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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 *EN BANC* RECONSIDERATION**

Pursuant to NRAP 40A(a)(1) and (2), Appellant hereby petitions for reconsideration *en banc* of the Court's panel decision in *Branch Banking & Trust Co. v. Gerrard*, 134 Nev. Adv. Op. 106 (December 27, 2018) (hereinafter the "Decision") and of the denial of the Petition for Rehearing thereof entered on January 22, 2019. This Petition is made under NRAP 40A(a)(1) on the grounds

that the Decision undermined the rationale of earlier decisions of this Court, such that reconsideration by the full Court is necessary to maintain the uniformity of this Court's decisions; and under NRAP 40A(a)(2), on the grounds that the Decision involved a substantial precedential and public policy issue, with a potential impact beyond the litigants involved herein, on an issue of first impression which the entire Court should address.

I.

FACTUAL OVERVIEW

This is an appeal from an order of dismissal of a litigation malpractice case (the "Malpractice Suit"), brought by Appellant Branch Banking against its counsel in previous litigation (the former "Priority Litigation") in which the priority of two competing deeds of trust was contested. Branch Banking lost that prior Priority Litigation suit due to its counsel's failure to timely disclose, so as to be able to present at trial, evidence of Branch Banking's ownership of the deed of trust and claims at issue in that suit, which Branch Banking had obtained prior to trial, from the FDIC, which had taken over those assets from an entity known as Colonial Bank, upon Colonial's liquidation. For a more detailed factual analysis of the underlying Priority Litigation and of the malpractice alleged to have been committed therein, *see*, Appellant's Opening Brief (hereinafter "AOB") in this case at pp. 9-18; this Court's decision on appeal from the underlying suit, *R & S St. Rose Lenders, LLC v. Branch Banking & Trust. Co.*, 2013 WL 3357064 (Unpublished Disposition; Docket No. 56640; Nev. May 31, 2013); and *Branch Banking & Trust Co. v. D.M.S.I., LLC*, 871 F.3d 751, 760-61 (9th Cir. 2017) (recognizing that Branch Banking did not lose the Priority Litigation on the merits,

but due to procedural and evidentiary failures, and was thus not issue precluded in other cases from demonstrating that it had acquired Colonial's assets, by relying on evidence which was excluded in the Priority Litigation as not timely disclosed).

Branch Banking appealed the outcome of the Priority Litigation to this Court, which upheld the lower court's ruling. III Appellant's Appendix (hereinafter "AA") AA0594-601. Branch Banking then filed timely Petitions for rehearing and for *en banc* reconsideration of the outcome in the Priority Litigation, before this Court. V AA0956-957. When these were rejected, Branch Banking filed a timely Petition for Writ of Certiorari to the U.S. Supreme Court (hereinafter the "Writ Petition"). The U.S. Supreme Court thereafter rejected the Writ Petition. III AA0620-622.

Within two years of that U.S. Supreme Court denial of the Writ Petition (but more than two years after this Court had rejected the appeal), Branch Banking filed the instant Litigation Malpractice Suit. I AA0008. The district court then granted a motion to dismiss this Malpractice Suit as untimely brought under the applicable two year statute of limitations (IV AA0849-853), relying in part on Branch Banking having failed to obtain a stay of remittitur, which issued while the Writ Petition was pending and before it was rejected. This appeal followed, and the panel's Decision affirmed the lower court's dismissal. A petition for rehearing was then denied by the panel, and this Petition is timely filed within ten days of that ruling.

II.

LEGAL ARGUMENTS PRESENTED ON APPEAL

Branch Banking argued, on appeal from the order of dismissal, that its Malpractice Suit was timely brought as the malpractice claims did not accrue until

after the U.S. Supreme Court rejected its Petition for Writ of Certiorari. AOB 23-38. In making this argument, Branch Banking relied on this Court's decision in *Semenza v. Nevada Medical Liability Insurance Co.,* 104 Nev. 666, 668, 765 P.2d 184, 186 (1988), which ruled that "a legal malpractice action does not accrue until the plaintiff's damages are certain and not contingent upon the outcome of an appeal." *Semenza* became the basis for a long line of subsequent Nevada Supreme Court cases which have recognized that the statute of limitations for litigation malpractice does not begin to run until the underlying suit in which the malpractice occurred, including any appeal thereof, has been resolved. *See e.g.*, *K.J.B. Inc. v. Drakulich*, 811 P.2d 1305, 1306, 107 Nev. 367, 369-70 (1991) (under *Semenza* "the statute of limitations . . . 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.").

Branch Banking argued below and on appeal that, under the rationale of *Semenza*, and its progeny, the Writ Petition should have been treated as an accrual-delaying event, as it rendered Branch Banking's damages uncertain and contingent until the Petition was decided. Indeed, although a minority position, Nevada's position that the statute of limitations on litigation malpractice claims does not begin to run during any appeal from the suit wherein the malpractice occurred, is also followed by other jurisdictions, and those which both follow this rule, and have also reached the question, uniformly apply that rule to the time period during which a timely filed writ petition to the U.S. Supreme Court is pending. *See, e.g., Haase v. Abraham, Watkins, Nichols, Sorrels, Agosto & Friend LLP*, 499 S.W.3d 169, 175 (Tex. Ct. App. 2016); *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).[1]

Moreover, the *Semenza* and *K.J.B.* decisions did not simply create, from whole cloth, a merely arbitrary deadline for determining the date on which the subject statute of limitations would begin to run, but were themselves based on more fundamental principles, namely, that damages must have been suffered and rendered certain before any claim may be said to have accrued: "In Nevada, legal malpractice is premised upon . . . a duty owed to the client by the attorney, having been filed. Thus, [and] breach of that duty . . . as proximate cause of the client's damages. . . . Such an action does not accrue until . . . 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." *Semenza*, 104 Nev. at 667-68, 765 P.2d at 185-86 (1989). Likewise, the *K.J.B.* decision specifically quoted from and reiterated *Semenza's* concern that suits not be filed while "the element of injury or damage remains speculative" in determining that, under the rationale of *Semenza*, the statute of limitations for litigation malpractice should be deemed tolled while the underlying suit is still pending or on appeal. *K.J.B.*, 107 Nev. at 369, 811 P.2d at 1306. Stated otherwise, the date of injury in states which follow reasoning similar to that in

[1] The *Mackenzie* decision distinguished *Joel Erik Thompson, Ltd. v. Holder*, 965 P.2d 82 (Az. Ct. App. 1998), which is one of the cases cited by this Court's Decision (Decision at p. 8), on the grounds that *Joel* involved a case "without a petition for Supreme Court review," having ever been filed. *Mackenzie* at *2. Thus, it is possible that Arizona law on this subject may be interpreted differently than the Decision suggests, as to the proper construction and application of that *Joel* ruling, to cases such as the instant matter.

Semenza "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).

Importantly, this Court has recognized that an appeal is not the only event which might delay the date on which damages become certain, and thereby delay the accrual of a litigation malpractice claim. *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 beginning to run, 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). In other words, the date of rejection of an appeal is not merely an arbitrary rule for establishing the date on which the limitations period begins to expire, but is based on the more fundamental question of when did damages become certain, and the claim therefore accrue. Thus, there is no reason why the Writ Petition, which rendered damages uncertain and contingent until it was adjudicated, should not have tolled the statute of limitations in this case in the same manner as the second attempted lawsuit had done in *Kopicko.*

Based on these precedents, and, more importantly, the rationale and fundamental rules of claim accrual on which these precedents were based, Branch Banking contended below and in its briefs to this Court that the statute of limitations did not begin to run in this case until the Writ Petition was denied, such that its complaint, filed less than two years after that date, was timely under the applicable two year statute.

With respect to the fact that remittitur had issued, Branch Banking pointed out that the remittitur did not render damages certain or noncontingent (either generally speaking or under the facts of this particular case), upon the outcome of the Writ Petition. Rather, had the Writ Petition been granted and the final outcome of the Priority Litigation been reversed, the remittitur would have simply been recalled, as demonstrated by numerous precedents set forth in Branch Banking's briefs. *See, e.g.,* AOB 38-44. Moreover, the debtor whose notes were secured by the competing deeds of trust in the Priority Litigation had in any event filed bankruptcy, such that the remittitur did not need to be stayed to protect Branch Banking's interests pending the outcome of the Writ Petition, as a bankruptcy stay, to the same effect, was in place anyway. *See, e.g.,* IV AA0917 at fn. 2; AOB at pp. 43-44; AA0927-929; AA0807-809.

The panel's Decision however ignored these arguments and affirmed dismissal, on the theory that, because Branch Banking had failed to obtain a stay of the remittitur during the pendency of the Writ Petition, Branch Banking could not utilize the date of rejection of the Writ Petition as the date on which the statute of limitations first began to run. In order to reach this conclusion, the Decision, although it discussed *Semenza*, largely ignored, and thereby established a precedent regarding the apparent unimportance of, the *rationale* of *Semenza*. However, that rationale has been invoked and relied on in Nevada for the past three decades. In place of the *Semenza* analysis, which ascertains the date on which damages become certain, the Decision sought the advantages of "bright-line rules" which avoid delay and uncertainty. Decision at 8.

III.

THE PANEL'S DECISION (A) INVOLVED A SUBSTANTIAL NEW PRECEDENT ON AN ISSUE OF FIRST IMPRESSION, AND (B) UNDERMINED THE UNIFORMITY OF THIS COURT'S PRIOR RULINGS, BY IGNORING AND THEREFORE APPARENTLY REJECTING, THE RATIONALE OF THIS COURT'S PRIOR PRECEDENTS IN THIS SUBJECT AREA OF THE LAW. THUS, THE DECISION SHOULD BE RECONSIDERED BY THIS ENTIRE COURT

A. Reconsideration *en banc* is appropriate under NRAP 40A(a)(2).

The questions argued by both sides in this case involved the application and continuing validity of substantial prior precedents, such as *Semenza*, *K.J.B.*, and *Kopicko*. Moreover, this case, and the ruling thereon, addressed an important issue of first impression, the Decision on which will now create a substantial new precedent in this State (whether and under what circumstances the rules created in *Semenza* and its progeny, regarding delayed accrual or tolling of the date on which malpractice statutes of limitations begin to run, apply during the pendency of Petitions for Writ of Certiorari to the U.S. Supreme Court). Based thereon, this dispute should be considered by this entire Court under the standard established by NRAP 40A(a)(2).

The panel Decision held that the Appellant's Writ Petition, filed in an attempt to reverse the outcome of the underlying Priority Litigation, "could" have delayed the date of accrual and the running of the statute of limitations. Decision at p. 7. However, the Decision ruled this would not be the outcome in this matter, because, during the period that the Writ Petition was pending, Branch Banking had failed to seek a stay of the remittitur, which issued while the Writ Petition was pending. *Id*. The Decision suggests that, had a motion to stay the remittitur been

filed and granted, preventing issuance of 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. This approach to the issue creates an important and substantial new precedent, on an issue of first impression, such that it should be jointly reviewed and examined by this entire Court.

B. Reconsideration *en banc* is also appropriate under NRAP 40A(a)(1).

In reaching its conclusion, the panel's Decision did not reach, ask, address or examine the question which this Court's prior precedents, in cases such as *Semenza*, *K.J.B.*, and *Kopicko* have uniformly treated as the major issue required to be addressed: namely, whether the issuance of the remittitur rendered damages certain and no longer contingent on the outcome of the Writ Petition. Had the Panel asked and addressed that question, the answer would have been a resounding "no." This is so both generally speaking (as remittiturs can be and routinely are recalled, on good cause shown[2] to include cases in which the U.S. Supreme Court issues a writ of certiorari after the issuance of a remittitur),[3] and under the facts of this particular case (where a bankruptcy stay, arising from a bankruptcy petition filed by the debtor whose two deeds of trust were at issue in the Priority Litigation, prevented the remittitur in this matter from having any practical effect in any event).[4] That the answer to this inquiry, had it been made, would have been "no,"

[2] *See, e.g., Bass-Davis v. Davis*, 133 P.2d 251 (Nev. 2005).
[3] *See, e.g., City of Long Beach v. Bozek*, 661 P.2d 1072, 1073 (Cal. 1983) (in which the California Supreme Court recalled its own previously issued remittitur, in order to then address issues raised by subsequently granted U.S. Supreme Court Writ of Certiorari).
[4] *See, e.g.*, IV AA0917 at fn. 2; AOB at pp. 43-44; AA0927-929; AA0807-809.

is demonstrated via the thorough analysis of that issue set forth in the AOB at pp. 38-44. This is so regardless of the Court where the remitted file is then located. *Id*.

The Decision declined to address this question, of whether the remittitur caused damages to become certain, even though *Semenza*, *K.J.B.*, and *Kopicko* all treated that question as the fundamental inquiry which needs to be addressed to determine the date on which accrual of a litigation malpractice case occurs, for statute of limitations purposes. The Decision instead indicated that a bright line rule should be arbitrarily imposed for cases in which no stay of remittitur is sought or obtained, regardless of the answer to, and without any need to even consider, the question (of the date on which damages became certain) which this Court has heretofore always treated as the paramount question which needs to be addressed in order to rule in this area.

The panel's Decision therefore undermined the precedential value of cases such as *Semenza*, *K.J.B.*, and *Kopicko*, by failing to squarely address the rationale of those cases, in favor of instead seeking to establish a new arbitrary bright line rule, completely divorced from the rationale of those prior precedents, and ignoring and sidestepping the analysis upon which this Court's prior jurisprudence in this area had always been based.

This ruling therefore deserves the attention of this entire Court, *en banc*, pursuant to NRAP 40A(a)(1): As the Decision of the panel now stands, the precedential value of cases such as *Semenza*, and its progeny, have been seriously undermined and called into question, thereby disrupting the uniformity of this Court's decisions. While the Decision does not state that the specific outcome in *Semenza* and *K.J.B.* and *Kopicko* has been explicitly overruled, the rationale of

those cases, and the need for future courts to apply that rationale, has apparently vanished. If the Decision stands, then, in any future litigation malpractice disputes, involving different litigants than those now before this Court, in which any (heretofore unaddressed) event is proposed by one of the litigants to be the date on which the statute of limitations should be treated as having begun to run, the lower court addressing such an argument has now been advised that its analysis thereof is no longer to be governed by the principles enunciated in *Semenza*, *K.J.B.*, and *Kopicko*. The guiding question will now be, "does the date on which the litigant claims the statute of limitations began to run offer a handy bright-line test" as preferred by the Nevada Supreme Court in the *Branch Banking* Decision, rather than, "does the date on which the litigant claims the statute of limitations began to run, correspond to the date on which damages became certain" as required by thirty years of precedent, from *Semenza* onwards, until that rationale was apparently set aside in the *Branch Banking* Decision.

If such a fundamental change in the tests applicable in this area of the law is to take place, it should at least first be considered by this entire Court, pursuant to NRAP 40A(a)(1) (as well as 40A(a)(2)).

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IV.

CONCLUSION

For the reasons stated herein, the entire Court should reconsider the Decision, *en banc*.

DATED this 29th day of January, 2019.

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CERTIFICATE OF COMPLIANCE

1. I certify that this petition for *en banc* reconsideration 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.

2. I further certify that this brief complies with the volume/length limitations of NRAP 40A(d), because the brief, including footnotes and this Certificate, is proportionately spaced, has a type face of 14 points or more, and contains only 3,122 words, and therefore does not exceed 4,667 words.

DATED this 29th 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 29th day of January, 2019, the foregoing **APPELLANT'S PETITION FOR *EN BANC* RECONSIDERATION**, 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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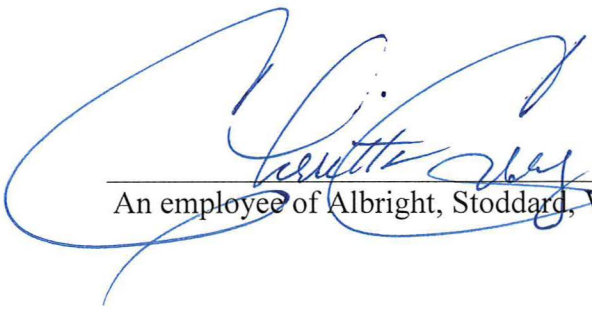

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