof. After the August 2010 Notice of Appeal was filed, and while the appeal from the underlying suit was still pending, R&S St. Rose LLC had filed a bankruptcy petition, on April 4, 2011, thereby causing a bankruptcy stay to come into effect which prevented any foreclosure sale of the subject property by the prevailing lender from being ordered by the district court in this case, even after remittitur issued. *See*, AOB 43-44; AA0927-929; AA0807-809. Upon information and belief, had the motion to dismiss upheld by this Court's Decision been denied, and discovery commenced in this legal malpractice suit, said discovery would have

demonstrated that these bankruptcy proceedings, including adversarial suits filed therein by Branch Banking, were still pending when the Writ Petition was filed in this matter, and when remittitur issued, with a new court (namely the federal bankruptcy court) then having taken jurisdiction over the competing deeds of trust, over any foreclosure sale thereof, and over any distribution of any sale proceeds.

Accordingly, and importantly, no motion to file a stay of remittitur was therefore necessary in this case, to prevent the remittitur from having any adverse impact upon the disposition of the subject property, while the Writ Petition was pending. There was simply no action which the district court, upon receiving the remittitur, could have taken to have created any such impact. Rather, the parties to the underlying suit were prevented, by the existence of a bankruptcy stay, from seeking any post-remittitur relief from the district court, after that remittitur. Thus, after the remittitur issued, *the district court in the subject underlying priority suit where the malpractice occurred, was in the exact same position it would have been in HAD the remittitur been stayed, and not been issued: unable to issue any orders or take any action whatsoever, including with respect to directing the prevailing deed of trust holder that it might move forward and foreclose.*

Based thereon, the issuance of the remittitur in this case was even more of a non-dispositive event than would have otherwise been the case, more generally. Holding otherwise grossly overstated and misapprehended the importance of issuance of the remittitur, especially in this particular case.

A motion to dismiss under NRCP 12(b)(5) should not be granted if there is any set of facts on which relief can be afforded to the Plaintiff. *Holcomb Condominium Homeowners' Association, Inc. v. Stewart Venture, LLC*, 129 Nev.

Adv. Op. 18, 300 P.3d 124, 128 (2013). In the present case, therefore, rather than issuing a dismissal on the grounds that the Writ Petition did not delay the accrual of Branch Banking's claims, the district court should have denied the motion to dismiss, without prejudice to bring a motion for summary judgment, after discovery. Such a post-discovery motion could have been defended on the merits of the question of whether Branch Banking's damages actually became certain upon issuance of the remittitur, or whether the bankruptcy stay of any further district court involvement, prevented damages from accruing until the Writ Petition was rejected.

However, instead of inferring the best possible factual scenarios in favor of the non-moving party, as required when reviewing a motion to dismiss, the order of dismissal instead assumed the worst. This included an assumption by the district court, and now by this Court, that the damages were rendered certain long before the date on which the Writ Petition was denied, simply because the remittitur issued. The district court took this position without requiring the Defendants to file an Answer and test those claims through discovery followed by motions for summary judgment, or trial, on the question of whether any events occurring after remittitur actually rendered the claimant's damages final, certain, and non-contingent, upon the outcome of the Writ Petition.

Therefore, this Court's Decision misapprehended the foregoing facts and rules of law, as well as the rationale of this Court's own prior precedents. Those precedents did not implement the delayed claim accrual rule, or the appeal tolling rule, simply to create an arbitrary deadline for the date on which the statute of limitations begins to run. Rather, this Court's relevant prior precedents were based

on its recognition of a fundamental underlying principle: that a client's litigation malpractice claim simply does not accrue until the client's damages (a major and required element of such a claim) are certain. The Court's Decision seemingly rejects that longstanding principle of Nevada law. In its place, the Decision creates a new rule, which is now arbitrary, and which is divorced from the principle that claim accrual occurs when damages are certain, which prior principle has heretofore guided this Court's jurisprudence in this area, for decades.

In place of that principle, the Court has created a trap for the unwary. This is especially true in this case, where Branch Banking has now been subjected to this trap (by failing to seek a stay of the remittitur while the Writ Petition was pending) even though this newly adopted rule did not exist when Branch Banking filed its Writ Petition, and even though Branch Banking had no reason to seek a stay at that time, given the bankruptcy stay which was already in place.

As such, this Court's ruling also violates the longstanding position of this Court, that its rules and precedents, as well as other Nevada statutes, should not be construed so as to create a trap for the unwary. *See, e.g., Van Cleave v. Gamboni Const. Co.,* 101 Nev. 524, 530, 706 P.2d 845, 849 (1985) (Uniform Contribution Among Joint Tortfeasors Act, should be construed in a manner which does not create a trap for the unwary); *Bing Const. Co. v. Nevada Dept. of Taxation*, 107 Nev. 630, 631, 817 P.2d 710, 711 (1991) (rejecting literal reading of civil cover sheet and judicial review statutes which would create a "trap for the unwary"); *Hansen v. District Court*, 116 Nev. 650, 656, 6 P.3d 982, 985 (2000) (abrogating special appearance versus general appearance rules for jurisdictional motions to

dismiss, including so such rules will no longer needlessly create a "trap for the unwary").

Furthermore, by applying this new arbitrary bright line rule retroactively to this particular appellant, whose claims were not brought too late under the previously existing *Semenza* test (under which claims accrue upon damages becoming certain), but whose claims were only brought too late under this newly adopted remittitur-issuance rule, this Court's Decision improperly deprived Branch Banking of claims which had otherwise vested, before this new test was announced. *See, Allsenz v. Twin Lakes Village*, 108 Nev. 1117, 843 P.2d 834 (1992) (unconstitutional to apply new statutes of repose retroactively to divest claimants of otherwise previously vested claims).

This outcome misapprehended the prior legal precedents of this Court, the rationale for those precedents, and the facts of this matter, especially with respect to the effect of the remittitur while the Writ Petition was pending.

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III.

CONCLUSION

This Court should withdraw its Decision and reverse the lower court's dismissal of this suit.

DATED this 11th day of January, 2019.

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CERTIFICATE OF COMPLIANCE

I certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font. I further certify that this brief complies with the length limitations of NRAP 40(b)(3), because the brief, including footnotes and this Certificate, contains only 4,155 words, and therefore does not exceed 4,667 words.

I further certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 11th day of January, 2019.

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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 11th day of January, 2019, the foregoing **APPELLANT'S PETITION FOR REHEARING**, 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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