CASE NO. 76062

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONETTE PATUSH, Appellant

v.

LAS VEGAS BISTRO, LLC, Respondent

APPEAL FROM THE
EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA

APPELLANT'S REPLY BRIEF

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NRAP 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:

1. The Appellant, ANTONETTE PATUSH (not a pseudonym) is a natural person and is the only person or entity that is an Appellant in this case;

2. The undersigned counsel of record for Ms. Patush is the only attorney who has appeared on his behalf in this matter in this Court. The undersigned and his associate Victoria L. Neal are the only attorneys that appeared on behalf of Ms. Patush before the District Court.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 13th day of November 2018.

/s/ James P. Kemp

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I. THE SUPREME COURT OF NEVADA HAS RULED THAT NRS 11.190(4)(e) ONLY APPLIES TO PERSONAL INJURY AND WRONGFUL DEATH CASES AND NOT TO ALL "WRONGFUL ACT" TORT CLAIMS GENERALLY.

Respondent's argument that NRS 11.190(4)(e) is a general "tort" statute of limitations that applies generically to all tort actions is incorrect. In considering what statute of limitations applies to claims of Intentional Interference with Prospective Economic Advantage and Intentional Interference with Contract the Supreme Court of Nevada held as follows:

> NRS 11.190(4)(e) provides a two-year statute of limitations for "action[s] to recover damages for injuries to a person ... caused by the wrongful act or neglect of another." Although Mushkin asserts that this provision provides the statute of limitations for all wrongful act torts generally, we have previously addressed and rejected this argument

Stalk v. Mushkin, 199 P.3d 838, 841, 125 Nev. 21 (2009). In *Stalk* the District Court was held to have improperly applied NRS 11.190(4)(e) to the tort claims in question. The Supreme Court held that those claims were "injury to property" claims and applied the three year limitations period under NRS 11.190(3)(c) as the Court determined that the true nature of those claims was for damage to property interests and NOT personal injuries. The *Stalk* Court in footnote 1 was very clear about the limitations of NRS 11.190(4)(e):

> In *Hanneman v. Downer*, we explained that NRS 11.190(4)(e) "applies only to personal injury and wrongful death actions" and that

> other tort causes of action, such as those for fraud and damage to real property, are governed by other, more specific statute of limitations provisions. 110 Nev. 167, 180 n. 8, 871 P.2d 279, 287 n. 8 (1994). Following the *Hanneman* court, ***we determine that NRS 11.190(4)(e) is limited to personal injury and wrongful death actions*** and does not apply to claims for intentional interference with prospective business advantage and contractual relations.

Stalk, 199 P.3d at 845, n.1 (emphasis added) Thus, the District Court in this case erred in applying the two year limitations period of NRS 11.190(4)(e) because that statute of limitations is limited to personal injury and wrongful death actions. *Id*. Retaliatory Discharge in Violation of Public Policy is not personal injury or wrongful death.[1]

The Court in *Stalk* went on to explain that the way to analyze statute of limitations questions is to examine the "true nature" of the claim. *Stalk*, 199 P.3d

[1] Personal injury in the employment context is generally defined by the workers' compensation statute NRS 616A.265 which states in relevant part as follows: "1. "Injury" or "personal injury" means a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result which is established by medical evidence, including injuries to prosthetic devices." Being fired illegally and the resulting economic damages for lost wages does not fit this definition. Moreover even though general tort damages are available for elements like emotional distress, workers' compensation law specifically excludes mental or emotional injury "…caused by his or her layoff, the termination of his or her employment or any disciplinary action taken against him or her." NRS 616C.180(2)(c). Retaliatory Discharge in Violation of Public Policy is not a personal injury tort claim. *See also Wyeth v. Rowatt*, 244 P.3d 765, 776 (Nev. 2010) ("Section 146[of Restatement (Second) of Conflict of Laws] has defined 'personal injury' as 'either physical harm or mental disturbance, such as fright and shock, resulting from physical harm or from threatened physical harm or other injury to oneself or to another.'") Respondent's argument that "personal injury" in the context of NRS 11.190(4)(e) statute of limitations does not mean "physical injury" is without merit and Retaliatory Discharge claims are not personal injury or wrongful death claims.

at 841.("*See Hartford Ins. v. Statewide Appliances*, 87 Nev. 195, 197, 484 P.2d 569, 571 (1971) (explaining that the object of the action, rather than the legal theory under which recovery is sought, governs when determining the type of action for statute of limitations purposes).") Citing a number of cases from other jurisdictions the Court reasoned that interference with contract and interference with prospective economic advantage claim have to do with harm to business interests which the court determined to be "personal property" and based upon that concluded that the claims were about injuries to property that were covered by the three year period in NRS 11.190(3)(c). That was the most closely analogous statute of limitations for those claims.[2]

The *Stalk* case raises a question: Should Retaliatory Discharge in Violation of Public Policy cases be treated similarly to Intentional Interference with Contract or Intentional Interference with Prospective Economic Advantage cases and subjected to the three year statute of limitations under NRS 11.190(3)(c). The answer is no based on policy and precedent. First, while an at-will employment

[2] Interestingly two years later in *In re Amerco Derivative Litigation*, 252 P.3d 681, 703 (Nev.2011) the Court never addressed its earlier conclusion in *Stalk* regarding the three year statute of limitations under NRS 11.190(3)(c) for Intentional Interference with Prospective Economic Advantage. In *Amerco* that the same type of tort claim, labeled Wrongful Interference with Prospective Economic Advantage, was held "subject to a four-year statute of limitations" under NRS 11.190(2)(c) ("An action upon a contract, obligation or liability not founded upon an instrument in writing"). The *Stalk* case clearly presents the more thorough analysis of the issue, but *Amerco* is more recent. The Court should consider taking this case as an opportunity to clear up this discrepancy.

relationship is contractual in nature, *Vancheri v. GNLV Corp*., 105 Nev. 417, 421, 777 P.2d 366, 369 (1989), the tort's elements require that the interference be done by a third-party and not an actual party to the contract. *See J.J. Indus., LLC v. Bennett*, 71 P.3d 1264, 1267 (Nev. 2003) (citing to Restatement (Second) of Torts §§766A-766B for elements which state th at the claim is against a third-party who interferes); *See also Blanck v. Hager*, 360 F. Supp. 2d 1137, 1154-55 (D. Nev. 2005). ("In Nevada, a party cannot, as a matter of law, tortiously interfere with its own contract. *See Bartsas Realty, Inc. v. Nash,* 81 Nev. 325, 402 P.2d 650, 651 (1965)"). Thus, as the Retaliatory Discharge claim is by one party to the at-will contract against another party to the at-will contract, the Intentional Interference with Contractual Relations claim is not similar. The Retaliatory Discharge case is more like an unwritten contract or obligation claim that would be a four year statute of limitations under NRS 11.190(2)(c). The same analysis would hold true for the Intentional Interference with Prospective Economic Advantage claim. The tort contemplates interference by a third-party, not one of the parties to the prospective beneficial transaction. Thus, the Retaliatory Discharge claim is not similar to the Intentional Interference with Prospective Economic Advantage claim and would not appropriately be held to the same statute of limitations as that claim.

This brings the matter full circle. The true nature of the Retaliatory Discharge claim is that of an unwritten contract or obligation. The obligation of an

employer is to continue the at-will employment relationship and not sever it in retaliation for filing a workers' compensation claim. Thus, in that sense it is a contract type of claim. However, the claim has been designated as a tort claim by the Supreme Court of Nevada. The Court in *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394(1984) wanted to make the full panoply of tort damages, including punitive damages available, but the claim still has to do with a contractual relationship. The central component of damages is for lost wage from the actual employer, not a third-party tortfeasor. This looks like contract damages. The at-will employment relationship is contractual, but it is NOT a personal property interest such as the claim in *Stalk*. This is why the Appellant characterizes this case as a "hybrid" type of claim that is not closely analogous to any other type of claim for purposes of determining the correct statute of limitations to apply. It is in some senses like a contract, but it has tort damages available as remedies. It is a hybrid type claim that the Supreme Court of Nevada said in *Perry v. Terrible Herbst, Inc.*, 383 P.3d 257, 260, 132 Nev. Adv. Op. 75, 132 Nev. (2016) should be covered under the "catch-all" statute of limitations under NRS 11.220, which is four years. Ms. Patush's claim here was timely under that statute of limitations and the District Court's order dismissing her claim should be reversed.

II. FOUR YEARS UNDER NRS 11.220 IS THE APPLICABLE STATUTE OF LIMITATIONS BECAUSE NO OTHER STATUTE CONTAINED IN NRS CHAPTER 11 OR ELSEWHERE IN THE STATUTES PROVIDES A SPECIFIC OR CLOSELY ANALAGOUS LIMITATIONS PERIOD.

The Supreme Court of Nevada's statute of limitations jurisprudence has historically looked to apply the most analogous limitations period when one is not specifically provided by statute. *Perry v. Terrible Herbst, Inc.*, 383 P.3d 257, 260, 132 Nev. Adv. Op. 75, 132 Nev. (2016). As argued in the Appellant's Opening Brief, the present case is the kind of "hybrid" claim that the Court in *Perry* indicated would be appropriate to apply the "catch-all" four year limitations period set forth in NRS 11.220.

To reiterate, NRS 11.220 states as follows:

> **NRS 11.220 Action for relief not otherwise provided for.** An action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued.

The statute is plain and unambiguous and should be applied exactly how it is written. "This court has established that when it is presented with an issue of statutory interpretation, it should give effect to the statute's plain meaning." *MGM Mirage v. Nev. Ins. Guar. Ass'n*, 125 Nev. 223, 228, 209 P.3d 766, 769 (2009). "[W]hen the language of a statute is plain and unambiguous, such that it is capable

of only one meaning, this court should not" look any farther than the plain meaning of the statute. *Id.* at 228-29, 209 P.3d at 769.

The Retaliatory Discharge claim brought by Ms. Patush because her employer fired her for filing a workers' compensation claim is an "Action for relief not otherwise provided for" in NRS Chapter 11 or anywhere else in the Nevada Revised Statutes. The Legislature has written and enacted a very straight forward statute for the courts to apply. If there is no limitation expressly provided for a cause of action, then four years is the limitations period.

The District Court erred in applying NRS 11.190(4)(e) because that only applies to personal injury and wrongful death claims, as discussed above. The correct statute of limitations for Ms. Patush's case is four years under NRS 11.220 and this Court should reverse the District Court's order of dismissal and remand this case for further proceedings.

III. THE FEDERAL COURTS HAVE BEEN IN ERROR FOR YEARS ON THIS ISSUE AND THIS COURT SHOULD DEFINITIVELY SAY SO.

The Respondent emphasized that for many years the Federal District Court in Nevada has applied the two year statute of limitations for personal injury and wrongful death under NRS 11.190(4)(e) to Retaliatory Discharge claims. As set forth above, this was wrong and it continues to be wrong.

The Respondent points out, correctly, that many employment law cases are removed to federal court because there are often alternative theories of recovery pleaded in the cases arising out of Title VII of the Civil Rights Act of 1964, the Age Discrimination Act of 1967, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, and several other federal statutes. When claims under these statutes are brought the federal courts have original jurisdiction over them and the cases are either filed in federal court directly or are removed there by defendants that view that forum as friendlier to their cause. Thus, the state court claims like Retaliatory Discharge are removed along with the federal claims under the federal court's supplemental jurisdiction pursuant to 28 U.S.C. §1367. This is why the statute of limitations for Retaliatory Discharge issue seems to have been litigated exclusively (until now) in federal courts. The issue seems to rarely if ever make it to the Ninth Circuit Court of Appeals (Respondent cites two unpublished orders from the 9th Cir.). The issue has never been certified to this court under NRAP 5 to Appellant's knowledge (there certainly are not any published opinions on the subject). The issue has NEVER been fully analyzed by any federal court. Mostly the federal courts seem to just cite to one another and rule that the statute of limitations is two years and dismiss the claims. It would seem that pragmatic plaintiffs then just let the state law claim die and focus on their federal claims. That is the sense one gets by looking at the cases and noting

the lack of significant federal appellate case law on this subject and no certified questions under NRAP 5.

Taking stock of Respondent's cited cases it is clear that the federal courts are wrong on Nevada law. In *Fox v. Sysco Corp*., 2:11-cv-00424-RLH-PAL, 2011 WL 5838179, *4 (D.Nev. Nov. 21, 2011) the court stated that NRS 11.190(4)(e) is generally applicable to "tort claims" and applied it to all of the plaintiff's state law tort claims including Retaliatory Discharge and Intentional Infliction of Emotional Distress (IIED).[3] There was absolutely no analysis and the federal court only cited to ONE Supreme Court of Nevada case, *State Farm Mut. Auto Ins. Co. v. Fitts*, 120 Nev. 707, 99 P.3d 1160(2004) which is a car wreck case involving personal injuries and uninsured and under insured motorist (UM/UIM) insurance coverage issues having nothing to do with Retaliatory Discharge. This is in no way persuasive on the issue.

In *Scott v. Corizon Health, Inc.*, 3:14-cv-00004-LRH-VPCD, 2014 WL 1877434 (D. Nev. May 9, 2014) there is no analysis whatsoever. The case cites to the *Fox* case (above) and other cases that also cite to no controlling Nevada

[3] IIED claims have been held to be subject to the two year limitations period under NRS 11.190(4)(e) and this is understandable because the IIED claim requires "severe" emotional distress which must be either secondary to physical injuries, must precipitate physical manifestations (physical symptoms) of the emotional distress, or fall into some rare categories where the Supreme Court of Nevada has permitted recovery. *Betsinger v. DR Horton, Inc.*, 232 P.3d 433, 436, 126 Nev. 162 (2010). This is personal injury within the contemplation of NRS 11.190(4)(e).

authority. There is simply no rationale stated for how the personal injury and wrongful death statute of limitations applies to a plaintiff's claim that she was illegally fired from her job. Like so many of these cases the reasoning is completely circular: the statute of limitations is two years because it is two years, and no explanation of how or why.

Smallwood v. Titanium Metal Corp., 115 Fed.Appx. 416 (9th Cir. 2004) is an unpublished U.S. Court of Appeals case that primarily cites to *Palmer v. State*, 106 Nev. 151, 797 P.2d 803 (1990) and *Torre v. J.C. Penney Co., Inc.*, 916 F.Supp 1029 (D.Nev. 1996). These cases are cited in *Smallwood* without any discussion or proper analysis. The problem with *Palmer* is that it does not state or hold what it is being cited for.

In fact the only Supreme Court of Nevada employment related case ever cited by the federal decisions that Plaintiff's counsel could find is *Palmer v. State,* 106 Nev. 151, 787 P.2d 803, 804 (1990). That very short *per curiam* decision does NOT analyze the issue or hold that a two year statute of limitations under NRS 11.190(4)(e) applies to Retaliatory Discharge claims. Indeed the case involves the unrelated issue of administrative exhaustion of a statutory discrimination claim and does not even mention NRS 11.190(4)(e). No reasonably intelligent person could read the *Palmer* case and come away with the notion that NRS 11.190(4)(e) imposes a two year statute of limitations for common law Retaliatory Discharge

from employment claims. The case mentions that Ms. Palmer filed her case in court prior to Nevada Equal Rights Commission finishing the processing of her administrative charge in order to avoid a "potential" two year statute of limitations defense against her "tort claim." The Supreme Court of Nevada never identifies what the "tort claim" was for (no violation of public policy is discussed[4]), nor does it ever say that Ms. Palmer was correct in her concern that any statute of limitations defense that could have been raised was valid. Thus, *Palmer* is no authority to support the unpublished federal court decisions that are out there including the one cited by Respondent in its motion to dismiss below (which does not cite *Palmer* or *any* employment cases). In short, there is no controlling or persuasive authority for the Respondent's bald assertion that the Plaintiff's retaliatory discharge in violation of public policy claim is subject to a two year statute of limitations under NRS 11.190(4)(e).

The *Torre* case from 1996 appears to be the oldest case to raise the issue of the statute of limitations for a Retaliatory Discharge claim. The following is the entirety of what the U.S. District Court had to say about the law:

> Under state law, however, there is a two-year limitation period on such a claim, *Palmer v. State*, 106 Nev. 151, 787 P.2d 803, 804 (1990), and a federal court sitting in diversity applies state's statute of limitation. *Nevada Power Co. v. Monsanto Co.*, 955 F.2d 1304, 1306

[4] Based upon the context of the limited amount of factual description the undersigned speculates that it was a defamation claim—we apparently will never know.

(9th Cir.1992); *see also Muldoon v. Tropitone Furniture Co.,* 1 F.3d 964, 966 (9th Cir.1993).

Torre v. J.C. Penney Co., Inc., 916 F.Supp 1029, 1030-31 (D.Nev. 1996). That's it. No reasoning, no analysis, just a citation to Palmer which ***does not say*** that the statute of limitations for a Retaliatory Discharge claim is two years. Note that *Torre* does not even bother to cite NRS 11.190(4)(e)! The case literally pulls the two year period out of thin air. It did not analyze why NRS 11.220's four year catch-all period would not apply. This case, *Torre*, appears to be the genesis of 22 years of federal courts applying the wrong statute of limitations to Retaliatory Discharge cases.

Respondent also cites a case *Perez v. Seevers*, 869 F.2d 425 (1989) which is a 42 U.S.C. §1983 civil rights case. Respondent reads too much into the *Perez* case. Section 1983 cases under federal law use the personal injury statute of limitations for the state in which the action accrues. The leading case is *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985) wherein the Supreme Court of the United States noted that under 42 U.S.C. §1988 the law of the forum state is used for statute of limitations purposes because 42 U.S.C. §1983 does not have its own express limitations provision. In *Wilson* the claim was that a New Mexico state police officer unlawfully arrested the plaintiff and brutally and viciously beat him and tear gassed him. In short *Wilson* was a personal physical injury

cases. The U.S. Supreme Court abandoned it previous rule that had courts look to the most analogous state statute of limitations and instead made a blanket determination that 42 U.S.C. §1983 cases are generally personal injury cases, involving deprivation of constitutional rights, and that state statutes of limitations for personal injury should be used. The court noted that the catalyst for passing the civil rights statute in 1871 was to provide a federal remedy for violent attacks by the Ku Klux Klan, which were often aided and abetted by local officials in the south. These were personal injury type claims for the most part. So it is with that history in mind that the *Perez v. Seevers* court applied NRS 11.190(4)(e) in a 42 U.S.C. §1983 originating in Nevada. The *Perez* case merely followed *Wilson v. Garcia* and adopted the two year limit in 11.190(4)(e) for 42 U.S.C. §1983federal claims arising in Nevada. The *Perez* opinion is bereft of any factual information about the nature of the claim, but as it involved a Nevada state trooper it would seem that some level of personal injury or police misconduct involving physical force may have been alleged. In the end §1983 claims are often physical force or negligent personal injury cases where NRS 11.190(4)(e) makes sense to apply. Section 1983 claims are very dissimilar from a Retaliatory Discharge claim like Ms. Patush's here where she was fired from her job in retaliation for filing a workers'

compensation claim against her employer, the owner of Larry Flynt's Hustler Club in Las Vegas.

CONCLUSION

In accordance with the above and the arguments set forth in Appellant's Opening Brief, this court should REVERSE the dismissal order entered against Appellant in this case and REMAND the matter to the District Court for trial.

RESPCTFULLY SUBMITTED this 13th day of November 2018.

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ATTORNEY'S CERTIFICATION IN COMPLIANCE WITH RULE 28.2 OF THE NEVADA RULES OF APPELLATE PROCEDURE

James P. Kemp, Attorney for Appellant, by signing below herby certifies in compliance with Rule 28.2 of the Nevada Rules of Appellate Procedure that:

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

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman size 14 font;

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:

Proportionately spaced, has a typeface of 14 points or more, and contains 3,939 words;

3. Finally, I hereby certify that I have read this appellate 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 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 accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 13th day of November 2018

/s/ James P. Kemp

JAMES P. KEMP, ESQ., Bar No.6375

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 13, 2018, I filed the foregoing Appellant's REPLY BRIEF through the Supreme Court of Nevada's electronic filing system along with the Appellant's Appendix. Electronic service of the foregoing shall be made in accordance with the Master Service List as follows:

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DATED this 13th day of November 2018

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