

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

TAE-SI KIM, AN INDIVIDUAL; AND  
JIN-SUNG HONG, AN INDIVIDUAL,

APPELLANTS,

v.

DICKINSON WRIGHT, PLLC, A  
NEVADA PROFESSIONAL LIMITED  
LIABILITY COMPANY; JODI DONETTA  
LOWRY, ESQ., AN INDIVIDUAL;  
JONATHAN M.A. SALLS, ESQ., AN  
INDIVIDUAL; ERIC DOBBERSTEIN,  
ESQ., AN INDIVIDUAL; AND MICHAEL  
G. VARTANIAN, ESQ., AN  
INDIVIDUAL,

RESPONDENTS.

Electronically Filed  
Jul 23 2018 09:42 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
Supreme Court No. 74803  
District Court Case No.  
A-17-756785-C

**RESPONDENTS' ANSWERING BRIEF**

MORRIS LAW GROUP  
Steve Morris, NV Bar No. 1543  
Ryan M. Lower, NV Bar No. 9108  
411 E. Bonneville Ave., Ste. 360  
Las Vegas, Nevada 89101

Attorneys for Respondents

## **RULE 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dickinson Wright, PLLC does not have a parent company and no publicly-held company owns 10% or more of its stock. The remaining respondents, Jodi Donetta Lowry, Jonathan M.A. Salls, Eric Dobberstein, and Michael G. Vartanian, are individuals. Since the inception of this case, respondents have been represented only by the firm and lawyers listed below, who will appear in this Court.

MORRIS LAW GROUP

By: /s/ Ryan Lower  
MORRIS LAW GROUP  
Steve Morris, NV Bar No. 1543  
Ryan M. Lower, NV Bar No. 9108  
411 E. Bonneville Ave., Ste. 360  
Las Vegas, Nevada 89101

Attorneys for Respondents

## TABLE OF CONTENTS

### Page No.:

Rule 26.1 Disclosure.....	i
I. ROUTING STATEMENT .....	2
II. INTRODUCTION.....	2
III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW .....	5
IV. STATEMENT OF THE CASE .....	6
V. STATEMENT OF FACTS .....	7
A. The Kims Retain and Terminate Charles Damus.....	7
B. The Federal Action.....	8
C. Damus Successfully Moves to be Dismissed From the Federal Action.....	9
D. The Conclusion of the Federal Case and Dickinson Wright's Termination of Its Representation of the Kims.	10
VI. SUMMARY OF ARGUMENT .....	12
VII. ARGUMENT .....	13
A. The Statute of Limitations for the Kims' Claims against Damus was Tolerated During the Pendency of the Federal Action Pursuant to 28 U.S.C. § 1367(d).....	13
B. The Kims' Legal Malpractice Claim Against Damus Did Not Accrue until the Conclusion of the Federal Action When Their Damages Became Certain. ....	17
C. The District Court Properly Dismissed the Complaint Based on the Attorney Judgment Rule. ....	20
D. The District Court Correctly Found that the Kims' Claims against Dickinson Wright are Time-Barred. ....	23

VIII. CONCLUSION.....	26
CERTIFICATE OF COMPLIANCE .....	28
CERTIFICATE OF SERVICE .....	29

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>Artis v. D.C.</i> , 583 U.S. ___, 138 S. Ct. 594 (2018) .....	14
<i>Bergstrom v. Noah</i> , 266 Kan. 847, 974 P.2d 531 (1999) .....	22
<i>Biomet Inc. v. Finnegan Henderson LLP</i> , 967 A.2d 662 (D.C. 2009) .....	22
<i>Blanchard v. Blanchard</i> , 108 Nev. 908 P.2d 1320 (1992) .....	15
<i>Brady, Vorwerck, Ryder &amp; Caspino v. New Albertson's, Inc.</i> , 130 Nev. Adv. Op. 68, 333 P.3d 229 (2014) .....	19
<i>Dannenberg v. Software Toolworks Inc.</i> , 16 F.3d 1073 (9th Cir. 1994) .....	10
<i>Dettling v. U.S.</i> , 948 F. Supp. 2d 1116 (D. Hawaii 2013) .....	15
<i>Garner v. Bank of Am. Corp.</i> , No. 2:12-CV-02076-PMP, 2014 WL 1945142 (D. Nev. May 13, 2014) .....	16
<i>Hewitt v. Allen</i> , 118 Nev. 216, 43 P.3d 345 (2002) .....	18
<i>In re Amerco Derivative Litig.</i> , 127 Nev. 196, 252 P.3d 681 (2011) .....	16
<i>In re Vertrue Inc. Mktg. &amp; Sales Practices Litig.</i> , 719 F.3d 474 (6th Cir. 2013) .....	14
<i>Kopicko v. Young</i> , 114 Nev. 1333, 971 P.2d 789 (1998) .....	18
<i>Lazy Y Ranch LTD v. 24 Behrens</i> , 546 F.3d 580 (9th Cir. 2008) .....	15
<i>Nelson v. Quarles &amp; Brady, LLP</i> , 997 N.E.2d 872 (Ill. App. Ct. 2013) .....	23
<i>Powell v. Liberty Mut. Fire Ins. Co.</i> , 127 Nev. 156, 252 P.3d 668 (2011) .....	13, 24
<i>Quintilliani v. Mannerino</i> , 62 Cal. App. 4th 54, 57, 72 Cal. Rptr. 2d 359 (1998) .....	25
<i>Semenza v. Nev. Med. Liab. Ins. Co.</i> , 104 Nev. 666, 765 P.2d 184 (1998) .....	17, 18, 20

<i>Stalk v. Mushkin</i> , 125 Nev. 21, 199 P.3d 838 (2009) .....	25
<i>Stumpf v. Albracht</i> , 982 F.2d 275 (8th Cir. 1992).....	25
<i>Turner v. Kight</i> , 957 A.2d 984 (Md. 2008) .....	14

## STATUTES

28 U.S.C. § 1291 .....	10
28 U.S.C. § 1367(a).....	2
28 U.S.C. § 1367(d) .....	2, 3, 5, 13, 16, 25
NEFR 9(f) .....	29
Nev. R. App. P. 17(a)(10).....	2
Nev. R. App. P. 25(b) .....	29
Nev. R. App. P. 26.1(a) .....	i
Nev. R. App. P. 28(e) .....	28
Nev. R. App. P. 32(a)(4)–(6).....	28
Nev. R. App. P. 32(a)(7)(A)(ii).....	28
NRS 11.190(2)(c) .....	16
NRS 11.190(4)(e) .....	16
NRS 11.207 .....	4, 6, 13, 19, 24, 25, 26
NRS 11.207(1).....	16

## RULES

EDCR 2.20(e) .....	21
--------------------	----

## TREATISES

3 R. Mallen & J. Smith, Legal Malpractice §18.1 at 2 (5th ed 2000).....	22
7 Am. Jur. 2d Attorneys at Law § 199 .....	22

## **I. ROUTING STATEMENT**

The Supreme Court should hear this appeal under Nev. R. App. P. 17(a)(10) because this appeal presents a question of first impression for Nevada—the time within which state claims that were filed in federal court under the federal supplemental jurisdiction statute, 28 U.S.C. § 1367(a), and later dismissed by the federal court may be refiled in state court under the federal tolling provision, 28 U.S.C. § 1367(d).

## **II. INTRODUCTION**

This case is about appellants Tae-Si Kim and Jun-Sung Hong's (the "Kims") search to find someone to compensate them for an unsuccessful real estate investment. To this end, the Kims have sued Dickinson Wright and some of its current and former lawyers<sup>1</sup>—who had nothing to do with the real estate investment—for legal malpractice, intentional and negligent misrepresentation, and breach of fiduciary

---

<sup>1</sup> Jodi Donetta Lowry, Jonathan M.A. Salls, Eric Dobberstein, and Michael G. Vartanian (collectively "Dickinson Wright").

duty based on the Kims' allegation that the firm did not re-file in state court their claim for legal malpractice against attorney Charles Damus on or before September 2011, after the federal court dismissed their claim against Damus on December 6, 2010.

The Kims allege that a "claim against defendant Damus had to [be] brought, pursuant to statute, on or before September of 2011"<sup>2</sup>, that "[Dickinson Wright had] represented to [the Kims] that a claim against Damus could be brought at the end of the United States District Court case"<sup>3</sup>, and that statement "was statutorily false."<sup>4</sup>

Notwithstanding the Kims' allegations, the evidence in the record and the applicable law demonstrate that:

(1) under the federal tolling statute, 28 U.S.C. § 1367(d), the statute of limitations against Damus was suspended from March 2, 2010 until September 4, 2015 when the federal action was finally

---

<sup>2</sup> AA164 at ¶ 37.

<sup>3</sup> AA164 at ¶ 39.

<sup>4</sup> AA165 at ¶ 40.



dismissed. Thus, the Kims had until April 2017 to file their legal malpractice claim against Damus in state court. The record also shows that Dickinson Wright terminated its representation of the Kims on July 30, 2015, and that when it did so, the firm clearly informed them of their ability to sue Damus in state court at that time and suggested they contact another attorney to initiate that litigation;

(2) based on Nevada's litigation tolling rule, the Kims' legal malpractice claim against Damus did not accrue until the conclusion of the federal action on September 4, 2015, when their damages became certain;

(3) under the attorney judgment rule, Dickinson Wright's exercise of professional judgment to advise the Kims that they could re-file their claims against Damus in state court is not, as a matter of law, actionable; and

(4) the Kims' claims against Dickinson Wright are time-barred under NRS 11.207, in any event.

For these reasons, the Court should affirm the district court's order granting the motion to dismiss.

### **III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

Should the Court affirm the district court's order dismissing this case against Dickinson Wright when the evidence in the record establishes without contradiction that:

(1) under 28 U.S.C. § 1367(d), the statute of limitations for the Kims' malpractice claim against Damus was tolled until September 4, 2015, when the federal action was finally dismissed, and prior to that time, Dickinson Wright clearly advised them of their ability to sue Damus in state court when the firm terminated its representation of them on July 30, 2015;

(2) based on Nevada's litigation tolling rule, the Kims' legal malpractice claim against Damus did not accrue until the conclusion of the federal action, when their damages became certain;

(3) under the attorney judgment rule, Dickinson Wright's exercise of professional judgment to advise the Kims that they could re-

file their claims in state court against Damus with other counsel is not, as a matter of law, actionable; and

(4) the Kims' claims against Dickinson Wright are time-barred under NRS 11.207, in any event.

#### **IV. STATEMENT OF THE CASE**

This is a legal malpractice case arising from Dickinson Wright's representation of the Kims in a federal action that was dismissed on September 4, 2015. The federal action involved a dispute with several parties over an unsuccessful real estate investment. AA160 at ¶ 1; AA162 at ¶ 14; AA156–158.

Prior to the final dismissal of the federal action, Dickinson Wright clearly informed the Kims in writing on July 30, 2015, in response to an inquiry from them, that (1) no suit had been filed against Damus in state court, (2) the firm's representation of the Kims had concluded as of that date, and (3) the Kims should contact another lawyer if they wished to pursue any action against Damus in state court. AA188.

Instead of pursuing their claims against Damus, as the firm advised them that they could do, the Kims did nothing until June 12, 2017, when they filed this action against Dickinson Wright. AA159–169.

Dickinson Wright moved to dismiss the complaint on August 8, 2017. AA170–186. The district court heard argument on the motion to dismiss on September 26, 2017. AA324. The district court entered an order granting the motion and dismissed the Kims' complaint on October 17, 2017, without leave to amend. AA323–325.

On November 6, 2017, the Kims filed a motion to reconsider the dismissal. AA326–335. The district court heard argument on that motion on December 5, 2017, AA341, and denied reconsideration on December 12, 2017. AA340–341. This appeal followed that decision.

## **V. STATEMENT OF FACTS**

### **A. The Kims Retain and Terminate Charles Damus.**

On December 17, 2008, the Kims retained attorney Charles Damus, to represent them in a dispute concerning "certain real estate and other related claims regarding real property." AA162 at ¶ 19. In

September 2009, the Kims terminated Damus because he failed to file a complaint to initiate an action to resolve the real estate investment dispute. AA162 at ¶ 20.

**B. The Federal Action.**

On August 20, 2009, the Kims retained Gibson Lowry Burris, LLP ("GLB") to initiate the action that Damus failed to file. AA161–162 at ¶¶ 11–16. On October 15, 2009, GLB filed a complaint on the Kims' behalf in federal court in Las Vegas asserting federal question jurisdiction in *Kim v. Kearney, et al.*, Case No. 2:09-cv-02008-RFB-GWF. AA162 at ¶ 17.

On March 2, 2010, GLB filed an amended complaint on the Kims' behalf in the federal action to add a claim against attorney Damus for legal malpractice, negligence, and unjust enrichment based on his failure to file an action to prevent the foreclosure of their property, alleging that the federal court had supplemental jurisdiction over those state law claims. AA162 at ¶ 18; AA039–41 at ¶¶ 200–223; AA059–60 at ¶¶ 389–396; AA061 at ¶¶ 406–407.

**C. Damus Successfully Moves to be Dismissed From the Federal Action.**

On October 5, 2010, Damus moved the federal court to dismiss the claims against him for lack of subject matter jurisdiction. AA163 at ¶ 22; AA251–264. Damus argued that the claims against him did not arise out of the same transaction or occurrence as plaintiffs' federal securities fraud claims alleged against the other defendants in the federal action. AA258–263. Damus also argued that the claims against him were premature because "until the underlying dispute is resolved it is too early to know whether Plaintiffs have suffered any damages as a result of any alleged conduct by Damus, and the claims against him should be dismissed." AA261 at lines 15–17.

On October 22, 2010, Dickinson Wright<sup>5</sup> filed the Kims' opposition to Damus's motion to dismiss. AA163 at ¶ 23.

---

<sup>5</sup> In August 2010, Steven Gibson and respondent Jodi Donetta Lowry joined Dickinson Wright. AA271 at ECF No. 84; *see also* AA160 at ¶ 1. Mr. Gibson was not served in this case and is not a party to this appeal. *See* Order Granting Motion to Amend Caption in this appeal, dated July 9, 2018, on file.

On December 6, 2010, the federal court granted his motion to dismiss. AA163 at ¶ 25; AA273–274 at ECF No. 117. The dismissal of the Kims' claims against Damus was a non-final and non-appealable order, and the federal action remained pending against the other defendants. *Id.*<sup>6</sup> Thereafter, on July 30, 2015, Dickinson Wright informed the Kims that their claims against Damus could be brought *at the conclusion of the federal case*. AA163 at ¶ 39; AA188.

**D. The Conclusion of the Federal Case and Dickinson Wright's Termination of Its Representation of the Kims.**

Following Damus's dismissal, the federal case proceeded through motion practice and two separate appeals, which resulted in a judgment against one of the defendants, dismissal of some defendants,

---

<sup>6</sup> "Under the final judgment rule embodied in 28 U.S.C. § 1291, parties may appeal only the 'final decisions of the district courts.' A final judgment under § 1291 is 'a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Dannenberg v. Software Toolworks Inc.*, 16 F.3d 1073, 1074 (9th Cir. 1994) (dismissing appeal of interlocutory order).

judgment in favor of some defendants, and settlements with and stipulated dismissals of other defendants.<sup>7</sup>

On July 30, 2015, Dickinson Wright informed the Kims in writing, in response to their inquiry on the subject, that an action against Damus had not been filed in state court. AA163 at ¶ 29; AA188. The firm also clearly told the Kims that they should contact another lawyer if they still wished to file an action against Damus, and terminated the firm's representation of them. *Id.* The complaint does not allege, and there is no evidence in the record showing, that Dickinson Wright or any of the other defendants represented the Kims after this point in time in any court. AA159–169. Shortly thereafter, on September 3, 2015, another attorney, Joseph Geller, appeared on the Kims' behalf in the federal case;<sup>8</sup> thereby confirming the exit of Dickinson Wright as attorneys for the Kims.

---

<sup>7</sup> AA274 at ECF Nos. 123, 125; AA275 at ECF No. 135; AA281–282 at ECF Nos. 213, 214; AA284 at ECF No. 245; AA285 at ECF No. 258; AA293 at ECF Nos. 369, 370, 374; AA296 at ECF No. 416.

<sup>8</sup> AA297 at ECF No. 425.



The federal action remained pending until September 4, 2015, when the federal court entered a final order dismissing it with prejudice. AA297 at ECF No. 426.

Instead of filing an action against Damus, the Kims waited until June 12, 2017 to file this action against Dickinson Wright. AA159–169.

## **VI. SUMMARY OF ARGUMENT**

The district court properly granted Dickinson Wright's motion to dismiss because the undisputed evidence in the record shows that: (1) the statute of limitations for the Kims' claims against Damus was tolled during the pendency of the federal action; (2) the Kims' legal malpractice claim against Damus did not accrue until the final conclusion of the federal action, when their damages became certain; (3) under the attorney judgment rule, Dickinson Wright's exercise of professional judgment as to when the Kims could re-file their claims against Damus in state court is not, as a matter of law, actionable; and (4)

the Kims' claims against Dickinson Wright are time-barred under NRS 11.207.

## VII. ARGUMENT

### A. The Statute of Limitations for the Kims' Claims against Damus was Tolloed During the Pendency of the Federal Action Pursuant to 28 U.S.C. § 1367(d).

Although a key part of the district court's dismissal order is based on the tolling effect of 28 U.S.C. § 1367(d) on the Kims' claims against Damus,<sup>9</sup> they fail to address the operation of the statute in any respect in their opening brief. Thus, the Kims have waived any argument against the dispositive effect of the statute in this appeal.<sup>10</sup>

Moreover, as is shown below, Section 1367(d) is fatal to their claims against Dickinson Wright. 28 U.S.C. § 1367(d) provides: "The period of limitations for any claim asserted under subsection (a) [supplemental jurisdiction], and for any other claim in the same action

---

<sup>9</sup> AA324–325.

<sup>10</sup> *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n. 3, 252 P.3d 668, 672 n. 3 (2011) (holding issues not raised in an appellant's opening brief are deemed waived) (citations omitted).

that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."

Recently, the U.S. Supreme Court in *Artis v. D.C.* held Section 1367(d)'s instruction to "toll" a state limitations period means to "hold it in abeyance, *i.e.*, stop the clock." 583 U.S. at \_\_\_, 138 S. Ct. 594, 598 (2018). Thus, "the limitations clock stops the day the claim is filed in federal court and, 30 days postdismissal, restarts from the point at which it had stopped." *Id.*; see also *In re Vertrue Inc. Mktg. & Sales Practices Litig.*, 719 F.3d 474, 481–82 (6th Cir. 2013) (holding the statute of limitations stopped running on unnamed class members' state law claims during the pendency of a prior federal court case and did not start to run again until after the claims were dismissed).

The tolling under Section 1367(d) also includes federal appellate proceedings. *Turner v. Kight*, 957 A.2d 984, 996 (Md. 2008) (holding "that §1367(d) serves to suspend the running of a State statute

of limitations from the time the State-law claim is filed in U.S. District Court until 30 days after (1) a final judgment is entered by the U.S. District Court dismissing the pendent State-law claim, or (2) if an appeal is noted from that judgment, issuance of an order of the U.S. Court of Appeals dismissing the appeal or a mandate affirming the dismissal of those claims by the District Court").

Here, the Kims allege that the statute of limitations for their claims against Damus began running in September 2009 when they terminated him. AA163 at ¶ 27. Accepting this allegation as true<sup>11</sup> and applying tolling under 28 U.S.C. § 1367(d), the statute of limitations began running in September 2009, but it was suspended from March

---

<sup>11</sup> Although all factual allegations are taken as true on a motion to dismiss for failure to state a claim, *Blanchard v. Blanchard*, 108 Nev. 908, 839 P.2d 1320, 1321 (1992), the Court "need not accept as true allegations contradicting documents that are referenced in the complaint," *Lazy Y Ranch LTD v. 24 Behrens*, 546 F.3d 580, 588 (9th Cir. 2008), or "allegations that contradict the complaint's exhibits, documents incorporated by reference, or matters properly subject to judicial notice." *Dettling v. U.S.*, 948 F. Supp. 2d 1116, 1123 (D. Hawaii 2013).

2010 when the amended complaint, which added claims against Damus, was filed in the federal case until 30 days after that action was dismissed with prejudice on September 4, 2015. AA297 at ECF No. 426. *At that time*, the statute began to run again until it ran on the Kims' legal malpractice and negligence claims in April 2017.<sup>12</sup> They could have commenced an action against Damus at any time during that 18-month interregnum, as they had been advised by Dickinson Wright to do on July 30, 2015, through another lawyer. AA188.<sup>13</sup>

These un-contradicted facts and law show that the district court correctly found that under 28 U.S.C. § 1367(d), the Nevada statute of limitations against Damus was tolled during the pendency of the

---

<sup>12</sup> The statute of limitations for the Kims' legal malpractice claim against Damus is two years. NRS 11.207(1). The statute of limitations for their negligence claims against Damus is also two years. NRS 11.190(4)(e); *see also Garner v. Bank of Am. Corp.*, No. 2:12-CV-02076-PMP, 2014 WL 1945142, at \*4 (D. Nev. May 13, 2014).

<sup>13</sup> The statute of limitations for the Kims' unjust enrichment claim against Damus is four years. *In re Amerco Derivative Litig.*, 127 Nev. 196, 228, 252 P.3d 681, 703 (2011) (citing NRS 11.190(2)(c)). It will run in April 2019.

federal action and did not run until 18 months *after* Dickinson Wright terminated its representation and advised the Kims to contact another lawyer if they wished to pursue their claims against Damus in state court. AA163 at ¶ 29; AA188. Thus, the Court should affirm the district court's order granting Dickinson Wright's motion to dismiss.

**B. The Kims' Legal Malpractice Claim Against Damus Did Not Accrue until the Conclusion of the Federal Action When Their Damages Became Certain.**

The Kims contend that Nevada's litigation tolling rule does not apply to their claims against Damus because there was no underlying action in which Damus committed malpractice. Opening Br. p. 10. The Kims' contention is wrong because they do not understand the rationale for and application of Nevada's litigation tolling rule.

Under Nevada law, a legal malpractice action "does not accrue until the plaintiff knows, or should know all facts relevant to the foregoing elements *and damage has been sustained*." *Semenza v. Nev. Med. Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d 184, 185–86 (1998) (emphasis added).

In *Semenza*, this Court specifically held "[w]here there has been no final adjudication of the client's case in which the malpractice allegedly occurred, the element of injury or damages remains speculative and remote, thereby making premature the cause of action for professional negligence." *Id.*; *Hewitt v. Allen*, 118 Nev. 216, 221, 43 P.3d 345, 348 (2002) ("In the context of litigation malpractice, that is legal malpractice committed in the representation of a party to a lawsuit, damages do not begin to accrue until the underlying legal action has been resolved."); *Kopicko v. Young*, 114 Nev. 1333, 1337, 971 P.2d 789, 791 (1998) (holding "the ultimate malpractice action against Young did not accrue until dismissal because no legal damages had yet been sustained as a result of the alleged negligence").

In *Brady*, the Court explained that the "rationale" for this rule, *i.e.*, "a malpractice action does not accrue until the end of the litigation, including any appeal, because the damages sought by the action may be cured during the litigation's progression." *Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 130 Nev. Adv. Op. 68, 333 P.3d 229, 235

(2014) (holding the statute of limitations in NRS 11.207 "is tolled against a cause of action for attorney malpractice, pending the outcome of the underlying lawsuit in which the malpractice allegedly occurred").

Here, as set forth above, the federal court granted Damus's motion to dismiss on December 6, 2010, but did not finally dismiss the federal case until September 4, 2015. AA163 at ¶ 25; AA273–274 at ECF No. 117; AA297 at ECF No.426. The federal court's decision to dismiss Damus applied the rationale of Nevada's litigation tolling rule because the damages the Kims sought to recover from him could have been cured through the federal action, *i.e.* Damus' failure to file an action against the parties involved in the real estate investment could have been cured by successful prosecution of the Kims' claims against those parties in the federal action. See AA198–247, *passim*; AA261 at lines 15–17; AA273–274 at ECF No. 117; *Brady, Vorwerck*, 130 Nev. Adv. Op. 68, 333



P.3d at 235.<sup>14</sup> Thus, September 4, 2015 is the date of "final adjudication" referred to in *Semenza*.

For these reasons, the district court correctly found that the Kims' legal malpractice claim against Damus did not accrue until September 4, 2015, irrespective of whether they suffered damages as a result of his alleged malpractice before that time because it could have been cured by successful prosecution of the federal action. Therefore, the Court should affirm the order granting Dickinson Wright's motion to dismiss on this basis.

**C. The District Court Properly Dismissed the Complaint Based on the Attorney Judgment Rule.**

The Kims failed to respond to Dickinson Wright's argument in the district court that the court should dismiss the complaint based on

---

<sup>14</sup> The Kims argue that their "claims against Damus were realized in that Appellants had lost their property to foreclosure by failure of Damus to timely file suit to protect their interest" and that "[t]he damages arising from Damus' malpractice were recognized when Appellants lost their real property." Opening Br. pp. 12–13. The Court should disregard these *new allegations and arguments* because the Kims did not allege in the complaint that they retained Damus to prevent the foreclosure of their property or that they subsequently lost that property. AA159–167.

the attorney judgment rule.<sup>15</sup> Their failure to oppose this substantive and dispositive argument in the district court may be taken as an admission of the argument's merit, and that the complaint was properly dismissed. *See* EDCR 2.20(e).

Now, the Kims argue for the first time on appeal that the attorney judgment rule is not applicable. Opening Br. pp. 14–15. The Court should disregard this argument because they waived it by failing to raise it in the district court. AA302–313; *Diamond Enters., Inc. v. Lau*, 113 Nev. 1376, 1378, 951P.2d 73, 74 (1997) ("It is well established that arguments raised for the first time on appeal need not be considered by this court.").

Moreover, the Kims do not cite any legal authority or point to allegations in the complaint to support their argument that the attorney judgment rule is not applicable in this case.

---

<sup>15</sup> AA183 at 14:1–28; AA302–313; RA0006–7.

It is black-letter law that attorneys cannot be liable for legal malpractice when the advice they give concerns a proposition of state law for which no settled answer has been provided by the Nevada Supreme Court. 7 Am. Jur. 2d Attorneys at Law § 199 ("An attorney is not liable for a mistaken opinion on a point of law that has not been settled by a court of last resort and on which reasonable doubt may well be entertained by informed lawyers."); 3 R. Mallen & J. Smith, Legal Malpractice §18.1 at 2 (5th ed 2000) ("the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized"); *Bergstrom v. Noah*, 266 Kan. 847, 885, 974 P.2d 531, 560 (1999) (applying attorney judgment rule); *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 667–68 (D.C. 2009) (holding "'[a]n attorney is not liable for an error of judgment regarding an unsettled proposition of law' and that if 'reasonable attorneys could differ with respect to the legal issues presented, the second-guessing after the fact of . . . professional judgment [i]s not a sufficient foundation for a legal malpractice claim").

This Court has not addressed the effect of 28 U.S.C. § 1367(d)'s tolling rule on Nevada's statute of limitations. Thus, as the district court properly held, the Kims cannot, as a matter of law,<sup>16</sup> establish that Dickinson Wright committed malpractice, because Dickinson Wright reasonably advised them, based upon the available legal authority, that they could sue Damus at the conclusion of the federal action. For this reason, the Court should affirm the district court's order based on the attorney judgment rule.

**D. The District Court Correctly Found that the Kims' Claims against Dickinson Wright are Time-Barred.**

The Kims do not challenge the other basis on which the district court granted the motion to dismiss—that their claims against

---

<sup>16</sup> *Nelson v. Quarles & Brady, LLP*, 997 N.E.2d 872, 880–81 (Ill. App. Ct. 2013) ("although the question of whether a lawyer has breached a duty to his client presents a factual question courts have held that the issue may be decided as a matter of law under the doctrine of judgmental immunity which provides that 'an attorney will generally be immune from liability, as a matter of law, for acts or omissions during the conduct of litigation, which are the result of an honest exercise of professional judgment'").

Dickinson Wright are time-barred under NRS 11.207—in their opening brief. Thus, they have waived any arguments challenging the district court's order regarding the statute of limitations under NRS 11.207.

*Powell*, 127 Nev. at 161 n. 3, 252 P.3d at 672 n. 3 (holding issues not raised in an appellant's opening brief are deemed waived) (citations omitted).

Therefore, the Court should affirm the district court's order on this basis without further consideration.

If the Court does review this part of the district court's order, however, it should affirm the order because the district court correctly found that the Kims' claims against Dickinson Wright are time-barred.

Under 11.207(1), "An 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*." *Id.* (emphasis added).

NRS 11.207 applies to each of plaintiffs' claims because it "is applicable to legal malpractice claims, *whether based on breach of contractual obligations or breach of fiduciary duties.*" *Stalk v. Mushkin*, 125 Nev. 21, 25, 199 P.3d 838, 841 (2009) (emphasis added); *see also Stumpf v. Albracht*, 982 F.2d 275, 278 (8th Cir. 1992) (holding statute of limitations for malpractice applied to the fraud claim because "[i]f parties were permitted to circumvent the statute of limitations via artful pleading, the statute of limitations would serve no purpose"); *Quintilliani v. Mannerino*, 62 Cal. App. 4th 54, 57, 72 Cal. Rptr. 2d 359, 368 (1998) (holding statute of limitations for legal malpractice applied to plaintiff's claim for negligent misrepresentation where plaintiff had intermingled both legal and nonlegal misrepresentations).

Here, the Kims' allegations demonstrate that their claims against Dickinson Wright are time-barred under NRS 11.207. The complaint alleges the Kims sustained damages in September 2011, which is the date they allege a claim against Damus had to be brought. AA162 at ¶ 20; AA163 at ¶ 27; AA164 at ¶ 37. Moreover, the Kims knew

Dickinson Wright had not filed claims against Damus in state court after they were dismissed in the federal action on December 6, 2010 because the complaint alleges "Defendants represented to Plaintiffs that a claim against Damus could be brought at the end of the United States District Court case." AA164 at ¶ 39.

The Kims did not file this action until June 12, 2017, That is more than 4 years after they allegedly sustained damages in September 2011, and more than 2 years after they knew or should have known of the material facts which constitute their alleged malpractice claims, *i.e.*, Dickinson Wright had not re-filed their claims against Damus after the federal court dismissed them in December 2010. Therefore, on the facts pleaded and established in the documents referred to in the Kims' complaint, the district court correctly found that the Kims' claims against Dickinson Wright are time-barred under NRS 11.207.

## **VIII. CONCLUSION**

Based on the forgoing, respondents Dickinson Wright, Jodi Donetta Lowry, Jonathan M.A. Salls, Eric Dobberstein, and Michael G.

Vartanian respectfully request the Court to affirm the district court's October 17, 2017 order granting Dickinson Wright's motion to dismiss without leave to amend.

MORRIS LAW GROUP

By: /s/ Ryan Lower  
Steve Morris, NV Bar No. 1543  
Ryan M. Lower, NV Bar No. 9108  
411 E. Bonneville Ave., Ste. 360  
Las Vegas, Nevada 89101  
Attorneys for Respondents



## CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read RESPONDENTS' ANSWERING 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 that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2. I also certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4)–(6) because it is in a proportionally spaced typeface using Palatino 14 point font, and that it complies with the type-volume limitation of Nev. R. App. P. 32(a)(7)(A)(ii) because it contains 5,673 words.

3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

MORRIS LAW GROUP

By: /s/ Ryan Lower  
Steve Morris, NV Bar No. 1543  
Ryan M. Lower, NV Bar No. 9108  
411 E. Bonneville Ave., Ste. 360  
Las Vegas, Nevada 89101  
Attorneys for Respondents

## CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25(b) and NEFR 9(f), I hereby certify that I am an employee of Morris Law Group; that on this date I electronically filed the foregoing **RESPONDENTS' ANSWERING BRIEF**, with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex).

Participants in the case who are registered with Eflex as users will be served by the Eflex system as follows:

Brandon L. Phillips, NV Bar No. 12264  
BRANDON L. PHILLIPS, ATTORNEY AT LAW, PLLC  
1455 E. Tropicana Ave., Suite 750  
Las Vegas, Nevada 89169  
[blb@abetterlegalpractice.com](mailto:blb@abetterlegalpractice.com)

Attorneys for Appellants

DATED this 20th day of July, 2018.

By: /s/ Gabriela Mercado  
An employee of Morris Law Group