Docket Number 74803

In the

SUPREME COURT

For the

STATE OF NEVADA

Tae-Si Kim as an individual; and Jin-Sung Hong, as 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

Respondent.

On Appeal from the Granting of Respondents' Dickinson Wright's Motion To Dismiss and Order Denying Appellants' Motion to Reconsider the Order Granting Dickinson Wright's Motion To Dismiss

APPELLANTS' REPLY BRIEF

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I. STATEMENT OF THE ISSUES

A. Whether the District Court erred in its discretion in granting Respondents' Motion to Dismiss based on the Respondents' proposed calculation of the relevant tolling statutes as applied with the statute of limitations.

B. Whether the District Court erred in its discretion in granting Respondents' Motion to Dismiss based on the Court finding that the Attorney Judgment Rule allowed Respondents discretion as to when and upon whom to bring said litigation.

C. Whether the District Court erred in its discretion in granting Respondents' Motion to Dismiss based on Respondent's claim that Appellants' claims against Dickenson Wright were time-barred under NRS 11.207.

II. STATEMENT OF THE CASE

Appellants rely on their Statement of the Case submitted in their Opening Brief. It is submitted that the Statement of the Case proffered by Respondents is similar in that it identifies the key issues raised in Appellants Opening Brief. In short, the Parties agree that the dispute of this case centers around the dismissal of Appellants claim against Damus and whether the statute of limitations for malpractice claims, as asserted in the Federal Complaint, began to run following his dismissal or did such claim toll until the end of the Federal Complaint.

Appellants would contest the general position of certain Statements of the Case in that Appellants add descriptive adjectives to relay facts such as claiming, "clearly informed" (Pg. 6 of Answering Brief), and "unsuccessful" (Pg. 6 of Answering Brief.

III. General Statement of Facts

Appellants rely upon their Statement of Facts, General Statement of Facts, and subsection of facts submitted in their Opening Brief. As with the Statement of the Case, Respondents' Statement of Facts in very similar in nature to Appellants'.

However, there are key statements of fact that are simply ignored or misstated.

1. Damus was terminated after he failed to set aside or contest the foreclosure. Failure to contest the foreclosure or subsequently set it aside prevented the Appellants from asserting any interest in the Property.

2. There should be no dispute that Respondents were retained to bring claims against Damus. Respondents accepted fees for such services. Appellants' claims against Damus were dismissed for lack of jurisdiction in the Federal Court.

3. As a matter of law, Appellants did in fact have claims against Damus regardless of whether Appellants' prevailed on claims against the named Defendants in the Federal Action.

IV. Argument.

The District Court erred in granting Respondents' Motion to Dismiss. The focus of this Court should remain on Damus, the claims asserted against Damus, dismissal of Damus, and the statute of limitations as applied to Damus. Respondents continue to confuse the matter by claiming that claims asserted against the Defendants in the Federal Court tolled the claims asserted against Damus. The Federal Court confirmed that the claims asserted against Damus could not be brought in Federal Court. Thus, the question remains, how could Appellants' claims against Damus be tolled while Appellants proceeded against other defendants on completely separate claims. Simply, it could not have tolled.

1. Appellants Did Not Waive The Dispositive Effect of the Statute 28 U.S.C. § 1367(d).

Appellants addressed this statute through argument of the tolling statutes, specifically, recognized by *Brady* and *Semenza*, which proved that 28 U.S.C. § 1367(d) was not applicable to the Damus litigation, but only to the claims Appellants brought against the Respondents.

Respondents' Answering Brief skims over the important distinctions from the current claims against them and the claims against Damus. The Respondents' claim that Appellants' claims against Damus, pursuant to 28 U.S.C. § 1367(d),

were tolled from the date of the filing of the amended complaint until the action was dismissed with prejudice on September 4, 2015. This analysis is simply improper. There was no legal basis to bring claims against Damus in Federal Court, as confirmed by the dismissal of Damus from the Federal case. Further, the claims asserted against Damus were not rooted in a federal question. All claims against Damus were state law claims. There was not an assertion by Respondents in the Federal case that Damus was in some manner connected to those Defendants.

Under Respondents theory, so long as the Appellants continued to assert claims against some individuals and name Damus, in theory, the claims could possible survive for eternity. That theory simple cannot hold water. Appellants claims were for malpractice against Damus recognized, at the latest date, when they terminated him for failure to prevent or set aside the foreclosure.

B. Appellants Damages Were Certain.

The damages against Damus were immediately recognized when Damus failed to bring any claim to prevent the foreclosure or set aside the foreclosure. There was no need to determine whether there was recovery against the other named defendants, for separate causes of action, as the claims against Damus and damages thereto were unique and specific to Damus only.

Semenza protects clients/plaintiffs/defendants in causes of action against their attorneys who have possibly committed malpractice during the litigation. Specifically, this allows the attorneys an opportunity to correct the possible wrong doing. Further, this prevents an attorney from committing malpractice then delaying the case for two years to prevent the harmed party from bringing claims against their attorney. However, *Semenza* does apply when the malpractice is recognized and there is no possibility of offsetting the harm. Damus could no longer cure the harm when the time to set prevent the foreclosure and the time to set aside the foreclosure had passed. It was then that it was certain Appellants had recognized damages against Damus.

Further, *Brady* confirms Appellants' analysis. Malpractice does accrue until the end of the litigation where the clients' attorney possibly commits malpractice during the representation. If Damus had filed some action then his malpractice would have tolled should he have some way prevailed. However, Damus was sued for malpractice by the Respondents. By suing Damus, Respondents recognized that his malpractice had been committed and damages to the Appellants was recognized. Damus did not commit malpractice in the Federal case, his malpractice had already been recognized. Therefore, the District Court erred when it dismissed Appellants claims' against the Respondents because it was not the underlying action that would have tolled

claims against Damus.

C. Attorney Judgment Rule.

The Attorney Judgment Rule simply cannot protect Respondents' wrongufl interpretation of the relevant statutes. Appellants have repeatedly quoted the relevant and applicable cases that apply to this exact situation before the Court, *Semenza* and *Brady*.

Simply put, Damus committed malpractice just as the Appellants alleged in their Complaint. There can be no dispute to said fact. The dismissal of Damus, by filing a Complaint against him in a Court that did not have jurisdiction, only briefly stayed the claims against him. After his dismissal from the Federal Court case, the clock continued run. Respondents were retained to bring claims against Damus, in an appropriate Court. Therefore, said claims needed to be brought in a timely manner. However, Respondents failed to bring any appropriate claims against Damus in an appropriate venue. A claim of malpractice against Respondents must survive.

D. Appellants Did Not Waive Arguments Against NRS 11.207.

Appellants argued in their Opening Brief that "Pursuant to Nevada Revised Statute 11.207, a malpractice claim must be filed within two (2) years of the last date of representation. Appellants claim that Respondents had to bring a State Court

claim against Damus by a date certain in 2011. Respondents never brought any claim against Damus. By failing to bring a cause of action in State Court, Appellants contend that Respondents committed malpractice by failing to timely bring an action against Damus."

Again, *Brady* and *Semenza* address this statute directly. Appellants' malpractice claims against Respondents tolled during their representation of the Appellants. Therefore, Appellants' claim of malpractice would not have arose until two (2) years after Respondents terminated representation of Appellants, July of 2018. Since, Appellants brought their claim in June of 2018 they have satisfied NRS 11.207. Appellants' Complaint should not have been dismissed on alleged violations of NRS 11.207, in fact NRS 11.207 protects Appellants in this exact situation.

V. CONCLUSION

Based on the foregoing, Appellants respectfully request that this Court overturn the District Court's decision granting Respondents' Motion to Dismiss.

DATED this 4TH day of September, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirement of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This Reply Brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this brief complies with the page -or- type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 2,006 words; and does not exceed 30 pages.

3. Finally, I hereby certify that I have read this Reply Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Reply Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompany brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on 10th day of September, 2018.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that I am not aware of any of the participants in the case that are not registered CM/ECF users.

DATED this 10th day of September, 2018.

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