

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.

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A-17-756785-C

RESPONDENTS' APPENDIX

Volume 1

(RA0001 – RA0027)

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APPENDIX - CHRONOLOGICAL INDEX

Date	Document Description	Vol. No.	Bates Nos.
09/19/2017	Reply in Support of Dickinson Wright's Motion to Dismiss	1	RA0001-11
11/28/2017	Opposition to Plaintiffs' Motion for Reconsideration of Dismissal of Plaintiffs' Claims Against Dickinson Wright	1	RA0012-27

APPENDIX - ALPHABETICAL INDEX

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11/28/2017	Opposition to Plaintiffs' Motion for Reconsideration of Dismissal of Plaintiffs' Claims Against Dickinson Wright	1	RA0012-27
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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' APPENDIX**, 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:

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

TAE-SI KIM, an Individual, and
JIN-SUNG HONG, an Individual,

Plaintiffs,

v.

GIBSON LOWRY BURRIS, LLP,
(now known as GIBSON LOWRY,
LLP), a Nevada limited liability
partnership; DICKINSON
WRIGHT, PLLC, a Nevada
Professional limited liability
company; STEVE A. GIBSON, ESQ.,
an Individual; 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; and DOES I through X,
inclusive, and ROE BUSINESS
ENTITIES XI through XX, inclusive,

Defendants.

) Case No. A-17-756785-C

)

) Dept. No. XXIV

)

)

)

)

) **REPLY IN SUPPORT OF
DICKINSON WRIGHT'S MOTION
TO DISMISS**

)

)

) **Date of Hearing: September 26, 2017**

) **Time of Hearing: 9:00 a.m.**

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1 I. INTRODUCTION

2 The applicable law compels dismissing this lawsuit, with
3 prejudice, because:

4 (1) Under 28 U.S.C. § 1367(d), the statute of limitations
5 against Damus was suspended from March 2, 2010 until September 4, 2015
6 when the federal action was finally dismissed. Because the statute of
7 limitations did not expire until April, 2017, plaintiffs could have sued
8 Damus in state court any time until April, 2017. When Dickinson Wright
9 terminated its representation of plaintiffs on July 30, 2015, it clearly advised
10 plaintiffs of their ability to sue Damus in state court.

11 (2) Alternatively, based on Nevada's litigation tolling rule,
12 plaintiffs' legal malpractice claim against Damus did not accrue until the
13 conclusion of the federal action *when their damages became certain*.

14 (3) Under the attorney judgment rule, Dickinson Wright's
15 exercise of professional judgment as to when plaintiffs could re-file their
16 claims against Damus in state court is not, as a matter of law, actionable.

17 (4) Even if the Court were to disregard the Federal and
18 Nevada tolling rules, the plaintiffs' claims against Dickinson Wright are
19 nevertheless time-barred under NRS 11.270.

20 The Court should also disregard the new facts plaintiffs allege
21 in their opposition, which were not included or referred to in their
22 complaint, and deny plaintiffs' request for leave to amend its allegations
23 against the defendants because plaintiffs failed to submit any proposed
24 amended pleading, and because amendment would be futile.

1 **II. ARGUMENT**

2 **A. Under 28 U.S.C. § 1367(d), Plaintiffs Could Have Brought**
3 **Their Claims Against Damus in State Court After the Federal**
4 **Action was Dismissed on September 4, 2015.**

5 In their opposition, plaintiffs contend their "original claims did
6 not continue to toll during the Federal [Action] after Damus was
7 dismissed", and conclude that their "claims against Damus had to be
8 brought no later than December 6, 2012." Opp. 8:8–10, 10:6–7. Plaintiffs do
9 not, however, identify any allegations in the complaint or develop any
10 argument from authority to support this plainly wrong contention.

11 Plaintiffs' opposition fails to even acknowledge, much less
12 come to grips with, 28 U.S.C. § 1367(d) and the cases interpreting this
13 statute that were analyzed in the motion to dismiss. Their failure to
14 address the federal tolling statute confirms that it is fatal to their claims
15 against the defendants.

16 Accepting the allegations in the complaint as true and applying
17 tolling under 28 U.S.C. § 1367(d), the 2-year statute of limitations for
18 plaintiffs' claims against Damus began running in September 2009 (Compl.
19 ¶ 27), and ran for five months until it *was suspended* on March 2, 2010 when
20 the amended complaint, which included the claims against Damus, was
21 filed in the Federal Action. Compl. ¶18. It remained suspended until
22 thirty days after that action was dismissed with prejudice on September 4,
23 2015. Ex. F, Civil Docket for Case No. 2:09-cv-02008, at ECF No. 426; *In re*
24 *Vertrue Inc. Mktg. & Sales Practices Litig.*, 719 F.3d 474, 481 (6th Cir. 2013);
25 *Turner v. Kight*, 406 Md. 167, 173, 957 A.2d 984, 987 (2008); *Goodman v.*

1 *BestBuy, Inc.*, 777 N.W.2d 755, 761–62 (Minn. 2010); *Oleski v. Dep't of Pub.*
2 *Welfare*, 822 A.2d 120, 126 (Pa. Commw. Ct. 2003).¹

3 On September 4, 2015 the statute and the remaining 18 months
4 on the claims against Damus began to run again until it ran out in April
5 2017. *Id.* Plaintiffs could have commenced an action against Damus in
6 state court during that 18 month period, as they had been advised they
7 could do by Dickinson Wright on July 30, 2015, when the firm terminated
8 its representation of them. (Compl. ¶ 29); Ex. A, Email from Vartanian to
9 Kim.²

10 **B. Alternatively, Plaintiffs' Legal Malpractice Claim Against**
11 **Damus in State Court Did Not Accrue until the Conclusion of**
12 **the Federal Action When Their Damages Became Certain.**

13 Plaintiffs ignore the facts alleged in their complaint,
14 misapprehend the arguments in Section III. C of the motion to dismiss, and
15 contend that the moving defendants knew of the damages Damus's
16 breaches caused when GLB filed the amended complaint to include claims
17 against Damus in the Federal Action. Opp. 9:19–26, 10:10–13. This
18 argument misses the mark because the issue before the Court is when
19 plaintiffs' legal malpractice against Damus accrued under state law—not
20 when they believed they suffered damages.

21 Although it is not entirely clear what plaintiffs are arguing in
22 their opposition, defendants do not dispute that plaintiffs alleged in the

23 ¹ Tellingly, plaintiffs' opposition completely fails to address the legal
24 authority set out in Dickinson Wright's motion regarding 28 U.S.C. §
25 1367(d).

26 ² The Court may properly consider on a motion to dismiss the entirety of
27 documents incorporated or referenced in the complaint. *Breliant v.*
28 *Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993); *Lazy Y*
Ranch LTD v. 24 Behrens, 546 F.3d 580, 588 (9th Cir. 2008); *Dettling v. U.S.*,
948 F. Supp. 2d 1116, 1123 (D. Hawaii 2013).

1 amended complaint in the Federal Action that Damus's breach had caused
2 them to suffer damages. In point of fact, this issue was the subject of
3 briefing in the Federal Action. Defendants explain this point in the motion,
4 at 6:6–7:8, by showing that:

5 (1) GLB filed an amended complaint on plaintiffs' behalf in
6 the Federal Action (Compl. ¶ 18);

7 (2) the amended complaint alleged state law claims against
8 Damus for legal malpractice, negligence, and unjust enrichment (*Id.*; Ex. D,
9 Am. Compl. ¶¶ 200–223, 389–396, 406–407);

10 (3) Damus moved the federal court to dismiss the claims
11 against him for lack of subject matter jurisdiction, arguing that the claims
12 against him were premature because "until the underlying dispute [was]
13 resolved it [was] too early to know whether Plaintiffs [had] suffered any
14 damages as a result of any alleged conduct by Damus, and the claims
15 against Damus should be dismissed" (Compl. ¶ 22; Ex. E, Damus's Mot. to
16 Dismiss at p. 11);

17 (4) Dickinson Wright filed plaintiffs' opposition to Damus's
18 motion to dismiss (Compl. ¶ 23);

19 (5) the federal court granted Damus's motion to dismiss in a
20 non-final and non-appealable order (Compl. ¶ 25; Ex. F, Civil Docket for
21 Case No. 2:09-cv-02008, at ECF No. 117); and

22 (6) Dickinson Wright expressly advised plaintiffs that their
23 claims against Damus could be brought *at the conclusion of* the Federal
24 Action (Compl. ¶ 39); and

25 (7) the Nevada Supreme Court has declared that "[t]he two-
26 year statute of limitations in NRS 11.207 . . . is tolled against a cause of
27 action for attorney malpractice, pending the outcome of the underlying
28 lawsuit in which the malpractice allegedly occurred." *Brady, Vorwerck,*

1 *Ryder & Caspino v. New Albertson's, Inc.*, 130 Nev. Adv. Op. 68, 333 P.3d 229,
2 235 (2014). Nevada courts apply this tolling rule because "[w]here there
3 has been no final adjudication of the client's case in which the malpractice
4 allegedly occurred, the element of injury or damages remains speculative
5 and remote, thereby making premature the cause of action for professional
6 negligence." *Semenza v. Nev. Med. Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d
7 184, 186 (1998). The underlying federal litigation in which Damus was
8 alleged to have committed malpractice did not finally conclude until
9 September 4, 2015, when it was dismissed with prejudice. Ex. F, Civil
10 Docket for Case No. 2:09-cv-02008, at ECF No. 426. That is the date of "final
11 adjudication" referred to in *Semenza*. For this reason, plaintiffs' legal
12 malpractice claim against Damus did not accrue until September 4, 2015,
13 irrespective of whether plaintiffs suffered damages as a result of his alleged
14 malpractice before that time. Thus, under Nevada law, they still had until
15 September 4, 2017, to sue Damus for malpractice, but did not do so. For
16 this reason, the claims against Dickinson Wright for failing to sue Damus
17 on or before September 2011 (as alleged in paragraph 37 of the complaint)
18 or December 6, 2012 (as alleged in the opposition at 10:7) are not actionable,
19 as a matter of law, and should be dismissed, with prejudice.

20 **C. The Court Should Dismiss the Complaint Based on the**
21 **Attorney Judgment Rule.**

22 Plaintiffs also failed to respond to defendants' argument that
23 the Court should dismiss the complaint based on the attorney judgment
24 rule. Mot. at 14:1–28. Their failure to oppose this substantive and
25 dispositive argument is an admission of the argument's merit, and that the
26 complaint should be dismissed. *See* EDCR 2.20(e).

27 Moreover, as explained in the motion, the Nevada Supreme
28 Court has not addressed the effect of 28 U.S.C. § 1367(d)'s tolling rule on
Nevada's statute of limitations. But based on the authorities cited in

1 defendants' motion and ignored by plaintiffs, the statute of limitations
2 against Damus was suspended from March 2, 2010 until September 4, 2015,
3 and did not expire until April, 2017. Thus, as a matter of law, plaintiffs
4 cannot establish that Dickinson Wright committed malpractice, because
5 Dickinson Wright reasonably advised them, based upon the available legal
6 authority, that they could sue Damus at the conclusion of the Federal
7 Action. For this reason, the Court should also apply the attorney judgment
8 rule and dismiss the complaint.

9 **D. Even if the Court Were to Disregard the Federal and Nevada**
10 **Tolling Rules, the Plaintiffs' Claims are Nevertheless Time-**
11 **barred Under NRS 11.270.**

12 The complaint alleges the plaintiffs sustained damages in
13 September 2011, which is the date the plaintiffs allege a claim against
14 Damus should have been made. Compl. ¶¶ 20, 27, 37. The plaintiffs knew
15 Dickinson Wright had not filed claims against Damus in state court *after*
16 they were dismissed in the Federal Action on December 6, 2010 because the
17 complaint specifically alleges "Defendants represented to Plaintiffs that a
18 claim against Damus could be brought at the end of the United States
19 District Court case." Compl. ¶ 39.

20 Plaintiffs did not file this action until June 12, 2017, which is
21 more than 4 years after plaintiffs allegedly sustained damages in
22 September 2011, and more than 2 years after plaintiffs knew or should have
23 known of the material facts which constitute their alleged malpractice
24 claims, i.e., Dickinson Wright had not re-filed their claims against Damus
25 after the federal court dismissed them in December 2010. Therefore, on the
26 facts pleaded and established in the documents referred to in their
27 pleading, plaintiffs' claims are time-barred under NRS 11.207.
28

1 **E. The Court Should Disregard the New Facts that Plaintiffs**
2 **Allege in Their Opposition.**

3 Defendants moved to dismiss the complaint filed and served by
4 plaintiffs, which is not the complaint the plaintiffs address in their
5 opposition (the "Complaint in Opposition"). Although the plaintiffs may
6 wish they had filed the Complaint in Opposition, it is not before the Court.
7 The Court should disregard the new allegations and evidence in the
8 opposition, which are not included or referred to in plaintiffs' complaint,
9 including: (1) Mr. Vartanian's June 14, 2017 email and discussion thereof
10 (Opp. 2:27–3:11); (2) the allegations claiming that plaintiffs retained Damus
11 to prevent the foreclosure of their property and the subsequent loss of that
12 property (Opp. 5:17–22, 8:11–9:2); and (3) the additional claims plaintiffs
13 "may have" against defendants, which were not alleged in the complaint
14 (Opp. 10:14–11:7) because defendants' motion addresses the complaint on
15 file, not a fanciful complaint cobbled together to distract the Court's
16 attention from the substantive, incurable defects in the plaintiffs' case
17 against the defendants.

18 **F. The Court Should Deny Plaintiffs' Request for Leave to**
19 **Amend Because They Failed to Comply with EDCR 2.30(a)**
20 **and Because Amendment Would Be Futile.**

21 EDCR 2.30(a) requires that "[a] copy of a proposed amended
22 pleading must be attached to any motion to amend the pleading", and a
23 request for leave is properly denied if no proposed amended pleading is
24 attached. *See Pletcher v. Boulevard Theater, LLC*, No. 66196, 2016 WL
25 1567055, at *2 (Nev. Apr. 15, 2016) (unpublished disposition) (holding
26 "district court did not abuse its discretion in denying appellant's motion for
27 leave to amend the first complaint because he never provided the court
28 with a proposed amended complaint as an attachment to his request")
 (citing EDCR 2.30); *see also Arcenas v. Mortgageit, Inc.*, No. 68178, 2016 WL
 3943342, at *3 (Nev. App. July 13, 2016) (unpublished disposition) (holding

1 district court did not abuse its discretion in denying the request to amend
2 the complaint where plaintiff, who was coincidentally represented by the
3 same counsel (Mr. Phillips) in this case, "failed to attach the required
4 proposed amended complaint to their single-sentence request for leave to
5 amend, which was included in their opposition to the motions to dismiss").

6 Here, plaintiffs did not file a motion for leave to amend, nor did
7 they submit a proposed amended complaint. Instead, they made their
8 improper request to amend in their opposition to this motion to dismiss.
9 Opp. at 12:5–8. Therefore, the Court follow should follow the *Pletcher* and
10 *Arcenas* cases and deny plaintiffs' request to amend for failure to comply
11 with EDCR 2.30.

12 Although Rule 15(a) provides that leave to amend "shall be
13 freely given when justice so requires", justice does not require the Court to
14 allow amendment when the "proposed amendment would be futile."
15 *Allum v. Valley Bank of Nev.*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993). A
16 motion to amend a complaint is futile when the motion offers no new set of
17 facts or legal theory, or fails to state a cognizable claim on which relief
18 could be granted. *Gardner v. Martino*, 563 F.3d 981, 991–92 (9th Cir. 2009).

19 Even if the Court were to consider plaintiffs' request to amend,
20 which it should not, it does not explain how they would cure the
21 deficiencies in the current complaint. Moreover, plaintiffs fail to discuss or
22 overcome the bar of limitations that defendants have pointed out to the
23 Court. Because they do not tender new facts or cognizable legal theories to
24 support their infirm claims against defendants, the Court should deny their
25 request for leave to amend and bring this tortured litigation to a close.

1 **III. CONCLUSION**

2 For the reasons discussed in the motion to dismiss and in this
3 reply, the Court should dismiss the complaint without leave to amend.

4 MORRIS LAW GROUP

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6 By: 

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b)(2)(D) and E.D.C.R. 8.05, I
certify that I am an employee of MORRIS LAW GROUP and that on the
date below, I caused the following document to be served via the Court's
Odyssey E-Filing system: **REPLY IN SUPPORT OF DICKINSON
WRIGHT'S MOTION TO DISMISS**. The date and time of the electronic
proof of service is in place of the date and place of deposit in the mail.

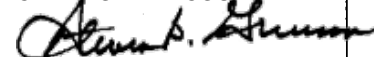
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Attorneys for Plaintiffs

DATED this 19th day of September, 2017.

By: Patty Carmin



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14 Vartanian

15 **DISTRICT COURT**
16 **CLARK COUNTY, NEVADA**

17 TAE-SI KIM, an Individual, and
18 JIN-SUNG HONG, an Individual,

19 Plaintiffs,

20 v.

21 GIBSON LOWRY BURRIS, LLP,
22 (now known as GIBSON LOWRY,
23 LLP), a Nevada limited liability
24 partnership; DICKINSON
25 WRIGHT, PLLC, a Nevada
26 Professional limited liability
27 company; STEVE A. GIBSON,
28 ESQ., an Individual; 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;
and DOES I through X, inclusive,
and ROE BUSINESS ENTITIES XI
through XX, inclusive,

Defendants.

) Case No. A-17-756785-C

)

) Dept. No. XXIV

)

) **OPPOSITION TO PLAINTIFFS'**

) **MOTION FOR**

) **RECONSIDERATION OF**

) **DISMISSAL OF PLAINTIFFS'**

) **CLAIMS AGAINST**

) **DICKINSON WRIGHT**

)

) **DATE: 12/5/2017**

) **TIME: 9:00 A.M.**

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1 **I. INTRODUCTION**

2 The Court should deny plaintiffs' motion to reconsider
3 dismissal of their claims against Dickinson Wright because it: (1) ignores a
4 dispositive part of the Court's order—28 U.S.C. § 1367(d), the federal
5 tolling statute, (2) re-argues plaintiffs' prior opposition, (3) makes
6 arguments that they could have, but did not raise before, and (4) fails to
7 show that the dismissal order was clearly erroneous.

8 The Court should also sanction plaintiffs for their repeated
9 failure to serve Dickinson Wright with motions they have filed in this case.

10 **II. LEGAL ARGUMENT**

11 **A. Plaintiffs' Motion Fails to Address 28 U.S.C. § 1367(d)—a**
12 **Dispositive Part of the Court's Order—Which Renders**
13 **Reconsideration a Moot Point.**

14 As in their opposition to the motion to dismiss, plaintiffs fail to
15 even acknowledge, much less come to grips with, 28 U.S.C. § 1367(d) in the
16 motion to reconsider the dismissal. *See* Ex. A, Order Granting Dickinson
17 Wright's Mot. to Dismiss, 2:14–19; Reply in Support of Dickinson Wright's
18 Mot. to Dismiss, filed on Sept. 19, 2017, 3:1–4:9. Their repeated failure to
19 address the federal tolling statute confirms that it is fatal to their claims
20 against the defendants.

21 As set forth in the motion to dismiss, reply in support thereof,
22 and at the hearing, accepting the allegations in the complaint as true and
23 applying tolling under 28 U.S.C. § 1367(d), the 2-year statute of limitations
24 for plaintiffs' claims against Damus began running in September 2009
25 (Compl. ¶ 27), and ran for five months until it *was suspended* on March 2,
26 2010 when the amended complaint, which included the claims against
27 Damus, was filed in the Federal Action. Compl. ¶18. It remained
28 suspended until thirty days after that action was dismissed with prejudice

1 on September 4, 2015. Ex. F to Mot. to Dismiss, Civil Docket for Case No.
2 2:09-cv-02008, at ECF No. 426; *In re Vertrue Inc. Mktg. & Sales Practices Litig.*,
3 719 F.3d 474, 481 (6th Cir. 2013); *Turner v. Kight*, 406 Md. 167, 173, 957 A.2d
4 984, 987 (2008); *Goodman v. BestBuy, Inc.*, 777 N.W.2d 755, 761–62 (Minn.
5 2010); *Oleski v. Dep't of Pub. Welfare*, 822 A.2d 120, 126 (Pa. Commw. Ct.
6 2003).

7 On September 4, 2015 the statute and the remaining 18 months
8 on the claims against Damus began to run again until it ran out in April
9 2017. *Id.* Plaintiffs could have commenced an action against Damus in
10 state court during that 18 month period, as they had been advised they
11 could do by Dickinson Wright on July 30, 2015, when the firm terminated
12 its representation of them. (Compl. ¶ 29); Ex. A to Mot. to Dismiss, Email
13 from Vartanian to Kim.

14 **B. Plaintiffs' Motion Does Not Meet the Standard for**
15 **Reconsideration.**

16 "Only in very rare instances in which *new issues of fact or law*
17 are raised supporting a ruling contrary to the ruling already reached
18 should a motion for rehearing be granted." *Moore v. City of Las Vegas*, 92
19 Nev. 402, 405, 551 P.2d 244, 246 (1976) (emphasis added) (holding motion
20 for reconsideration was superfluous, and it was abuse of discretion for the
21 judge to grant it); Nev. R. Civ. P. 60(b) (a court may reconsider a prior
22 order if party presents "*newly discovered evidence* which by due diligence
23 could not have been discovered in time") (emphasis added); *see also*
24 *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (finding motions to
25 reconsider are granted only in "highly unusual circumstances" where the
26 "court is presented with newly discovered evidence, committed clear error,
27 or if there is an intervening change in the controlling law").
28

1 A motion to reconsider is not simply an opportunity to re-argue
2 facts and theories upon which the court has already ruled. *Nevius v.*
3 *Warden*, 114 Nev. 664, 667, 960 P.2d 805, 806 (1998) (describing as
4 "improper" the movant's reassertion and re-argument of "matters
5 previously considered and rejected by the court"); *see also See State of New*
6 *York v. United States*, 880 F. Supp. 37, 38 (D.D.C. 1995) ("[a] motion to
7 reconsider is not simply an opportunity to reargue facts and theories upon
8 which a court has already ruled."). The motion "must establish more than
9 simply [the movant's] continued belief that the court's decision was
10 erroneous." *Id.* at 39.

11 Additionally, a court will not consider arguments that a
12 movant could and should have made before the order was entered. *See*
13 *Achrem v. Expressway Plaza LP*, 112 Nev. 737, 742–43, 917 P.2d 447, 450
14 (1996) ("Points or contentions not raised in the original hearing cannot be
15 maintained or considered on rehearing.").

16 **C. The Court Should Deny Plaintiffs' Motion Because It Does**
17 **Not Present Any Newly Discovered or Substantially**
18 **Different Evidence.**

19 Although plaintiffs argue that the Court may reconsider its
20 prior order "if substantially different evidence is subsequently introduced"
21 Mot. at 6:20–23, they fail to point the Court to *any* newly discovered or
22 substantially different evidence in their motion. Instead, plaintiffs include
23 the same fact section in their motion that they previously tendered in their
24 opposition to the motion to dismiss:

25 Compare Opposition to Mot. to	With Motion to Reconsider, filed
26 Dismiss, filed on Sept. 7, 2017	on Nov. 6, 2017
27 4:13–18	4:3–8
28 4:19–22	4:9–13

Compare Opposition to Mot. to Dismiss, filed on Sept. 7, 2017	With Motion to Reconsider, filed on Nov. 6, 2017
4:23–27	4:14–18
4:28–5:3	4:19–21
5:4–9	4:22–27
5:10–15	4:28–5:4
5:15–22	5:6–12
5:23–26	5:13–17
5:27–28	5:18–20
5:28–6:4	5:5:21–24
6:5–10	5:25–6:2

D. The Court Should Deny Plaintiffs' Motion Because It Re-argues Their Prior Opposition and Makes Arguments They Could Have Raised Before.

Plaintiffs argue that Nevada's litigation tolling rule articulated in the *Brady* and *Semenza* cases does not apply in this case. Mot. at 7:3–23. Plaintiffs have already asserted this argument, *see* Opp. to Mot. to Dismiss, at 11:8–12:2, and it was fully addressed by Dickinson Wright in the motion to dismiss at 12:17–13: and in the reply at 5:25–19. Thus, plaintiffs already made this argument.

Likewise, plaintiffs re-argue the same position on their alleged damages in the motion to reconsider at 8:19–9:6 that they previously made in their opposition to the motion to dismiss at 9:19–26. And plaintiffs' argument that their malpractice claim was timely filed in the motion to reconsider at 9:25–10:13 was already fully addressed in the motion to dismiss at 15:1–16:10, plaintiffs' opposition at 8:4–7, the reply in support of the motion to dismiss at 7:9–26, and at the hearing on September 26, 2017. Ex. A, Order at 2:27–28. Thus, each of these arguments were already made and ruled on by the Court.

1 Plaintiffs also make an argument in this motion that they could
2 have made previously but did not. For example, plaintiffs now argue that
3 the attorney judgment rule is not applicable in this case. *See* Mot. at 9:25–
4 10:13. Dickinson Wright, however, previously explained in its motion to
5 dismiss at 14:1–28 that the attorney judgment rule does apply. Plaintiffs
6 did not respond to this point in their opposition. *See* Opposition to Mot. to
7 Dismiss, filed Sept. 7, 2017. Dickinson Wright analyzed this failure in its
8 reply and correctly argued that under EDCR 2.20(e) plaintiffs' failure to
9 oppose this substantive and dispositive argument is an admission of the
10 argument's merit, and that the complaint should therefore be dismissed.
11 Reply in Support of Mot. to Dismiss, filed Sept. 19, 2017, at 6:20–7:8.

12 The Court should reject as untimely and unavailing the
13 arguments they should and could have made before the dismissal order
14 was entered. *Nevius*, 114 Nev. at 667, 960 P.2d at 806 (holding it is
15 "improper" for a party re-assert and re-argue "matters previously
16 considered and rejected by the court"); *Achrem*, 112 Nev. at 742–43, 917 P.2d
17 at 450 ("Points or contentions not raised in the original hearing cannot be
18 maintained or considered on rehearing.").

19 **E. The Court Should Deny the Motion Because Plaintiffs Fail to**
20 **Show that the Dismissal Order was Clearly Erroneous.**

21 Plaintiffs, as pointed out above, do not tender any new facts or
22 argument to demonstrate that the Court erred in dismissing their
23 complaint. Thus, dismissal was proper and should be affirmed. *McDowell*,
24 197 F.3d at 1255.

25 **F. The Court Should Sanction Plaintiffs for Failing to Timely**
26 **Serve the Motion on Dickinson Wright.**

27 Both the Nevada Rules of Civil Procedure and the District
28 Court Rules require that motions are to be served on all the parties to the

1 action. Nev. R. Civ. P. 5(a) (motions "shall be served upon each of the
2 parties"); DCR 13.1 ("All motions shall contain . . . due proof of service");
3 EDCR 2.20(c) ("A party filing a motion must also serve . . ."); EDCR 2.24(b)
4 (stating "[a] motion for rehearing or reconsideration must be served,
5 noticed, filed and heard as is any other motion.").

6 Here, plaintiffs filed their motion for reconsideration on
7 November 6, 2017, but they failed to serve Dickinson Wright at that time.
8 Dickinson Wright only learned of the motion when the court clerk emailed
9 counsel a copy of the Court's minute order on November 14, 2017. Ex. B,
10 Email from Ryan Lower. At that time, Dickinson Wright's counsel pointed
11 out to plaintiffs' counsel and the Court that the motion to reconsider had
12 not been served on Dickinson Wright and asked plaintiffs' counsel to
13 properly serve the motion. *Id.*

14 Because this is not the first time plaintiffs failed to serve
15 Dickinson Wright with a copy of a motion they filed,¹ the Court should
16 sanction plaintiffs and compel them to follow the rules.

17 ///

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24
25 ¹ Plaintiffs also failed to serve Dickinson Wright with a copy of their
26 motion to extend time for service and for publication of summons and
27 complaint, filed Oct. 10, 2017. *See* Opp. to plaintiffs' motion to extend time
28 for service and for publication of summons and complaint, filed Oct. 26,
2017, at p. 2, n. 1 and Ex. B to Opp., Lower Ltr. to Phillips, dated Oct. 12,
2017.

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1 **III. CONCLUSION**

2 For the reasons expressed herein, Dickinson Wright
3 respectfully requests that the Court deny plaintiffs' improper motion to
4 reconsider dismissal of plaintiffs' claims against Dickinson Wright.

5 MORRIS LAW GROUP

6
7 By: 

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

10 Attorneys for Defendants
11 Dickinson Wright, PLLC, Jodi Donetta Lowry,
12 Jonathan M.A. Salls, Eric Dobberstein, and
13 Michael G. Vartanian
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b)(2)(D) and E.D.C.R. 8.05, I certify that I am an employee of MORRIS LAW GROUP and that on the date below, I caused the following document to be served via the Court's Odyssey E-Filing system: **OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF DISMISSAL OF PLAINTIFFS' CLAIMS AGAINST DICKINSON WRIGHT**. The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

TO:

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

Attorney for Plaintiffs

DATED this 28th day of November, 2017.

By: 
An Employee of Morris Law Group

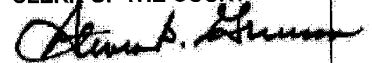
EXHIBIT A

EXHIBIT A

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Electronically Filed
10/17/2017 9:52 AM
Steven D. Grierson
CLERK OF THE COURT



1 **OGM**

Steve Morris, NV Bar No. 1543

2 Ryan M. Lower, NV Bar No. 9108

3 **MORRIS LAW GROUP**

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7 Attorneys for Defendants

Dickinson Wright, PLLC,

8 Jodi Donetta Lowry, Jonathan M.A.

9 Salls, Eric Dobberstein, and

Michael G. Vartanian

DISTRICT COURT

CLARK COUNTY, NEVADA

13 TAE-SI KIM, an Individual, and
14 JIN-SUNG HONG, an Individual,

15 Plaintiffs,

16 v.

17 GIBSON LOWRY BURRIS, LLP,
(now known as GIBSON LOWRY,
18 LLP), a Nevada limited liability
19 partnership; DICKINSON
20 WRIGHT, PLLC, a Nevada
Professional limited liability
21 company; STEVE A. GIBSON, ESQ.,
an Individual; JODI DONETTA
22 LOWRY, ESQ., an Individual;
JONATHAN M.A. SALLS, ESQ., an
23 Individual; ERIC DOBBERSTEIN,
ESQ., an Individual; and MICHAEL
24 G. VARTANIAN, ESQ., an
Individual; and DOES I through X,
25 inclusive, and ROE BUSINESS
26 ENTITIES XI through XX, inclusive,

27 Defendants.

) Case No. A-17-756785-C

) Dept. No. XXIV

) **ORDER GRANTING DICKINSON**
) **WRIGHT'S MOTION TO DISMISS**

1 This matter came before the Court on September 26, 2017 for
2 hearing on Defendants Dickinson Wright, PLLC, Jodi Donetta Lowry,
3 Jonathan M.A. Salls, Eric Dobberstein, and Michael G. Vartanian's
4 (collectively "Dickinson Wright") Motion to Dismiss. Brandon Phillips
5 appeared for Plaintiffs. Ryan Lower appeared for Dickinson Wright. The
6 Court, having considered the motion papers filed in support of and in
7 opposition to Dickinson Wright's motion to dismiss, and having heard the
8 argument of counsel, HEREBY FINDS:

9 (1) The plaintiffs allege the defendants committed malpractice
10 because they did not file a legal malpractice action in state court against
11 attorney Charles Damus on or before September 2011, after that claim
12 against Damus in a multi-party case in federal court had been dismissed on
13 December 6, 2010 in a non-final and non-appealable order;

14 (2) Under 28 U.S.C. § 1367(d), the statute of limitations against
15 Damus was tolled until September 4, 2015 when the federal action was
16 finally dismissed. Plaintiffs' claims against Damus could have been
17 brought in state court at that time and thereafter, as Dickinson Wright
18 clearly advised plaintiffs when the firm terminated its representation of
19 them on July 30, 2015;

20 (3) Based on Nevada's litigation tolling rule, plaintiffs' legal
21 malpractice claim against Damus did not accrue until the conclusion of the
22 federal action when their damages became certain;

23 (4) Under the attorney judgment rule, Dickinson Wright's
24 exercise of professional judgment as to when plaintiffs could re-file their
25 claims against Damus in state court is not, as a matter of law, actionable in
26 this case;

27 (5) The plaintiffs' claims against Dickinson Wright are time-
28 barred under NRS 11.270;
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(6) Plaintiffs included new allegations in their opposition (Opp. 2:27-3:11, 5:17-22, 8:11-9:2, 10:14-11:7) that were not alleged in the complaint and an improper request for leave to amend (Opp. 12:4-9) that did not comply with EDCR 2.30(a); nevertheless, the new allegations did not plead any facts or legal theories that would overcome the deficiencies in the complaint or require the Court to deny this motion.

Based on these FINDINGS, and good cause appearing IT IS
HEREBY ORDERED that:

- (1) Dickinson Wright's Motion to Dismiss is GRANTED;
- (2) The action is DISMISSED, without prejudice; and
- (3) Plaintiffs' request for leave to amend is DENIED.



DISTRICT COURT JUDGE

DATED: October 12, 2017

Approved by:
BRANDON L. PHILLIPS,
ATTORNEY AT LAW, PLLC

By: **NOT SIGNED**

Brandon L. Phillips, NV Bar No. 12264
1455 E. Tropicana Ave., Suite 750
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Submitted by:
MORRIS LAW GROUP

By:
Steve Morris, NV Bar No. 1543
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Attorneys for Defendants
Dickinson Wright, PLLC,
Jodi Donetta Lowry, Jonathan M.A.
Salls, Eric Dobberstein, and
Michael G. Vartanian

EXHIBIT B

EXHIBIT B

Ryan M. Lower

From: Ryan M. Lower
Sent: Tuesday, November 14, 2017 11:42 AM
To: 'Hernandez, Katrina'; blp@abetterlegalpractice.com; Steve Gibson
Subject: RE: MINUTE ORDER A756785 - KIM v GIBSON

Brandon,

The court's minute order references a motion for reconsideration that was filed on November 6th. It was not served on our office. Please properly serve it.

Thanks,


Ryan Lower
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This email is sent by a law firm and may contain privileged and confidential information. If you are not the intended recipient, please delete this email and notify me immediately. Please consider the environment before printing this email.

From: Hernandez, Katrina [<mailto:HernandezK@clarkcountycourts.us>]
Sent: Tuesday, November 14, 2017 10:41 AM
To: blp@abetterlegalpractice.com; Ryan M. Lower; Steve Gibson
Subject: MINUTE ORDER A756785 - KIM v GIBSON
Importance: High

A Minute Order has been issued and is attached herein. Please reply to confirm you have received this e-mail and inform any other parties not listed in this e-mail. Please note, the Minute Order is not an official record. Those wanting the official record must request a transcript from the department. Please also direct any further inquiries with regard to your case status to the department. Any questions regarding the Minute Order or exhibits may be directed to me.
Thank you.

**Note: All minute orders are sent in (.tif) format, or if available in pdf. If you are using a smart mobile device on the Android or Macintosh format, you can download a .tif reader via apple store/ android market in order to view the file.*

Sincerely,

Katrina Hernandez

| Courtroom Clerk II | hernandezk@clarkcountycourts.us |

| Department XXIV | The Honorable Jim Crockett |

| Eighth Judicial District Court | Clark County, Nevada |

| Regional Justice Center | 200 Lewis Avenue |