IN THE SUPREME COURT OF THE STATE OF NEVADA

TAE-SI KIM, an Individual, and JIN-SUNG HONG, an Individual. Plaintiffs, v. DICKINSON WRIGHT, PLLC, A NEVADA PROFESSIONAL LIMITEDLIABILITY 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, Defendants.	SUPREME COURT NO. 74803 CASE NO. A-17-756785-C

APPELLANT'S ANSWER TO RESPONDENTS' PETITION FOR REHEARING

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I. INTRODUCTION

This Court correctly decided *Kim v. Dickinson Wright*, 135 Nev. Adv. Op. 20 (Jun. 13, 2019), and found the statute of limitations on appellants Tae-Si Kim's and Jin Sun Hong's state-law, legal malpractice claims against their former attorney Charles M. Damus, Esq.—erroneously filed in federal court under supplemental jurisdiction—were only tolled until 30 days after the federal court dismissed Appellants' state-law ***claims***; and, as a result, the statute of limitations on those claims expired while Respondents still represented Appellants. *Id.*, at *8, 11.

Respondents contend rehearing *Kim* is necessary because this Court misinterpreted the Supreme Court of the United States' ("SCOTUS") opinion in *Artis v. Dist. of Columbia*, 583 U.S. at ___,138 S. Ct. 594, 199 L.Ed.2d 473 (2018), and misapplied 28 U.S.C. § 1367(d), the federal tolling statute for state-law claims filed in federal court under supplemental jurisdiction. However, as explained below, Respondents' theory is predicated upon three misconceptions: (1) that the terms "claim" and "suit" are interchangeable; (2) that a claim remains pending after the court dismisses it; and (3) that a claim can be refiled after there has been a final judgment on the claim's merits. A close reading of *Artis* and § 1367(d)'s text, and an examination of the principles of claim preclusion demonstrate Respondents' errors and confirm a rehearing is unnecessary and unwarranted.

II. LEGAL ARGUMENT

A. Rehearing is Improper, as This Court Neither Misapprehended a Material Fact or Issue of Law, Nor Misapplied Any Statute or Decision.

This Court correctly interpreted the federal tolling statute for state-law claims based on supplemental jurisdiction, 28 U.S.C. § 1367(d), in its original opinion, *Kim v. Dickinson Wright*, 135 Nev. Adv. Op. 20. The provision states:

> The period of limitations for any claim asserted under subsection (a), and for any other ***claim*** in the same action 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.

28 U.S.C. § 1367(d) (emphasis added).

Respondents' suggested interpretation of §1367(d) asks this Court to usurp the United States' Congress' role and rewrite the federal statute to substitute "suit" for "claim", and ignore the three circumstances § 1367(c) allows a federal district court to dismiss supplemental state-law claims and retain jurisdiction over federal-law claims. *See* 28 U.S.C. § 1367(c)(1), (2), and (4).

Nowhere in *Artis* does SCOTUS substitute the word "claim" for "suit" or "action". And, significantly, nowhere in the statute does Congress do so. The word "it", used in the second part of § 1367(d), is a pronoun that refers to its antecedent noun: "claim". The word "claim" is used in the provision twice after the word "action". Hence, there is no question Congress meant what it said: a claim is

tolled while the claim is pending. Thus, this Court correctly found § 1367(d)'s text distinguishes between a claim and an action. *Kim*, 135 Nev. Adv. Op. 20, at *7.

Perhaps most significantly, SCOTUS expressly rejected Respondents' same argument when the District of Columbia made it in *Artis*. SCOTUS pointed out:

> the first portion of the tolling period, the duration of the claim's pendency in federal court, becomes superfluous under the District's construction. The "effect" of the limitations period as a time bar, on the District's reading, becomes operative only after the case has been dismissed. That being so, what need would there be to remove anything while the claim is pending in federal court?

Artis, 138 S. Ct. at 604, 199 L.Ed.2d 473.

This passage clarifies "the first portion of the tolling period" is "the duration of the ***claim's*** pendency in federal court". *Id.* (emphasis added). The second period is 30 days, which begins to accrue when the state-law claim is dismissed. *Id.*, at 603.

Moreover, Respondents misstate *Artis'* holding, asserting *Artis* held the word "'tolled' in § 1367(d) means that 'the state limitations period is suspended during the pendency of the federal suit,' not merely until thirty days following dismissal of the state law claim". (*See* Resp't Pet. for Rehearing, at 4:25-28.) The quotation Respondents supply is not *Artis*' holding, but an incomplete statement of the question presented. The complete passage reads:

> The question presented: 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 is accorded a grace period of 30 days to refile in state court post dismissal of the federal case? Petitioner urges the first, or stop-the-clock, reading. Respondent urges, and the District of Columbia Court of Appeals adopted, the second, or grace-period, reading.

Artis, 138 S. Ct. at 598, 199 L.Ed.2d 473.

SCOTUS answered: "In § 1367(d), Congress did provide for tolling not only while the ***claim*** is pending in federal court, but also for 30 days thereafter." *Artis*, 138 S. Ct. at 605 (emphasis added).

To clarify, the only reason the statute of limitations began to accrue on Plaintiff Stephanie Artis' state-law claims when judgment was entered in her federal lawsuit is the district court entered summary judgment against Artis on her sole federal-law claim and, therefore, declined to exercise supplemental jurisdiction over Artis' state-law claims under § 1367(c)(3). *Artis*, 138 S.Ct. at 599-600, 199 L.Ed.2d 473. Notably, while summary judgment was entered against Artis on her federal-law claim, the court dismissed her state-law claims *without* prejudice, which is the reason she could refile them in state court. *Id.* ("If the state court would hold the claim time barred, however, then, absent a curative provision, the district court's dismissal of the state-law claim without prejudice would be tantamount to a dismissal with prejudice.").

Respondents' mistake when reviewing cases is overlooking the specific provision of § 1367(c) under which a plaintiff's claims are dismissed. All

of the cases Respondents cite in support of their argument are cases involving dismissals under § 1367(c)(3), which, like *Artis,* involve a court dismissing state-law claims after entering summary judgment against the plaintiff on his or her federal-law claims. *See, e.g. Petrossian v. Cole*, 613 F. App'x 109, 112 (3d Cir. 2015) (dismissing plaintiff's state-law claims because "[a] District Court has discretion to 'decline to exercise supplemental jurisdiction over a claim ... if ... (3) the district court has dismissed all claims over which it has original jurisdiction'" (citing 28 U.S.C. § 1367(c)(3)). Importantly, those courts still recognize the statute of limitations on state-law claims are only tolled until 30 days after the state-law claims are dismissed. *See, e.g. Varnell v. Dora Cons. Sch. Dist.*, 756 F.3d 1208, 1217 (10th Cir. 2014) (explaining under 1367(d) "Plaintiff has at least 30 days after dismissal of the state-law claims to bring suit in state court (assuming that the claim was originally timely filed)"); *see also In re Vertrue Inc. Marketing & Sales Practices Litigation*, 719 F.3d 474, 481 (6th Cir., 2013) (adopting "the suspension approach", under which "the clock is stopped and the time is not counted—while the federal court is considering the claim and for thirty days after the claim is dismissed").

Moreover, Respondents' argument regarding other state supreme courts' application of § 1367(d) is unavailing, as SCOTUS granted certiorari in *Artis* "[t]o resolve the division of opinion among State Supreme Courts on the proper

construction of § 1367(d)" *Artis*, 138 S. Ct. at 601, 199. Therefore, SCOTUS is the controlling authority interpreting § 1367(d), and this Court correctly interpreted SCOTUS' opinions[1].

Significantly, courts applying § 1367(d) in circumstances like this one—where the federal court dismissed supplemental state-law claims and retained jurisdiction over the federal-law claims[2]—have interpreted *Artis* and applied § 1367(d) the same way this Court did in *Kim*. *See, e.g., Makhnevich v. Bougopoulos*, Case No. 18-CV-285 (KAM)(VMS), 2019 WL 2994431, at *6-7 (E.D. N.Y., July 9, 2019) (Ord. Den. Mot. to Amend Compl.) (applying *Artis*, finding the statute of limitation had not run on plaintiff's state-law claims the court declined to exercise supplement jurisdiction over pursuant to § 1367(c)(1) and (2); and noting plaintiff is free to file her state-law claims in state court while the unrelated federal claims are pending in federal court); *see also Houck v. Lifestore*

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[1] As noted in *Kim*, this Court's construction of § 1367(d) is in accord with *Jinks v. Richland Cty., S.C.*, 538 U.S. 456, 459 (2003). *Kim*, 135 Nev. Adv. Op. 20, at *7.

[2] Contrary to Respondents' contention, the federal court's minute order dismissing Appellants' state-law claims against Damus were distributed to the parties and constituted the court's written order, which would start the clock on the time to appeal it. *See Ingram v. Acands, Inc.*, 977 F.2d 1332 (9th Cir., 1992) (explaining minute orders are sufficient to constitute written orders and trigger appeal periods). Further, there was never any judgment entered in the federal case against Appellants on their state-law claims against Damus. (Resp.t Pet. for Rehearing, at 2:1-4.) Those claims were dismissed.

Bank Substitute Tr. Servs., Inc., 582 B.R. 138, 141 (W.D. N.C., 2018) (remanding 11 U.S.C. § 362(k) claims to bankruptcy court, dismissing supplemental state-law claims because the state-law claims predominate over the § 362 claims, and advising plaintiff that, under *Artis*, she has 30 days to refile her state-law claims in state court unless state law provides a longer tolling period).

In sum, this Court followed *Artis*' instruction and correctly applied § 1367(d) in finding the statute of limitations on Appellants' state-law malpractice claims against Damus began to accrue again 30 days after the federal court dismissed them.

B. <u>Respondents' Tolling Theory on is Based on a Misunderstanding of the Preclusive Effect of a Dismissal with Prejudice.</u>

Respondents' contention that § 1367(d) is triggered upon a dismissal with prejudice is simply mistaken; as a dismissal with prejudice would bar Appellants from ever filing their state-law claims again. Under the doctrine of claim preclusion, a.k.a. *res judicata*, "a valid and final judgment on a claim precludes a second action on that claim or any part of it". *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709, 712 (2008). The dismissal of a claim *with* prejudice upon a Rule 12(b)(5) motion constitutes a decision on the merits and bars the claim in a subsequently filed suit. *See Zalk-Josephs Co. v. Wells Cargo, Inc*., 81 Nev. 163, 400 P.2d 621, 625 (1965); *see also Brent G. Theobald Constr. v. Richardson*, 122 Nev. 1163, 147 P.3d 238, 241 (2006) ("unless the district court states in its order

that dismissal is without prejudice, dismissal with prejudice is presumed and 'is res judicata and bars any other suit on the same claim'" (internal quotation omitted)). This Court has emphasized claim preclusion's purpose "is to obtain finality by preventing a party from filing another suit that is based on the same set of facts that were present in the initial suit." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709, 712 (2008).

Consequently, Respondents' theory that the statute of limitations only begins to accrue again 30 days after there is a final judgment on the claim's merits results in an absurdity. Namely, the statute of limitations would only begin to accrue again once the claim could no longer be filed. Not only is such a result absurd, but it undermines Congress's intent in drafting § 1367(d). *Jinks v. Richland County*, 538 U.S. 456, 459 (2003) (noting § 1367(d)'s purpose is to prevent the limitations period on supplemental claims from expiring while the plaintiff was "fruitlessly pursuing them in federal court").

In fact, the claim preclusive effect of a dismissal with prejudice or an "adjudication on the merits" is the precise reason federal district courts generally dismiss state-law claims they decline to exercise supplemental jurisdiction over without prejudice. *See Morimoto v. Whitley*, Case No. 2:17-cv-01774-APG-GWF, at *12 (D. Nev., Oct. 30, 2018) ("If the plaintiffs choose not to amend, I will decline to exercise supplemental jurisdiction over the state law claims and will dismiss them

without prejudice so the plaintiffs may pursue them in state court."); *Parker v. Blackerby*, 6:16-CV-06475 EAW, at *21 (W.D. N.Y., 2019) (Ord. Granting Defs.' Mot. to Dismiss) (explaining "[t]he dismissal of Plaintiff's state law claims is without prejudice so the plaintiffs may pursue them in state court"). *see also JetBlue Airways Corp. v. CopyTele Inc*., 629 F. App'x 44, 45 (2d Cir. 2015) (dismissal for lack of subject matter jurisdiction must be without prejudice).

The courts that Respondents mistakenly cite for the proposition that § 1367(d) tolls the statute of limitations on state-law claims during the federal suits' pendency have clarified the same. *See, e.g., Petrossian v. Cole*, 613 F. App'x 109, 111-12 (3d Cir. 2015) ("A dismissal with prejudice constitutes an adjudication on the merits 'as fully and completely as if the order had been entered after trial.'").

In light of the well-recognized claim preclusive effect of a judgment on the merits, Respondents' argument that it relied on Appellants' state-law claims being tolled until there was a judgment on the merits on the state-law claims only compounds Appellants' malpractice allegations against Respondents.[3] Similarly misreading a statute is no defense to legal malpractice.

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[3] Respondents' reliance is also misplaced given the pre-*Artis* line of cases holding § 1367(d) only applies to claims dismissed under § 1367(c)(3), and not in cases where the court finds it lacks supplemental jurisdiction under § 1367(a)—one of the bases of Damus' motion to dismiss. *See, e.g., Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533 (2002) (analyzing whether section 1367(d) applies to dismissals of claims not listed in subsection (c) and concluding section 1367(d) is inapplicable to

Respondents' suggested interpretation of § 1367(d) also asks this Court to ignore the entire purpose of statutory limitations periods: "'preventing surprises' to defendants and 'barring a plaintiff who has slept on his rights'". *Artis*, 138 S.Ct. at 608, 199 E.Ed. 2d 473 (quoting *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974)). Under Respondents' suggested application of Section 1367(d), defendants like Damus would have no certainty regarding when they would be free from a plaintiff's claims, as there is no telling when a federal district court may adjudicate the federal-law claims it retained jurisdiction over after having dismissed the state-law claims filed under supplemental jurisdiction.

Based on the foregoing, there is no basis for rehearing under Nevada's Appellate Rules and this Court should decline Respondents' invitation to revisit a case this Court correctly decided. *See* Nev. R. App. P. 40(c)(2) (enumerating the circumstances warranting rehearing).

III. CONCLUSION

As explained above, rehearing is unwarranted, as this Court properly applied § 1367(d) and interpreted the SCOTUS' controlling case law when this Court concluded § 1367(d) stops the clock on the statute of limitations for state-law claims

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claims dismissed under the Eleventh Amendment); *see also Parrish v. HBO & Co.*, 85 F. Supp. 2d 792, 796-97 (S.D. Ohio 1999).

filed in federal court based on supplemental jurisdiction until 30 days after the state-law claim is dismissed; at which time, the clock begins to run again.

IV. ATTORNEY'S CERTIFICATE

1. I hereby certify that this Answer complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using *Word* in 14 point Times New Roman.

2. I further certify that this Answer complies with the page- or type volume limitations of N.R.A.P. 40(b)(3) because, excluding the parts of the brief exempted by N.R.A.P. 32(a)(7)(C), it is either: Proportionately spaced, has a typeface of 14 points or more, and contains 2,521 words.

3. Finally, I hereby certify that I have read the forgoing Answer 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 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, and NRAP 40(a)(2), which requires any claim that the court has overlooked or misapprehended a material fact supported by reference to the portion of the record where such fact is to be found. I understand

that I may be subject to sanctions in the event that the accompanying Answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

Pursuant of NRCP 5(b), I hereby certify that I am an employee of BRANDON L. PHILLIPS, ATTORNEY AT LAW, PLLC, and that on the 5th day of August, 2019, I served a true copy of the of the documents listed below by E-Service and in the U.S. Mail to the following address:

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