

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Electronically Filed
Apr 25 2018 03:07 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SHELDON FREEDMAN MD, PANKAJ
BHATANAGAR MD, and MATHEW
NG MD,

Petitioners,

vs.

THE HONORABLE JOSEPH HARDY,
District Court Judge, Eighth Judicial
District Court of the State of Nevada, in
and for County of Clark,

Respondent.

MARK J. GARDBERG, ESQ., in his
capacity as Receiver for and acting on
behalf of, FLAMINGO-PECOS
SURGERY CENTER, LLC a Nevada
limited liability company,

Real Party in Interest

Supreme Court Case No.: 74726

**District Court Case No.
A-17-750926-B**

**PETITION FOR EN BANC
RECONSIDERATION**

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I.

INTRODUCTION

COMES MOW, Petitioner SHELDON FREEDMAN, M.D., (“Defendant”), by and through counsel, the law firm of COOK & KELESIS, LTD. and hereby submits the following Petition for En Banc Reconsideration of its denial of Petitioners’ Petition for a Writ of Mandamus, or, in the alternative, a Writ of Prohibition to vacate the portion of the Eighth Judicial District Court’s (hereinafter “District Court”) Order entered on December 6, 2017 (hereinafter “Order). On April 25, 2018, the panel denied Petitioner’s Motion for Reconsideration.

At this time, Petitioner seeks en banc reconsideration of the panel’s denial of the writ petition on the stated basis that “this court generally will not consider writ petitions challenging orders denying motions to dismiss.”

Petitioner asserts the panel has overlooked the fact that this matter can be concluded without further waste of party and judicial resources if a dismissal, which is appropriate under the circumstances, is granted. The the complaint as drafted is wholly inadequate for the Plaintiff to prevail in this case. Reconsideration of the panel’s decision is warranted under these circumstances.

II.

FACTUAL BACKGROUND

A. The Receiver.

Flamingo Pecos Surgery Center ("FPSC") had a lease for its ambulatory surgery center with Patriot-Reading Associates, LLC ("Patriot"). (AA000395). On March 23, 2014, Patriot sued FPSC for breach of contract (*Patriot-Reading Associates LLC v. Flamingo-Pecos Surgery Center LLC*, Case No. A-16-733627). (AA000396). Default was entered against FPSC, and default judgment was then entered in favor of Patriot. (AA000396). On August 10, 2016, Patriot moved for and was granted an appointment of receiver over FPSC. (the "Receivership Order"). (AA000396). In the September 13, 2016 order, Timothy R. Mulliner was appointed as receiver ("Mulliner"). (AA397).

The Receivership Order granted the receiver authority to take possession of and manage FPSC property, determine whether to make payments and whether to liquidate FPSC property, pursue claims which FPSC may have, and pursue claims related to FPSC's "former employee/office manager Robert W. Barnes." (AA000397). The receiver was also authorized to take any action deemed necessary to collect FPSC's accounts and debts owed to it (*id.* at 15), including actions against "Flamingo's directors and officers." (AA000397).

On or about July 21, 2017, Mark J. Gardberg replaced Mulliner as the receiver (AA000398).¹

B. Allegations Against All Defendants.

In its Complaint, Plaintiff FPSC alleges that Defendants were managers,² directors, and/or officers of the FPSC. (AA000396, 000399). FPSC was an LLC operating an ambulatory surgery center with 27 practicing surgeons located in southwest Las Vegas, Clark County, Nevada. (AA000395, 000399, 000402). Robert J. Barnes ("Barnes") was FPSC's office manager. (AA000397, 000398, 000405, 000406, 000407, 000419, 000420, 000421) and he has since been sentenced to prison for his actions. (AA000403).

Plaintiff alleges that the Defendants hired Barnes on October 5, 2006 for the position of FPSC's office manager. (AA000495). Plaintiff concedes that Barnes' employer was the FPSC. (AA000397, 000398n 000405, 000406, 000419, 000420, 000421). Barnes' functions and responsibilities extended to FPSC's full financial workings, accounts, and books. (AA00406). Plaintiff alleges that Defendants failed to supervise, oversee and/or monitor Barnes for many years during Barnes' crime

¹ From here on, any references to the "receiver" refer to Gardberg as the receiver.

² Notably, the Receivership Order permits actions against "directors and officers" and does not reference managers under that section. (AA000397).

spree, allowing a criminal to effectuate and conduct his embezzlement and theft from FPSC. (AA000406).

Plaintiff further alleges that Defendants had authority to act on behalf of the entity and failed - for an unreasonably lengthy period of time - to remove Barnes from his position as office Manager, and to block Barnes' access to FPSC's funds and assets. (AA0004413). Plaintiff alleges that "Defendants individually and collectively damaged Flamingo through a series of actions and inactions occurring over the course of several years," related to the injury to FPSC caused by Barnes. (AA000401). Specifically, Plaintiff alleges Defendants acted, or failed to act, with "gross negligence, willful misconduct, and reckless/intentional disregard" regarding Barnes' actions, as well as their duties to FPSC. (AA000401-402).

Barnes admitted in subsequent criminal proceedings (brought by the U.S. Government) that he had embezzled at least \$1.3 million during the course of his crime spree over many years. (AA000409). Receiver further alleges that upon discovery of Barnes' embezzlement and theft, Defendants had the authority to act on behalf of the entity but failed to (a) demand that Barnes return FPSC's funds and assets; (b) pursue Barnes; and (c) file a civil complaint against Barnes, with such failures resulting in substantial damages against FPSC. (AA000413).

Plaintiff, therefore, went on to allege that Defendants are liable for:

- Grossly negligent hiring, supervision, and retention of Barnes, First - Third Causes of Action (AA000419, 000420);
- Breaches of fiduciary duties of care and loyalty to FPSC, Fourth and Fifth (incorrectly labeled Fourth again) Causes of Action (AA000420, 000422);
- Breach of the operating agreement, Sixth (incorrectly labeled Fifth) Cause of Action (AA000423);
- Waste, Seventh (incorrectly labeled Sixth) Cause of Action (AA000423);
- Breaches of NRS Chapter 86, Eighth (incorrectly labeled Seventh) Cause of Action; and (AA000423).
- Imposition of a constructive trust, Ninth (incorrectly labeled Eighth) Cause of Action (AA000424).

Plaintiff claimed that Defendants' stories are inconsistent regarding Barnes' actions and the actions of FPSC, yet that all defendants "slept on their basic obligations for many years, [constituting] grossly, willfully and intentionally negligent conduct . . . and, a breach of" all defendants' fiduciary duties to FPSC. (AA000412). Essentially, Plaintiff alleged all defendants "were willfully blind to Barnes' criminality for several years, and that [all defendants] failed upon discovery

to immediately stop Barnes and protect [FPSC]." (AA000412). Accordingly, the Receiver has brought suit alleging the Defendants had the authority to act on behalf of the company and the Receiver has the ability to sue these members. In fact, the Receiver is pursuing this claim on behalf of the entity itself. (AA000700).

III.

ARGUMENT

A. The Nevada Supreme Court has demonstrated a willingness to consider writ petitions denying a motion to dismiss under circumstances where a litigant does not have an adequate and speedy legal remedy.

It is permissible for the Nevada Supreme Court to consider a petition challenging the denial of a motion to dismiss when either (1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule, or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration mitigate in favor of granting the motion. See *International Game Technology, Inc. v. Second Judicial Dist. Court ex rel. County of Washoe*, 124 Nev. 193, 179 P.3d 556 (2008); *Smith v. District Court*, 107 Nev. 674, 818 P.2d 849 (1991). Furthermore, this court may consider writ petitions that present matters of first impression that may be dispositive in the particular case. *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 312 P.3d 491, 496 (2013).

B. A Writ is appropriate in this Matter

The District Court has failed to issue a ruling on what is clearly a legal issue with no factual disputes. The decision regarding this legal issue could determine the entirety of the claim as it relates to multiple parties. Moreover, if the Writ is not granted, the Defendants will be subject to great expenses, and subject to personal intrusions of discovery and then required to wait until the conclusion of the trial, which has not even been set yet, for a remedy. Without this Writ, a legal decision as to this issue would subject individuals to various discovery, intrusions and interference in medical practice schedules, none of which are necessary based on the law in the State of Nevada. Accordingly, extraordinary relief is the Defendants' only remedy.

Specifically, Plaintiff faces an inability to proceed on his claims based on an expiration of applicable statute of limitations periods.

The Plaintiff in the District Court action is a Receiver appointed in a default action by a third party creditor. The Receiver is pursuing individual members of the now defunct and inoperational FPSC, seeking funds to pay back this third party vendor of the surgery center. Moreover, the specific language of the Receivership Order permits the Receiver to provide its collectibles directly to this third party

vendor.³

The Receiver has brought this action against these individual members alleging that their office manager who scammed millions from the Defendant members and the company, resulting in the downfall of the company, was somehow able to do so through negligence of its members. The Receiver alleges that the members had knowledge of the office manager stealing from them, had the power to stop this theft and/or fire the culprit, but neglected to do so. The Receiver admits that this action is filed more than three (3) years after the officers and directors had knowledge of the negligent conduct complained of, but suggests the discovery rule provides them some type of exception.

Herein lies the difficulty for the Receiver. The law creates a problematic situation for which the only solution creates circumstances that would deny the claims under the law; i.e., a Catch-22 with two equally undesirable alternatives. If the Receiver was truly the entity pursuing its members in a manner permitted under Chapter 86 and *Gardner*,⁴ and the entity pursuing its members⁵ then the entity is

³ See Receivership Order at Page 10, “the Receiver shall turn over possession, custody and control of the Receivership to either Patriots [Patriots is the third-party vendor], Flamingo or to the successful purchaser of the receivership property. . .”.

⁴ Notably, alter ego is not alleged. In fact, the allegations are the opposite of an alter-ego case. Receiver does not claim the doctors ran the company as their

impugned with the knowledge of its members⁶ and therefore, there is no basis to toll discovery for the statute of limitations.

Moreover, if the Receiver is the entity, and the entity is impugned with the knowledge of its agents who have the ability to make decisions on this issue, the Receiver is precluded from arguing to the contrary because if the Defendants did not have the authority to stop the thief, then the substance of the allegations against Defendants falls apart, i.e., they could not negligently, or in bad faith, fail to stop the thief if the Receiver's argument is that they do not have authority to do so. Thus, either the Receiver is the entity bound by the actions of its members and this matter must be dismissed as it has not been filed within the appropriate statute of limitations or, instead, it is not the entity and therefore is not bound by the members but is an

own. In fact, they plead the reverse, i.d., that the doctors let the thieving office manager run the company for himself without supervision from the doctors.

⁵ As an additional basis as to why the Operating Agreement would otherwise preclude this, but the same is not necessary for this aspect of the Writ.

⁶ In any application of the discovery rule, a party steps into the shoes of the person on behalf of whom they are suing. This has applied even in circumstances of survivorship actions. *See e.g., 25 A.C.G.S. Death § 166 Discovery Rule, see also Department of Labor and Industries v. Estate of MacMillan*, 117 Wash. 2d 222, 814 P.2d 194 (1991). Moreover, it is obviously also the case in receivership actions. *See e.g., The Unpublished Decision of Schettler v. RalRon Capital Corporation*, 275 P.3d 933, 938, 128 Nev. Adv. Op. 20 (2012) (noting that the FDIC acting as a receiver stands in the shoes of its predecessor and takes all defenses and is subject to all claims as the prior receiver).

outside vendor seeking to sue the members of an LLC in a manner that has just been specifically precluded in *Gardner, supra*. Under either scenario, the Receiver's case must be dismissed.

There is no discovery necessary to determine either of these issues. This is entirely a legal decision to which it is appropriate to be determined in this Writ rather than having years of litigation and discovery as well as schedules of practicing physicians being turned upside down on such a clear legal issue. Various entities and individuals will be held in a lawsuit for an extensive period of time where the law is clear and the facts are clear that neither should occur. Accordingly, neither should be subject to extensive discovery up disruption of their medical practice, wherein the Supreme Court's Orders on these issues are clear and based on the allegations of the Second Amended Complaint, none of them should remain in.

IV.

CONCLUSION

The Defendants respectfully request this Court accept this request for en banc reconsideration of their petition for writ of mandamus, of in the alternative a writ of prohibition, directing Respondent District Court to vacate its December 6, 2017 Order denying the Individual Doctors' Motion to Dismiss.

DATED this 25 day of April, 2018.

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V.

CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 40 AND 40A

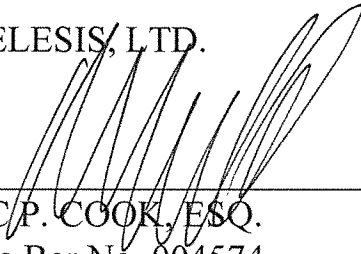
1. I hereby certify that this petition for reconsideration complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points or more and contains 2,981 words.

DATED this 25 day of April, 2018.

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VI.

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On April 25th, 2018, I caused to be served a true and correct copy of the foregoing **PETITION FOR EN BANC RECONSIDERATION** by the method indicated below:

- ☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
- ☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
- ☐ **BY EMAIL:** by emailing a PDF of the document(s) listed above to the email address(es) of the individual(s) listed below.
- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the Supreme Court of Nevada for electronic filing and service upon the Court's Service List for the above-referenced case:

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- ☒ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

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