

IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

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
Supreme Court No. 74803
District Court Case No. A756785
Elizabeth A. Brown
Clerk of Supreme Court

RESPONDENTS' PETITION
FOR REHEARING OF
DECISION REVERSING AND
REMANDING THE DISTRICT
COURT'S ORDER GRANTING
MOTION TO DISMISS

I. Introduction and Statement of Reasons to Grant Rehearing.

On March 2, 2010, Appellants ("the Kims") joined attorney Charles M. Damus as a malpractice defendant in a pending federal court case that the Kims had commenced on October 15, 2009 against others. After motion practice, and without resolution of the malpractice claim against him, Damus was dismissed from the federal case on December 6, 2010 by a non-final, non-appealable minute order that was subject to revision or reconsideration until a final judgment concluded the case.¹

¹ *Rich v. Taswer Int'l, Inc.*, 917 F. Supp. 2d 1092, 1094 (D. Nev. 2013) ("Fed. R. Civ. P. 54(b) provides that any interlocutory order 'may be revised at any time before the entry of a judgment adjudicating all claims and all the parties' rights and liabilities.'" (citation omitted); see also *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 688-689, 747 P.2d 1380, 1382 (1987) ("Prior to

1 Thus, the claim against Damus remained pending while the case continued
2 to a final judgment against his co-defendants, which occurred on
3 September 4, 2015, when it was finally dismissed with prejudice by a final
4 judgment.

5 At issue in this state court litigation is whether 28 U.S.C
6 §1367(d) tolled Nevada's statute of limitations (NRS 11.207(1)) for refileing
7 of the Kims' malpractice claim against Damus until 30 days following the
8 federal court's non-final, non-appealable minute order granting his motion
9 to dismiss for lack of subject matter on December 6, 2010 (AA273-274 at
10 ECF. No. 117)², or whether 28 U.S.C §1367(d) tolled NRS 11.207 until 30
11 days following final judgment of dismissal of the federal action on
12 September 4, 2015 (AA297 at ECF No. 426).³

13 The district court below held that "28 U.S.C. §1367(d) tolled the
14 statute of limitations on any state action against Damus until September 4,

15
16 the entry of a final judgment the district court remains free to reconsider
17 and issue a written judgment different from its oral pronouncement . . . The
18 district court's oral pronouncement from the bench, the clerk's minute
19 order, and even an unfiled written order are ineffective for any purpose
20 and cannot be appealed.").

21 ² The federal court's minute order granting Damus motion to dismiss
22 was not certified under Fed. R. Civ. P 54(b) as a final judgment, AA266-
23 297, thus rendering it at most an interlocutory order. Without finality of
24 judgment for the interlocutory dismissal of the Kims' state law claims there
25 is no reasonable basis to distinguish between "action" and "claim" for
26 tolling purposes under 28 U.S.C. §1367(d).

27 ³ This issue was not addressed in the Kims' opening brief, as the
28 Court pointed out in note 3 on page 6 of its opinion, so Dickinson Wright
could not address the issue in its answering brief. Nor was this federal
statutory issue addressed or discussed in the Kims' reply brief, except to
say on page 5, "This analysis is simply improper." Because the Court
deemed this appeal unworthy of oral argument and took it under
submission on the briefs, Dickinson Wright was deprived of the
opportunity to discuss §1367(d) with the Court as it does in this petition for
rehearing.

1 2015, when the federal action was dismissed" 135 Nev. Adv. Op. 20 at
2 4. This Court reversed, holding that "§1367(d) distinguishes between an
3 'action' and a 'claim' and thus the state-law claim's dismissal is sufficient to
4 end the federal tolling period." *Id.* at 2. The Court went on to explain that
5 "1367(d)'s language makes clear that it does not toll the relevant statute of
6 limitations while the *action* is pending, but instead only tolls the relevant
7 statute of limitations " 'while the [state law] *claim* is pending." *Id.* at 7
8 (emphasis in original).

9 Inexplicably, in reaching this result, the Court cited but did not
10 discuss or give effect to last year's seminal decision of the United States
11 Supreme Court in *Artis v. District of Columbia*, 583 U.S. ___, 138 S. Ct. 594,
12 598 (2018), that held 28 U.S.C. §1367(d) "stop[s] the [state limitations] clock"
13 while the federal suit is pending: "We hold that §1367(d)'s instruction to toll
14 a state limitations period means to hold it in abeyance, *i.e.*, to stop the
15 clock. Because the D.C. Court of Appeals held that §1367(d) did not stop
16 the D.C. limitations clock, but merely provided a 30-day grace period for
17 refiling in the D.C. Superior Court, we reverse the D.C. Court of Appeals
18 judgment." *Id.* 138 S. Ct. at 598.

19 The Court's decision in this appeal cannot be reconciled with
20 the holding in *Artis* and a host of other federal and state cases that support
21 and apply the "stop-the-clock" interpretation of §1367(d) on which the
22 district court and the respondents justifiably relied in this case. Surely the
23 Court did not mean to suggest that its reading of the plain language of this
24 federal statute prevails over the Supreme Court's interpretation in *Artis* of
25 what "tolled" means as used in §1367(d).

26 Unless the Court grants rehearing and corrects its mistake of
27 having overlooked controlling federal authority, this decision will likely be
28 regarded as an outlier because it interprets federal law contrary to the

1 United States Supreme Court— the ultimate authority on the interpretation
2 and application federal law, including federal law that regulates the
3 application of state-law limitations periods. *Jinks v. Richland County*, 538
4 U.S. 456, 464–465, 138 S. Ct. 1667, 1672 (2003) ("we do not think that state-
5 law limitations periods fall into the category of 'procedure' immune from
6 congressional regulation").

7 **II. Authority for Rehearing.**

8 Nevada Rule of Appellate Procedure 40(b)(2) governs a petition
9 for rehearing of an en banc decision. Rehearing is appropriate when the
10 "petitioner believes the court has "overlooked or misapprehended a
11 material fact," a "material question of law," or "overlooked, misapplied or
12 failed to consider controlling authority." Nev. R. App. P. 40(c)(2). A
13 petition for rehearing may also be considered "in such other circumstances
14 as will promote substantial justice." *In re Dunleavy*, 104 Nev. 784, 786, 769
15 P.2d 1271, 1272 (1988).

16 Rehearing is warranted in this case because the Court
17 overlooked and misapprehended a material question of law and
18 misapplied and failed to consider controlling authority—28 U.S.C. §
19 1367(d) and *Artis v. D.C.*, 583 U.S. ___, 138 S. Ct. 594 (2018), cited and
20 discussed in Respondents' Answering Brief on pages 3–5, 10, and 12–17—
21 when it held that under § 1367(d) the Kims' state law claims against Damus
22 were tolled only for 30 days after the federal court dismissed those state
23 law claims on December 6, 2010 in non-final and non-appealable minute
24 order (AA273–274 at ECF No. 117).

25 The United States Supreme Court expressly held the word
26 "tolled" in §1367(d) means that "the state limitations period is suspended
27 during the *pendency of the federal suit*," not merely until thirty days
28 following dismissal of the state law claim, which was the ruling of the

District of Columbia Court of Appeals that *Artis* reversed. 583 U.S. at ___, 138 S. Ct. at 598 (emphasis added). In other words, *Artis* specifically rejects the holding in this Court's decision that §1367(d) merely provides a 30 day grace period following dismissal of the state law claim before NRS 11.207(1) resumes running. The significance of the *Artis* decision was explained in the leading treatise on federal practice:

The Supreme Court held that 28 U.S.C.A. § 1367(d) operates to "stop the clock" on supplemental claims that are dismissed under § 1367(c). The Court rejected the argument that the provision merely allowed plaintiff 30 days after the federal-court dismissal in which to file the state-law claims in state court. Rather, the state statute of limitations is held in abeyance *during pendency of the federal case, and, upon the federal dismissal, picks up where it left off*. *Artis v. District of Columbia*, 138 S. Ct. 594, 600–606, 199 L. Ed. 2d 473 (2018).

13D Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, & Richard D. Freer, *Federal Practice and Procedure* § 3567.4, at 459 n. 2 (3d ed. 2008 & Supp. 2019) (emphasis added).

The Court should grant this petition for rehearing and amend its decision to conform to the interpretation and application of §1367(d) in *Artis* and affirm the district court's dismissal of the Kims' claim for malpractice against Dickinson Wright, which would also promote substantial justice.

III. Section 1367(d) Tolls the Statute of Limitations Throughout the *Pendency of the Federal Action* Plus 30 Days Beyond the Dismissal of Claims in Federal Court.

The specific question presented to the Supreme Court in *Artis* was: "Does the word 'tolled,' as used in § 1367(d), mean the state limitations period is suspended during *the pendency of the federal suit*; or does 'tolled' mean that, although the state limitations period continues to run, a plaintiff

1 is accorded a grace period of 30 days to refile in state court post dismissal
2 of the federal case?" 583 U.S. at ___, 138 S. Ct. at 598 (emphasis added).

3 The *Artis* Court analyzed how § 1367(d)'s tolling rule operates
4 by considering the plain the meaning of § 1367(d) and "look[ing] first to its
5 language, [and] giving the words used their ordinary meaning." 583 U.S. at
6 ___, 138 S. Ct. at 603 (citation omitted). The Court then held that § 1367(d)
7 "suspends the statute of limitations for two adjacent time periods: while the
8 *claim is pending* in federal court and for 30 days postdismissal." *Id.*
9 (emphasis added)

10 **IV. Under Section 1367(d), a Claim is Pending in Federal Court until a**
11 **Final Judgment on that Claim is Entered.**

12 Numerous federal courts applying § 1367(d) have held that a
13 "*claim is pending*" in federal court until a *final judgment* on that claim is
14 entered, expiration of the deadline to file an appeal of that judgment, or if
15 an appeal is taken from that judgment, issuance of an order of the U.S.
16 Court of Appeals dismissing the appeal or a mandate affirming the
17 dismissal of those claims by the federal court. *Petrossian v. Cole*, 613 F.
18 App'x 109, 112 (3d Cir. 2015) ("When a District Court declines to exercise
19 supplemental jurisdiction over state law claims, the statute of limitations is
20 *tolled while the federal suit is pending* and for a period of 30 days after *the*
21 *suit is dismissed*. 28 U.S.C. § 1367(d)") (emphasis added); *Varnell v. Dora*
22 *Consol. Sch. Dist.*, 756 F.3d 1208, 1217 (10th Cir. 2014) ("State courts have
23 apparently agreed that tolling under § 1367(d) continues until any *federal*
24 *appeal is complete*" and "[w]e are confident that the New Mexico courts
25 would follow suit") (emphasis added; citations omitted); *In re Vertrue Inc.*
26 *Mktg. & Sales Practices Litig.*, 719 F.3d 474, 481–82 (6th Cir. 2013) (holding
27 the statute of limitations stopped running on unnamed class members'
28 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) (emphasis added); *Bodine v. Graco, Inc.*, 533 F.3d 1145, 1155 n. 10 (9th Cir. 2008) ("We assume that the statutes of limitations on Bodine's state-law claims are tolled during *the pendency of this matter*. See 28 U.S.C. § 1367(d)") (emphasis added); *Sanders v. City of Union Springs*, 405 F. Supp. 2d 1358, 1373 (M.D. Ala. 2005) ("This dismissal [of Plaintiffs' state law claims] should not work to Plaintiffs' disadvantage should they elect to bring suit in state court because the period of limitations for any of these claims *is tolled during the pendency of this action*. See 28 U.S.C. § 1367(d)") (emphasis added); *Griffin v. Acacia Life Ins. Co.*, 151 F. Supp. 2d 78, 82 (D.D.C. 2001) (plaintiff is "advised that 28 U.S.C. § 1367(d) tolls the statute of limitations for these D.C. law claims for a period of 30 days after entry of the *final order in this case*") (emphasis added); *Redeaux v. Brannon*, 2018 WL 2329763, at *1 (E.D. Tex. May 23, 2018) (holding "the statute of limitations on these state law claims [is] suspended from the date that the federal lawsuit was filed until 30 days after the date of *entry of final judgment*. 28 U.S.C. § 1367(d)") (emphasis added); see also 13D Wright, Miller, Cooper, & Freer, *Federal Practice and Procedure* § 3567.4, at 459 (2008): ("Section 1367(d) tolls the statute of limitations *throughout the pendency of the federal action* plus 30 days beyond the dismissal of claims in federal court.") (emphasis added).

Many state courts have also applied § 1367(d) in the same manner. See, e.g., *Turner v. Right*, 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

1 appeal or a mandate affirming the dismissal those claims by the District
2 Court") (emphasis added); *Okoro v. City of Oakland*, 142 Cal. App. 4th 306,
3 311, 48 Cal. Rptr. 3d 260, 264 (2006) (holding state law Tort Claims Act's
4 six-month statute of limitations was tolled under § 1367(d) *until 30 days*
5 *after time for filing appeal from final judgment in federal action had*
6 *expired*) (emphasis added); *Berke v. Buckley Broad. Corp.*, 359 N.J. Super. 587,
7 595, 821 A.2d 118, 123–24 (App. Div. 2003) (holding "we are satisfied that
8 the 'tolling' provision of the statute refers to the period between the
9 running of the statute while *the action is pending in the federal court* and
10 thirty days following *the final judgment* of the federal court declining to
11 exercise supplemental jurisdiction") (emphasis added).

12 Therefore, the Court misapplied controlling authority—§
13 1367(d) and the United States Supreme Court's decision in *Artis*—when it
14 held that under § 1367(d) the Kims' state law claims against Damus were
15 only tolled until 30 days after the federal court dismissed those state law
16 claims on December 6, 2010 in non-final and non-appealable minute order.

17 **V. The Court Should Rehear Its Decision to Promote Substantial**
18 **Justice.**

19 Rehearing the decision and correctly applying § 1367(d), as set
20 forth above, would also promote the interests of justice; otherwise, under
21 the Court's decision, plaintiffs, such as the Kims in this case, would be
22 required to litigate the same claim at the same time in two forums.
23 Therefore, if a federal court declines to exercise supplemental jurisdiction
24 over plaintiffs' state law claims in a non-final and non-appealable order,
25 the plaintiffs would be required to re-file their state law claims in state
26 court and prosecute them before they could even appeal the federal court's
27 dismissal of those claims. Such a result would lead to duplicative litigation
28 and a potential for inconsistent rulings, which is contrary to both judicial

1 efficiency and the interests of justice. Nev. R. Civ. P. 1. This issue was a
2 concern that the United States Supreme Court addressed in *Artis* because
3 "duplicative filings in federal and state court are 'generally disfavored . . .
4 as 'wasteful' and . . . 'against [the interests of] judicial efficiency.'" *Artis*, 583
5 U.S. at ___, 138 S. Ct. at 600 (citation omitted).

6 Moreover, correctly applying § 1367(d) would comport with
7 Nevada's policy to "resolve cases on the merits whenever possible." By
8 following *Artis* and the many other courts, which hold that under § 1367(d)
9 a "claim is pending" in federal court until a final judgment on that claim is
10 entered by the federal court, expiration of the deadline to file an appeal of
11 that judgment, or if an appeal is taken from that judgment, issuance of an
12 order of the U.S. Court of Appeals dismissing the appeal or a mandate
13 affirming the dismissal of those claims by the federal court, plaintiffs'
14 claims will be preserved for a much longer period of time than allowed
15 under the Court's decision in this appeal.

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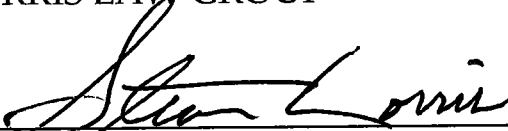
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VI. CONCLUSION

Based on the foregoing, respondents respectfully ask the Court to: (1) grant this petition; (2) rehear its decision; (3) properly apply § 1367(d) in accordance with *Artis* and the other federal and state cases cited above; (4) hold that the Kims' state law claims against Damus were tolled under § 1367(d) until 30 days after the federal court entered its final order dismissing the federal action with prejudice on September 4, 2015; and (5) affirm the district court's order granting the motion to dismiss.

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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' PETITION FOR REHEARING OF DECISION REVERSING AND REMANDING THE DISTRICT COURT'S ORDER GRANTING MOTION TO DISMISS** 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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DATED this 1st day of July, 2019.

By: 

An employee of Morris Law Group