**IN THE SUPREME COURT OF THE STATE OF NEVADA**

THYSSENKRUPP ELEVATOR CORPORATION

Petitioners,

v

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOANNA KISHNER, DISTRICT JUDGE

Respondents,

JOE N. BROWN, an individual, and his wife, NETTIE J. BROWN, an individual

Real Parties in Interest



# PETITION FOR WRIT OF MANDAMUS

Rebecca L. Mastrangelo, Esq.
Charles A. Michalek, Esq.
ROGERS, MASTRANGELO, CARVALHO & MITCHELL
700 South Third Street
Las Vegas, Nevada 89101
Telephone: 702-383-3400
Facsimile: 702-384-1460
*Attorneys for Petitioners*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Nevada Cases**

**Federal and Other Jurisdiction Cases**

**Statutes and Other Authorities**

## VERIFIED PETITION FOR WRIT OF MANDAMUS

Petitioner/Third-Party Defendant, THYSSENKRUPP ELEVATOR CORPORATION, by and through its counsel of record, Rebecca L. Mastrangelo, Esq., and Charles A. Michalek, Esq., of the law firm of Rogers, Mastrangelo, Carvalho & Mitchell, hereby respectfully submits this Petition for Writ of Mandamus. Petitioner provides the Court with the following affidavit in support of this verified Petition:

1. Petitioner herein is Third-Party Defendant below, in the case of Joe N. Brown, an individual, and his wife, Nettie J. Brown, an individual, Plaintiffs, v. Landry's, Inc., a foreign corporation; Golden Nugget, Inc., a Nevada corporation d/b/a Golden Nugget Laughlin; GNL Corp., a Nevada corporation; DOE Individuals 1-100; ROE Business Entities 1-100, Defendants. (District Court Case No. A-16-739887-C.)

2. The action below involves a fall by Plaintiff Joe Brown which occurred on an escalator at the Golden Nugget Laughlin ("GNL") on **May 12, 2015**. Plaintiffs' Complaint was filed on **July 12, 2016** (1 P.A. 0001-0006) and their First Amended Complaint was filed on **September 1, 2016.** (1 P.A. 0009-0014.)

3. Plaintiffs' First Amended Complaint alleges that Defendants GNL, Golden Nugget and Landry's owed Plaintiffs a duty of care, and that they negligently designed, installed, operated and maintained the stairs, railings and /or escalators,

causing injuries and damages to Plaintiffs. Notably, although DOE Defendants are named in the caption of the First Amended Complaint, no specific allegations of negligence are alleged against any DOE Defendant in the body of the First Amended Complaint. (1 P.A. 0009-0014.)

4. Plaintiffs were provided documents pursuant to NRCP 16.1 on **November 9, 2016**, including the maintenance agreement between GNL and ThyssenKrupp Elevator Corporation ("TKE"). (1 P.A. 0029-0140.)

5. After Plaintiffs filed suit against GNL, GNL then filed a Third-Party Complaint against TKE alleging breach of contract, breach of express and implied warranties, and seeking apportionment and contribution as well as equitable indemnification against TKE. (1 P.A. 0144-0153.)

6. TKE filed its Answer to the Third Party Complaint on **February 17, 2017**, three months prior to the running of the two-year statute of limitations codified in NRS 11.190(4)(e). (1 P.A. 0154-0159.) The Answer admitted that TKE was responsible for maintenance on the subject escalator. (1 P.A. 0155.)

7. Plaintiffs allowed the statute of limitations to expire without moving to amend their Complaint to assert a direct cause of action against TKE. Plaintiffs waited until **July 4, 2018 at 12:01 a.m.** to file a Motion to Amend. (1 P.A. 0183-0195.)

8. The trial court granted Plaintiffs' motion, stating that the "totality" of the circumstances justified amendment of the Complaint. (2 P.A. 0409).

9. However, the order drafted by Plaintiffs' counsel, and signed by the court, included many findings of fact and conclusions of law that were never discussed at the hearing, nor made the basis of the court's ruling. (2 P.A. 0411-0416.)

10. As an example, the order claims that discovery was not produced showing that TKE knew there were "cracks" in the escalator steps until months after the statute of limitations expired. (2 P.A. 0413.) However, GNL produced an email from TKE which addressed that very issue. (1 P.A. 0105.) This production was provided to Plaintiff on **November 9, 2016.**

11. Although Petitioners have the ability to appeal a final judgment, an appeal does not always constitute an adequate and speedy remedy that precludes writ relief, depending on the circumstances. Petitioner contends that no factual dispute exists concerning the above stated facts, and the district court was obligated to dismiss an action pursuant to clear authority under a statute or rule. Alternatively, Petitioner contends that resolution of the interaction between third-party defendants under NRCP 14 and the statute of limitations is an important issue of law that needs clarification, and considerations of sound judicial economy and administration militate in favor of granting this petition. *Nevada Checker Cab Corp. v. Eighth Judicial Dist. Court of State, ex rel. County of Clark*, 2016 WL 482099, at *1 (Nev. Feb. 3, 2016) citing *State v. Eighth Judicial Dist. Court* (Anzalone ), 118 Nev. 140, 147, 42 P.3d 233, 238 (2002).

12 Petitioner believes that this Writ is presumptively retained by the

Supreme Court pursuant to NRAP 17(a)(11) as a question of statewide public importance.

**WHEREFORE,** based on the accompanying Points and Authorities, Petitioner respectfully requests this Court to grant the Petition for Writ of Mandamus.

DATED this 16th day of October, 2018.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

Rebecca L. Mastrangelo, Esq.
Nevada Bar No. 5417
Charles A. Michalek, Esq.
Nevada Bar No. 5721
700 S. Third Street
Las Vegas, Nevada 89101
Attorney for Petitioners
THYSSENKRUPP ELEVATOR CORPORATION

## VERIFICATION

Under the penalty of perjury, the undersigned declares that she is the attorney of record for Petitioners named in the foregoing Writ Petition and knows the contents thereof; that the pleading is true of her own knowledge, except as to those matters stated on information and belief, and that as such matters she believes to be true. This verification is made by the undersigned attorney pursuant to N.R.S. 15.010, on the ground that the matters stated, and relied upon, in the foregoing petition are all contained in the prior pleadings and other record of the district court, true and correct copies of which have been attached hereto.

Executed this 16th day of October, 2018.

Rebecca L. Mastrangelo, Esq.

SUBSCRIBED AND SWORN to before me
this 16 day of October, 2018.

NOTARY PUBLIC

LAURA FITZGERALD
Notary Public, State of Nevada
Appointment No. 93-0979-1
My Appt. Expires June 26, 2021

## ROUTING STATEMENT (NRAP 17 STATEMENT)

Petitioner believes that this Writ is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(11) as a question of statewide public importance, as there is a conflicting application between NRCP 10, 14 and 15.

## NRAP 26.1 DISCLOSURE STATEMENT

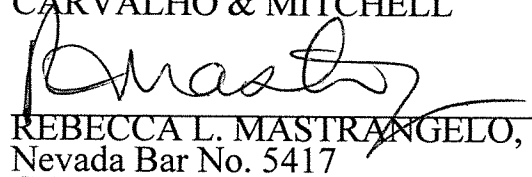
The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Petitioner Thyssenkrupp Elevator corp is wholly owned by Thyssenkrupp Americas Corp which is 100% owned by Thyssenkrupp North America which is 100% owned by Thyssenkrupp AG.

2. Respondents were separately represented by current counsel in matters before the District Court, the law firm of ROGERS, MASTRANGELO, CARVALHO & MITCHELL, Rebecca Mastrangelo and Charles Michalek.

DATED this 16 day of October, 2018.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL



REBECCA L. MASTRANGELO, ESQ.
Nevada Bar No. 5417
CHARLES A. MICHALEK
Nevada Bar No. 5721
700 S. Third Street
Las Vegas, Nevada 89101
Attorneys for Petitioners

# POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

## I. STATEMENT OF FACTS

### A. Facts of the Underlying Premises Liability Case

This case involves an incident which occurred on May 12, 2015, on the down escalator at the Golden Nugget Laughlin ("GNL"). Plaintiffs' First Amended Complaint, filed on September 1, 2016, alleges as follows (1 P.A. 0011):

> 11. Joe Brown, who suffered shrapnel wounds in his legs while serving overseas and uses a cane when he walks, boarded the Laughlin escalator last.
>
> 12. When Joe Brown stepped onto the Laughlin Nuggets Escalator, the stair he stood on was loose and unstable.
>
> 13. Because the Laughlin Nugget escalator stairwell was narrow, Joe Brown was unable to steady himself with his cane. He reached for the escalator handrail, but was blocked by a stationary metal railing running the length of the escalator and was unable to steady himself with the handrail.
>
> 14. As a result, Joe Brown lost his balance and fell down the Laughlin Nugget escalator.

Plaintiffs' First Amended Complaint alleges that Defendants GNL, Golden Nugget and Landry's owed Plaintiffs a duty of care, and that they negligently designed, installed, operated and maintained the stairs, railings and /or escalators, causing injuries and damages to Plaintiffs. Notably, although DOE Defendants are named in the First Amended Complaint, no specific allegations of negligence are alleged against them. Thyssenkrupp Elevator Corporation ("TKE") was never named in the First Amended Complaint in any capacity. (1 P.A. 0009-0014.) As outlined by TKE at the hearing, Plaintiffs never intended to bring a cause of action against any

maintenance company, because the complaint did not include any proper DOE allegations which would have been required to utilize NRCP 10. (2 P.A. 0404):

> This motion, as far as Thyssenkrupp is concerned, is not even a close call.
>
> The whole purpose of naming Doe defendants in a complaint is when you don't know the identity of that defendant and later you find out who it is and you substitute. Here, he knew the identity well before the statute of limitations ran. He's always known the identity. Thyssenkrupp has been in this case before the statute of limitations ran, and even when Thyssenkrupp got in the case, he waited another year and a half to file this motion.
>
> So even if you had everything else working, Judge, he still hasn't named any allegations against Doe Defendant Escalator Maintenance Company in either the first amended complaint or the original complaint. There is nothing in there that says maintenance company was negligent. Nothing in there at all. That does not satisfy Nurenberger, it does not satisfy his Doe defendant allegations.

DOE Defendants are only present in the caption of the First Amended Complaint, and in one generic paragraph, which states that these unnamed Defendants are somehow responsible for the incident, without actually explaining why. (1 P.A. 0010):

> The true names and capacities of Defendants DOE Individuals 1 through 100, are presently unknown to Plaintiffs, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes, and thereupon alleges that each Defendant designated as DOE Individuals 1 through 100 are legally responsible for the events referred to herein. The First Amended Complaint will be amended to include them when their true names and capacities become known.

Several months prior to the running of the statute of limitations, Plaintiffs were made award that Thyssenkrupp was the maintenance company responsible for servicing the subject escalator. (1 P.A. 0155.) Defendant GNL provided Plaintiffs a copy of the maintenance agreement and the service records on November 9, 2016. (1 P.A. 0029-0140.)

**B. Facts concerning the Writ.**

GNL filed a Third-Party Complaint against TKE alleging breach of contract, breach of express and implied warranties, and seeking apportionment and contribution as well as equitable indemnification against TKE. (1 P.A. 0154-0159.) The Third-Party Complaint specifically alleged that TKE was responsible for the maintenance and upkeep on the subject escalator which allegedly injured Plaintiffs. (1 P.A. 0146.) Thyssenkrupp answered on **February 17, 2017**, admitting that it maintained the subject escalator pursuant to the produced maintenance agreement. (1 P.A. 0155.) Despite this admission, Plaintiffs claimed at the hearing that they did not know of TKE's maintenance role until "months" later. (2 P.A. 0408.)

Plaintiffs' claims are for personal injuries and are thus governed by the two-year statute of limitations codified in NRS 11.190(4)(e). The statute of limitations had clearly expired prior to Plaintiffs' Motion to Amend, which was untimely and did not comply with Nevada law. Plaintiffs waited until July 4, 2018, to move to amend the complaint to bring in TKE as a Defendant. (1 P.A. 0183-0195.) TKE opposed the motion. (2 P.A. 0307-0326.) Plaintiffs filed a reply. (2 P.A. 0383-0394.)

At the hearing on the Motion to Amend on August 7, 2018, the trial court referenced Plaintiffs' DOE paragraph, and the court asked if the DOE paragraph was sufficient to put TKE "on notice" of the lawsuit. Plaintiffs acknowledged that

they knew of Thyssenkrupp, but claimed ignorance as to its role in maintenance of the property, and also argued for a lack of prejudice to TKE. (2 P.A. 0407-0408):

> THE COURT: Part of Thyssenkrupp's argument is on the Roes, right? So paragraph 7 is your Roes.
>
> The true names and capacities of Defendants DOE Individuals 1 through 100, are presently unknown to Plaintiffs, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes, and thereupon alleges that each Defendant designated as DOE Individuals 1 through 100 are legally responsible for the events referred to herein. The First Amended Complaint will be amended to include them when their true names and capacities become known.
>
> So would you argue that that is or is not sufficient to put –
>
> Mr. Iqbal: Your Honor, under – under the standard we – we knew of Thyssenkrupp, obviously, they were brought in. We did not know their role in – in the defects, we did not role – know their role in the maintenance, we did not know that these e-mails were going back and forth and that they sat on their hands, Your Honor.
>
> And do when you look at 15(a), when you look at Costello, you can relate back, you can relate back when the – when there's no prejudice. And they've literally conducted discovery, which is still ongoing, as if they've been in this – against Plaintiffs.

Plaintiffs were on notice of the alleged role of Thyssenkrupp long before the statute ran. Defendant GNL served its Initial List of Witnesses and Documents pursuant to NRCP 16.1 on **November 9, 2016**, which documents included the maintenance agreement between GNL and TKE pertaining to the subject escalator as well as the escalator service records. (1 P.A. 0029-0140.) Thus, Plaintiffs were specifically on notice that there was an escalator maintenance company potentially responsible for the injury. Yet, Plaintiffs waited until **July 4, 2018 at 12:01 a.m.** to file a Motion to Amend. (1 P.A. 0183.)

At the hearing, it was the determination of the trial court that "all the circumstances" justified an allowance of amendment of the complaint. (2 P.A.

0409). This ruling was in error, as the court never made findings that complied with the standards under either NRCP 15 (*Costello v. Casler*, 127 Nev. 436, 440–41, 254 P.3d 631, 634 (2011)) or NRCP 10 (*Nurenberger Hercules-Werke GMBH v. Virostek*, 107 Nev. 873, 881, 822 P.2d 1100 (1991)). The district court was obligated to deny Plaintiffs leave to amend, pursuant to these clear authorities.

Subsequent to the hearing, Plaintiffs' counsel drafted an order for the trial court's signature. ( 2 P.A. 0411-0416). The order states that maintenance of the escalators "has always been an issue known to the parties in this case," and that the interest of justice requires TKE's inclusion as a direct defendant. (2 P.A. 0415.)

The order also alleges several other "factual findings," that the trial court never addressed nor found at the hearing. The order states that Plaintiffs were unaware of TKE's role in the maintenance of the escalator until after the pleadings were filed, that TKE did not allege or demonstrate prejudice, and that TKE withheld evidence concerning its culpability, which was a "basis" for permitting the amendment. (2 P.A. 0411-0416.) This assertion is untrue, as Plaintiffs' received the so called "hidden" documents in the very first ECC production by GNL on November 9, 2016. (1 P.A. 0105-0119.) What the order does not address is the actual factors required by NRCP 15 or NRCP 10 in allowing amendment of the complaint and the prejudice due to the running of the statute of limitations.

## II.

## STANDARD OF REVIEW

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." *Humphries v. Eighth Judicial Dist. Court*, 129 Nev., Adv. Op. 85, 312 P.3d 484, 486 (2013) (quoting *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (footnote omitted)); see also NRS 34.160. "Normally, this court will not entertain a writ petition challenging the denial of a motion to dismiss," *Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010), but may do so when "(1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule; or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition," *Nevada Checker Cab Corp. v. Eighth Judicial Dist. Court of State, ex rel. County of Clark*, 66349, 2016 WL 482099, at *1 (Nev. Feb. 3, 2016); *State v. Eighth Judicial Dist. Court (Anzalone)*, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002). See also *Gardner on Behalf of L.G. v. Eighth Judicial Dist. Court in & for County of Clark*, 405 P.3d 651, 654 (Nev. 2017) (writ petition challenging a district court's denial of leave to amend their complaint).

In the present case, there are no factual disputes concerning the First Amended Complaint and the ECC documents and Third-Party Complaint (and

Answer thereto) establishing notice prior to the running of the statute of limitations. Under clear Nevada law, TKE asserts that the district court was obligated to deny leave to amend based upon long standing case authorities.

Pursuant to NRAP 17(a)(11), the relationship between NRCP 14 and NRCP 15 is an important issue that needs clarification and/or is of public importance, and so writ relief would be appropriate under this alternate scenario:

> We acknowledge that the ability to appeal a final judgment may not always constitute an adequate and speedy remedy that precludes writ relief, depending on the "underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented." *D.R. Horton v. Dist. Ct.*, 123 Nev. 468, 474–75, 168 P.3d 731, 736 (2007). Thus, we may consider writ petitions challenging the admission or exclusion of evidence when " 'an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction,' " *Sonia F. v. Dist. Ct.*, 125 Nev. 38, ——, 215 P.3d 705, 707 (2009) (quoting Mineral County, 117 Nev. at 243, 20 P.3d at 805), or when the issue is "one of first impression and of fundamental public importance," County of Clark v. Upchurch, 114 Nev. 749, 753, 961 P.2d 754, 757 (1998). We may also consider whether resolution of the writ petition will mitigate or resolve related or future litigation. *Id.* Ultimately, however, our analysis turns on the promotion of judicial economy. *Smith v. District Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997) ("The interests of judicial economy ... will remain the primary standard by which this court exercises its discretion.").

*Williams v. Eight Judicial Dist. Court of State, ex rel. County of Clark*, 127 Nev. Adv. Op. 45, 262 P.3d 360, 364 65 (2011). In *Williams,* this Court allowed a writ petition concerning the scope of a nurse's testimony as to medical causation:

> We conclude that an exception to our normal rule rejecting writ petitions challenging evidentiary rulings is necessary in this matter, and we exercise our discretion to consider these writ petitions. These petitions involve issues of first impression regarding whether a nurse can offer expert testimony about medical causation and the appropriate standard for defense expert testimony regarding alternative theories of medical causation, and these issues have the potential of being repeated in the many endoscopy cases pending before the district court. We also conclude that, in this narrow instance, waiting for an appeal to resolve these issues does not provide the parties with an adequate or speedy remedy because the ongoing litigation of multiple cases in the district court and conflicts in evidentiary rulings limits

> our ability to meaningfully review the issues on appeal. We reemphasize, however, that generally this court will not consider writ petitions challenging evidentiary rulings, as those rulings are discretionary and there typically is an adequate remedy in the form of an appeal following an adverse final judgment. However, in the interest of judicial economy, it is necessary to resolve the issues presented in these writs.

Id. at 365. The present case presents issues of significant import and presents issues that present public policy concerns as well as judicial economy, and the relationship between NRCP Rules 14 and 15. The Supreme Court should thus retain jurisdiction of this writ pursuant to NRAP 17(a)(11).

## III.

## STATEMENT AS TO WHY THE WRIT SHOULD ISSUE

TKE requests that this writ be granted for the following reasons:

1. The trial court's granting of amendment of the Complaint was improper under either NRCP 15 or NRCP 10;
2. The applicable statute of limitations expired;
3. Plaintiffs' failure to sue Thyssenkrupp prior to the running of the statute of limitations was a legal choice pursuant to *Reid v. Royal Ins. Co.*, 80 Nev. 137, 390 P.2d 45 (1964);
4. Plaintiffs' original pleadings did not name specific DOE Defendants to comply with NRCP 10, but instead utilized them as a catch-all as a precaution in violation of *Nurenberger* and *Cruz v. Durbin*, 2014 WL 5449710, at *3–4 (D. Nev. Oct. 17, 2014); and
5. Plaintiffs did not exercise reasonable diligence in moving to amend.

Plaintiffs should not have been allowed to amend their complaint to name Thyssenkrupp as a Defendant, as Plaintiffs had sufficient knowledge of Thyssenkrupp's role in the maintenance of the subject escalator well prior to the running of the statute, and Plaintiffs deliberately chose not to sue Thyssenkrupp before the statute ran. See *Reid v. Royal Ins. Co.*, 80 Nev. 137, 141, 390 P.2d 45,

47 (1964). As a Third-Party Defendant of which Plaintiffs knew but failed to timely sue, Thyssenkrupp was allowed to rely upon the running of the statute of limitations, and will now be unfairly prejudiced if a direct action is now allowed against it.

An amended pleading adding a defendant that is filed after the statute of limitations has run will relate back to the date of the original pleading under NRCP 15(c) if "the proper defendant (1) receives actual notice of the action; (2) knows that it is the proper party; and (3) has not been misled to its prejudice by the amendment." *Costello v. Casler*, 127 Nev. 436, 440–41, 254 P.3d 631, 634 (2011). NRCP 15(c) is to be liberally construed to allow relation back of the amended pleading where the opposing party will be put to no disadvantage. Here, TKE will clearly be disadvantaged, as the statute has run. *Grice v. CVR Energy, Inc*, 2016 WL 7495818, at *2 (N.D. Okla. Dec. 30, 2016).

Additionally, Plaintiffs' proposed Second Amended Complaint could not be proper under NRCP 10, which requires compliance with the factors outlined in *Nurenberger Hercules–Werke GMBH v. Virostek*, 107 Nev. 873, 881, 882 P.2d 1100 (1991). Plaintiffs' original and First Amended Complaints did not comply with these factors, as there were no identifiers for DOE Defendants and no actual allegations contained in the complaint against them. Finally, the motion was untimely, as Plaintiffs waited more than a year to file it.

## IV.

## LEGAL ARGUMENT

### A. Leave to amend Plaintiffs' Complaint under NRCP 15 should have been denied as the statute of limitations had run.

NRCP 15(a) provides that leave to amend a complaint shall be "freely given when justice so requires." However, leave to amend should not be granted if the proposed amendment would be futile. See *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013), as corrected (Aug. 14, 2013); *Allum v. Valley Bank of Nev.*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993). A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim. See *Soebbing v. Carpet Barn, Inc.*, 109 Nev. 78, 84, 847 P.2d 731, 736 (1993).

Where claims are barred by the statute of limitations, the trial court may dismiss the plaintiff's claims without leave to amend because the amendment would be futile. *Andersen v. Portland Saturday Mkt.*, 2018 WL 2917357, at *2 (D. Or. June 11, 2018), citing *Platt Elec. Supply Inc. v. EOFF Elec. Inc.*, 522 F.3d 1049, 1060 (9th Cir. 2008). See also *Deutsch v. Turner Corp.*, 324 F.3d 692, 718 n. 20 (9th Cir. 2003) (denying leave to amend in part because the 10–year statute of limitations on the claim had run and thus, "permitting Deutsch to amend his complaint would be futile"); *American Stock Exchange, LLC v. Mopex, Inc.*, 230 F.Supp.2d 333, 337 (S.D.N.Y. 2002) (denying leave to amend to add a new claim "[b]ecause amending its pleading to assert this time-barred claim would be

futile"); *In re Dynamic Random Access Memory Antitrust Litigation*, 516 F.Supp.2d 1072, 1113 (N.D. Cal. 2007) (denying leave to amend as futile in part because "the statute of limitations bars the claim").

Several months prior to the running of the statute of limitations, Plaintiffs were made award that Thyssenkrupp was the maintenance company responsible for servicing the subject escalator through records provided by Defendant GNL, including a copy of the maintenance agreement and the service records produced on **November 9, 2016.** (1 P.A. 0029-0140.) Plaintiffs did not choose to amend their complaint following this production.

GNL then filed a Third-Party Complaint against Thyssenkrupp, which Thyssenkrupp answered on February 17, 2017, admitting that Thyssenkrupp maintained the subject escalator pursuant to the produced maintenance agreement. (1 P.A. 0154-0159). Plaintiffs did not amend the complaint following this admission.

The two-year statute of limitations codified in NRS 11.190(4)(e) ran on May 15, 2017. Plaintiffs waited until **July 4, 2018**, to move to amend the complaint to bring in Thyssenkrupp as a Defendant. As a Third-Party Defendant under NRCP 14, Thyssenkrupp was entitled to rely upon the running of the statute of limitations as a basis for denial of leave to amend. *Grice v. CVR Energy, Inc*, 2016 WL 7495818, at *2 (N.D. Okla. Dec. 30, 2016). Thus, amendment of Plaintiffs' Complaint would be futile and leave should have been denied. The trial

court never addressed the running of the statute of limitations, and the cases cited in TKE's opposition which stated that the running of the statute of limitations would bar an untimely Third-Party Complaint. (2 P.A. 0307-0326.)

**1. Leave to amend to add a new party can be governed by NRCP 15 only if compliance with Costello is shown.**

Although not directly specified, NRCP 15 allows the relation back effect of NRCP 15(c) to apply to the addition or substitution of parties. *Costello v. Casler*, 127 Nev. 436, 440, 254 P.3d 631, 634 (2011). Pursuant to *Costello*, an amended pleading adding a defendant that is filed after the statute of limitations has run will relate back to the date of the original pleading under NRCP 15(c) if "the proper defendant (1) receives actual notice of the action; (2) knows that it is the proper party; and (3) has not been misled to its prejudice by the amendment." Id. at 634.

Federal law allows for the addition of new parties following the running of the statute of limitations pursuant to FCRP 15(c), which states:

> (c) Relation Back of Amendments.
>
> > (1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:
> >
> > > (A) the law that provides the applicable statute of limitations allows relation back;
> > >
> > > (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or
> > >
> > > (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Thus, for purposes of amendment under NRCP 15, both Nevada and federal law require that the defendant know that it is a proper party, and suffer no prejudice with the amendment. The *Costello* court allowed relation back because the proposed complaint effected no real change in the parties, as the complaint simply substituted the estate for the deceased defendant. *Costello v. Casler*, 127 at 442–43, 254 P.3d at 636:

> Allowing the amendment to relate back to the date of the original complaint will not prejudice Casler's estate or American Family Insurance. Although, in order to pursue her claim, Costello was required to name Casler's estate, the substance of the proposed amended complaint effected no real change as Costello's claim remained the same. American Family Insurance would presumably be required to defend the suit regardless of whether Casler was dead or alive. Further, there is no allegation that the amendment would cause any real prejudice to the estate or American Family Insurance. As a result, the requirements of Echols are met—through American Family Insurance, the estate had actual notice of the action, knew it was the proper party, and will suffer no prejudice from the amended pleading. We emphasize that the approach we adopt to relation back under NRCP 15(c) does not transform an insurer into an agent for service of process. We are dealing with the notice and knowledge requirements of NRCP 15(c) and whether, on the facts before us, they were met for purposes of relation back. We hold that they were. We therefore conclude that the district court erred in denying Costello leave to amend her complaint to add Casler's estate as a defendant. Consequently, summary judgment was improper.

The circumstances in the present case are far different from *Costello*. Case law from numerous jurisdictions holds that the relation back effect of FRCP 15 does not apply to third-party defendants added under FRCP 14. See *Frankel v. Back*, 37 F.R.D. 545, 548–49 (E.D. Pa. 1965).

Moreover, Plaintiffs knew of Thyssenkrupp's identify and role in the maintenance of the subject escalator before the running of the statute, but failed to timely sue it. Plaintiffs must be held to that choice. TKE would now be unfairly prejudiced if amendment of the complaint is allowed.

**2. The relation back effect of FRCP 15 does not apply to a Third-Party Defendant added under FRCP 14 .**

The relation back effect of FRCP 15 does not apply to a Third-Party Defendant added under FRCP 14. See *Frankel v. Back*, 37 F.R.D. 545, 548–49 (E.D. Pa. 1965) (emphasis added):

> In the instant case, plaintiff never filed a claim against the third party defendant so that the requested amendment would amount to an original claim against the third party defendant after the statute of limitations has run and not the amendment of a pleading already filed setting forth a claim against the third party defendant.
>
> On the basis of the foregoing opinion, the plaintiff's motion to amend his complaint to assert a claim against the third party defendant directly should be denied.

See also *Grice v. CVR Energy, Inc*, 2016 WL 7495818, at *2 (N.D. Okla. Dec. 30, 2016):

> Put differently, when a plaintiff seeks to charge a third-party defendant with liability after a statute of limitations has run, such claim is barred, whether raised under Rule 14(a) or otherwise.

See also *Coons v. Indus. Knife Co., Inc.*, 620 F.3d 38, 43 (1st Cir. 2010):

> The district court carefully considered the parties' arguments as they were presented. It first rejected Coons's Rule 14 argument, and rightly so. Rule 14(a)(3) delineates the circumstances in which a plaintiff may assert claims against a newly added third-party defendant, but it has nothing to say about whether such third-party claims are timely. See *D'Onofrio Constr. Co. v. Recon Co.*, 255 F.2d 904, 910 (1st Cir.1958) (noting that "Rule 14 does not purport to deal with the statute of limitations"); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1459 (3d ed. 2010) ("The fact that [a] third party has been brought into the action does not revive any claims the original plaintiff may have had against the third party that should have been asserted earlier but have become

unenforceable."). The question of timeliness is governed by the applicable statute of limitations, subject to the relation back doctrines of Rule 15(c).

TKE is not, and has never been, a direct Defendant, but only a Third-Party Defendant under NRCP 14. And, as a Third-Party Defendant under NRCP 14, TKE is entitled to assert the expiration of the statute of limitations as to any direct claim against it by Plaintiffs. See e.g., *Bishop v. Atmos Energy Corp.*, 161 F.R.D. 339, 340–41 (W.D. Ky. 1995); citing Wright & Miller, Federal Practice and Procedure, § 1459, p. 450; 3 Moore's Federal Practice § 14.09; and *Frankel v. Back*, 37 F.R.D. 545, 547–48 (E.D.Pa.1965) (holding that a statute of limitation will bar untimely claims asserted by plaintiffs against third-party defendants). See also *Netherlands Ins. Co. v. MD Plumbing & Heating, LLC*, 2011 WL 832555, at *2 (D. Conn. Mar. 3, 2011):

> As this Court has previously had occasion to recognize, it is well established that under Rule 14(a)(3), "any claim existing between plaintiff and the third-party defendant is subject to the applicable statute of limitations; the statute is neither tolled nor waived upon the third-party defendant's entry into the action but continues to run until the plaintiff actually asserts the claim against the third-party defendant, or, if the time period runs before the action is commenced, serves as a bar to the claim at the outset." 6 Charles Alan Wright, Arthur R. Miller & Mary Kaye Kane, Federal Practice and Procedure § 1459, at 526 (3d ed.2010); see *Gouveia v. Sig Simonazzi North America, Inc.*, No. 3:03cv597 (MRK), 2005 WL 293506, at *2 (D.Conn. Jan. 11, 2005) (denying leave to amend complaint to add direct claims against a third-party defendant where the statute of limitations on those claims had run).

See also *Fed. Ins. Co. v. Lighthouse Const., Inc.*, 230 F.R.D. 387, 390 (D. Del. 2005):

> Courts interpreting Rule 14(a) have not permitted the rule to be used to add a claim whichis barred by the applicable statute of limitations. See e.g. *Dysart v. Marriott Corp.*, 103 F.R.D. 15, 18 (E.D.Pa.1984) (permitting plaintiff to file a claim against third-party defendant under Rule 14(a) "at

> any time before the statute of limitations has run"); *Carroll v. USA*, 149 F.R.D. 524, 527 (W.D.La.1993) (holding that Rule 14(a) "does not envision the revival of an action barred by the statute of limitations"). In this case, Federal's claim arose from the partial roof collapse on February 17, 2003. The applicable statute of limitations for this action is two years as provided in 10 Del. C. § 8107. However, Federal did not file its Motion For Leave To File Rule 14(a) Claim Against East Coast until March 8, 2005, shortly after the expiration of the two-year limitations period. Federal has not made any argument that the statute of limitations should be tolled, and therefore, the Court concludes that Federal's claim against East Coast is barred by the statute of limitations.

Plaintiffs were aware of TKE's role in maintaining the subject escalator as Plaintiffs were provided with the maintenance agreement on November 9, 2016, long before the running of the statute of limitations. (1 P.A. 0029-0140). Additionally, TKE answered the Third-Party Complaint on February 17, 2017, admitting that it maintained the escalator in question. (1 P.A. 0154-0159).

The statute of limitations expired on May 11, 2017. Thus, Plaintiffs had an abundance of time within which to file a direct action against TKE, but decided not to do so. A plaintiff does not have to accept a third-party defendant into its case if it does not wish to do so. This decision by the Brown Plaintiffs was not a mistake, but a deliberate choice. See *Reid v. Royal Ins. Co.*, 80 Nev. 137, 141, 390 P.2d 45, 47 (1964):

> However, if a new party is impleaded, it is optional with the plaintiff whether he will accept the third-party defendant as a defendant in his (the plaintiff's) case. The rule is clear in this respect. It states: 'The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.
>
> Because of these clearly defined principles, it is apparent, in the case before us, that the judgment for the plaintiffs against the third-party defendant (subcontractor) cannot stand. The plaintiffs never sought to impose a liability upon the subcontractor. Even after the subcontractor was impleaded by the named defendant (contractor) the plaintiffs did not choose to amend their complaint to accept the subcontractor as an additional defendant in

their case. We can only conclude that they were satisfied with the validity of their case against the general contractor and were willing to win or lose on that claim for relief.

**3. <u>TKE could not have known that Plaintiffs would seek to add it as a Defendant once the statute ran, and such amendment is now unfairly prejudicial.</u>**

TKE could not have known that Plaintiffs would seek to hold it liable after the filing of the Third-Party Complaint, and TKE was clearly allowed to rely upon the absence of such allegations when the statute of limitations ran on May 11, 2017, more than a year prior to Plaintiffs filing of their Motion to Amend. See *Curry v. Johns-Manville Corp.*, 93 F.R.D. 623, 626–27 (E.D. Pa. 1982) (emphasis added):

> Moreover, the more reasonable inference to draw from the circumstances of this case is that third-party defendants had no reason to know, prior to the filing of plaintiffs' motion for leave to amend, that plaintiffs wished to assert direct claims against them. Plaintiffs presumably made some determination prior to filing their complaint of who most likely sold the products to which Mr. Curry was exposed. Tactical considerations may have entered into plaintiffs' decision to sue only the original defendants, instead of launching a broader attack on the asbestos industry. Pacor's decision to bring additional parties into the suit may also have been based in part on tactical considerations. To the extent Pacor's joinder of additional asbestos sellers was based on better information than that hitherto available to plaintiffs, plaintiffs certainly knew the identities of these additional companies by June of 1981. At that point, plaintiffs had four months within which to move for leave to amend before October 17, 1981, when their cause of action would arguably become barred according to the allegations of their own complaint. However, plaintiffs made no attempt to assert direct claims against the third parties until November. Under these circumstances, third-party defendants may have inferred quite reasonably that plaintiffs' failure to take prompt action to assert direct claims against them was a matter of deliberate tactical choice, not error.

Plaintiffs knew, almost from the beginning of this litigation, that TKE was a potential party. Plaintiffs chose not to sue TKE before the statute ran, even after

TKE was made a Third-Party Defendant. Plaintiffs must live with the deliberate choice that they made. See *Netherlands Ins. Co. v. MD Plumbing & Heating, LLC*, 2011 WL 832555, at *3 (D. Conn. Mar. 3, 2011):

> While Netherlands Insurance is surely correct that Allied Sprinkler and Central Connecticut Fire both had notice such that they would not be prejudiced in defending claims brought directly by Netherlands Insurance, see Fed.R.Civ.P. 15(c)(1)(C)(i), the Court concludes that Netherlands Insurance has not—and indeed cannot—make the required showing under Rule 15(c)(1)(C)(ii). Just like the plaintiff in Gouveia, Netherlands Insurance knew the identity of Allied Sprinkler and Central Connecticut Fire long before the statute of limitations ran on the claims it now seeks to bring against those third-party defendants. See 2005 WL 293506, at *4.
>
> Under that circumstance—that is, where a plaintiff knows the identity of the third-party defendant before the statute of limitations runs, but waits until after the statute of limitations has run to bring direct claims against the third-party defendant—the plaintiff's failure to name to proper defendant results from the plaintiff's own choice, and not from "a mistake concerning the proper party's identity." Fed.R.Civ.P. 15(c)(1)(C)(ii); see *Gouveia*, 2005 WL 293506, at *4 (citing, among others, *Rendell–Speranza v. Nassim*, 107 F.3d 913, 918–19 (D.C.Cir.1997); *Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173, 1183 (3d Cir.1994); Cornwell v. Robinson, 23 F.3d 694, 705 (2d Cir.1994)). Netherlands Insurance had ample time to assert timely direct claims, but it chose not to do so. See *Gouveia*, 2005 WL 293506, at *4.
>
> For those reasons, Netherlands Insurance Co.'s Motion for Leave to File Claims Against Third–Party Defendants [doc. # 56] is DENIED.

The trial court's order never addressed this issue, despite *Costello* requiring that a party actually know that it was a proper party meant to be sued by Plaintiffs. NRCP 15(c) only allows for relation-back of an amendment if "the proper defendant (1) receives actual notice of the action; (2) knows that it is the proper party; and (3) has not been misled to its prejudice by the amendment." *Costello v. Casler*, 127 Nev. 436, 440–41, 254 P.3d 631, 634 (2011). Plaintiffs cannot comply with these factors.

TKE did receive notice of the action prior to the running of the statute of limitations. However, this factor does not favor Plaintiffs, as they had sufficient time to add TKE as a direct defendant, but chose not to. By allowing the statute to run, TKE believed that Plaintiffs' choice of direct defendants had been made as in *Reid v. Royal Ins. Co.*, 80 Nev. 137, 141, 390 P.2d 45, 47 (1964) ("We can only conclude that they were satisfied with the validity of their case against the general contractor and were willing to win or lose on that claim for relief.").

Finally, the trial court's order never addressed prejudice, despite the fact that the statute of limitations had run. The "findings" allege that TKE never claimed prejudice. This is untrue. TKE alleged prejudice citing the running of the statute of limitations, and the same case law and arguments, as presented in this writ. (2 P.A. 0307-0326.) TKE specifically argued that the statute of limitations was an allowed defense under NRCP 14, which prevented relation back of the amendment in this case. (2 P.A. 0310-0314.)

TKE would now be unfairly prejudiced if Plaintiffs' amendment is allowed. As a Third-Party Defendant, TKE is only liable if GNL is found responsible. *Spearman v. Pender Cnty. Bd. of Educ.*, 623 S.E.2d 331, 333 (N.C. App 2006)( "If the original defendant is not liable to the original plaintiff, the third-party defendant is not liable to the original defendant.").

If Plaintiffs wanted TKE as a direct defendant, then Plaintiffs could have moved to amend the Complaint before the statute ran. They chose not to do so. If

Plaintiffs even intended to later add any maintenance company as a direct defendant, then Plaintiffs could have properly included DOE Defendants in their initial pleadings. They failed to do so. Allowing amendment in spite of Plaintiffs' failures would deprive TKE of essential fairness, and it violates the purpose behind the statute of limitations. See *Giovanelli v. D. Simmons Gen. Contracting*, 2010 WL 988544, at *1 (D.N.J. Mar. 15, 2010):

> The Third Circuit has pointed out that "statutes of limitations ensure that defendants are protected against the prejudice of having to defend against stale claims, as well as the notion that, at some point, claims should be laid to rest so that security and stability can be restored to human affairs." *Nelson v. County of Allegheny*, 60 F.3d 1010, 1014 (3d Cir.1995) (citation and quotations omitted). "In order to preserve this protection, the relation-back rule requires plaintiffs to show that the already commenced action sufficiently embraces the amended claims so that defendants are not unfairly prejudiced by these late-coming plaintiffs and that plaintiffs have not slept on their rights." *Id.*
>
> More specifically, it is not a "mistake" when a plaintiff is aware of his injury, but fails to use the time provided by the statute of limitations to investigate his claim to identify the proper parties purportedly responsible for his injuries. Id. at 1015 (finding that it was not a mistake to name a defendant where the plaintiffs had "ample time—the time dictated by the relevant statute ...—in which to file their claims," but they failed to add their names to the complaint until after expiration of the statute of limitations). "Although the relation-back rule ameliorates the effect of statutes of limitations, it does not save the claims of complainants who have sat on their rights." Id.
>
> The Third Circuit has held that a plaintiff's lack of knowledge of a particular defendant's identity can be a mistake under Rule (15)(c)(1)(C). See *Singletary v. Pennsylvania Dept. of Corrections*, 266 F.3d 186, 201 (3d Cir.2001) (discussing *Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171, 175 (3d Cir.1977)). In such cases, however, the plaintiff has pleaded "unknown defendants" or "John Doe" defendants, which indicates an intention to preserve claims against yet-to-be identified potential defendants who may have contributed to plaintiff's injuries. See id. As noted above, in his three complaints, plaintiff never included a fictitious party designation, which evidences a confidence that he filed suit against the proper parties rather than considering the possibility he was making a "mistake" as to the identity of his alleged tortfeasors. Furthermore, even if plaintiff did include a "John Doe" party, he must have provided a description sufficient for identification. Not providing a sufficient description would "completely eviscerate the statute of limitations." *Slater v. Skyhawk Transp., Inc.*, 187 F.R.D. 185, 198 (D.N.J.1999) (citations omitted) (explaining that without

such a rule, a "plaintiff could file a complaint on the last day before the statute of limitations would run alleging merely that he was injured in a particular situation and that 'John Doe(s) were negligent and responsible for plaintiff's loss.' He later could amend to include both defendants' names and the bases of responsibility"). Additionally, plaintiff must have provide evidence of due diligence in ascertaining the proper defendants. "If a plaintiff did not use diligence, and a court still permitted him or her to amend his or her original complaint to name a previously unknown defendant, it would not only fail to penalize delay on the plaintiff's part, but would also disregard considerations of essential fairness to the defendant, thereby violating the purpose behind the statute of limitations." *Mears v. Sandoz Pharmaceuticals, Inc.*, 300 N.J.Super. 622, 693 A.2d 558, 562–63 (N.J.Super.Ct.App.Div.1997) ((internal quotations and citations omitted)). Plaintiff failed to follow any of these procedures.

Plaintiffs chose not to sue Thyssenkrupp before the statute ran. This was a deliberate choice per *Reid*. The trial court's order did not consider or address the effect of NRCP 14 upon the ability of Plaintiffs to amend the complaint.

**4. Plaintiffs' Motion to Amend was clearly untimely.**

Leave to amend under NRCP 15 was not proper, as Plaintiffs were clearly untimely in seeking leave to amend. Even if the Motion is considered timely filed on **July 4, 2018**, Plaintiffs waited for more than a year after TKE was added as a Third-Party Defendant to bring the Motion. (1 P.A. 0183-0195.) Plaintiffs unduly delayed seeking amendment under NRCP 15 and cannot claim reasonable diligence. To determine reasonable diligence, courts consider three factors. *Sparks v. Alpha Tau Omega Fraternity, Inc.*, 127 Nev. 287, 295, 255 P.3d 238, 243 (2011):

1. whether the party unreasonably delayed amending the pleadings to reflect the true identity of a defendant once it became known,
2. whether the plaintiff utilized " 'judicial mechanisms such as discovery' " to inquire into a defendant's true identity, and
3. whether a defendant concealed its identity or otherwise obstructed the plaintiff's investigation as to its identity.

Defendant TKE never concealed its identity or otherwise obstructed Plaintiffs' investigation of this incident. Plaintiffs' argument at the hearing asserted that Plaintiffs did not know of TKE's alleged role in the maintenance of the escalator . (2 P.A. 0408):

> MR. IQBAL: Your Honor, under -- under the standard, we – we knew of Thyssenkrupp, obviously, they were brought in. We did not know of their role in -- in the defects, we did not role -- know their role in the maintenance, we did not know that these e-mails were going back and forth and that they sat on their hands, Your Honor.

This argument is belied by the produced ECC documents, and the subsequent admission in TKE's Answer to the Third-Party Complaint wherein TKE admitted (months before the statute of limitations ran) that it maintained the escalator in question at all relevant times. (1 P.A. 0155.)

Plaintiffs were clearly on notice of TKE's maintenance of the subject escalator yet they waited more than a year thereafter to request court approval for the second amendment of the Complaint. Plaintiffs cannot show reasonable diligence because they failed to promptly move to amend under *Sparks.*

**5. <u>TKE never improperly withheld any safety information</u>.**

The trial court's order states that TKE withheld knowledge of "cracks" in the escalator stairs until the statute of limitations had expired. (2 P.A. 0413.) Plaintiffs argued that both GNL and TKE "hid" emails until the statute of limitations had expired. (2 P.A. 0401):

> Now, what -- the difference again is the strength of the evidence that was hidden from Plaintiffs for six months after that statute of limitations passed with -- with Thyssen. And -- and Nugget separately, in February of '07 --

> '17, in March of '17 stated we're not aware of any mechanical problems, this, that, and everything.
>
> What do we get in November 6th? We get explicit e-mails that both parties hid -- both parties hid. I mean, I don't know if it gets any better than this. "A serious safety issue for the riding passengers." The escalator steps are "obsolete, prone to cracking." You know, there's a difference between that affidavit that was at issue in the earlier case and the strength of the evidence here, the posture of the parties, and the diligence that Plaintiffs have shown here. So it's -- Thyssen really can't complain about time when their second supplemental with all of those juicy e-mails that, by the way, back and forth between them and Golden Nugget, Nugget didn't share either with Plaintiffs, until that second supplemental came out. So you can't complain about time when you've -- when you've hidden evidence for six months.

This argument is absolutely untrue. Plaintiffs were aware that TKE was concerned about cracks in the escalator stairs because GNL produced the email from TKE discussing the issue on November 9, 2016. (1 P.A. 0105-0119.)

TKE asserted at the hearing that Plaintiffs were aware of these emails far earlier than November 2017. (2 P.A. 0405). In fact, it was **November of 2016** when Plaintiff first received these emails. (1 P.A. 0105-0119).

Contrary to Plaintiffs' arguments at the hearing, and the "findings of fact" drafted by Plaintiffs' counsel, Plaintiffs were clearly put on notice of TKE's role in the maintenance of the escalator, and that TKE recommended replacement of escalator stairs, prior to the running of the statute of limitations. These documents were never "hidden" as Plaintiffs argued, and as the order improperly reflects. Plaintiffs' decision not to sue TKE was simply based on their own choice (or lack of diligence), and not on any withholding of evidence.

**B. Amendment of Plaintiffs' Complaint fails to comply with NRCP 10.**

Amendment of the Complaint to add TKE as a direct Defendant is also improper under NRCP 10 and *Nurenberger Hercules–Werke GMBH v. Virostek*,

107 Nev. 873, 881, 882 P.2d 1100 (1991). This decision, which has been good law in the State of Nevada for 27 years, created a three-part test for whether an amended pleading, which adds a new party, relates back to an original pleading. This Court held that the amended pleading will relate back only if the plaintiff: (1) originally plead "fictitious or doe defendants in the caption of the complaint;" (2) originally plead "the basis for naming defendants by other than their true identity, and clearly specifying the connection between the intended defendants and the conduct, activity, or omission upon which the cause of action is based;" and (3) exercised "reasonable diligence in ascertaining the true identity of the intended defendants and promptly moving to amend the complaint in order to substitute the actual for the fictional." *Id.*

While Plaintiffs' initial Complaint contained DOE/ROE Defendants, the Complaint did not plead the basis for naming such Defendants by other than their true identity, nor did the Complaint clearly specify the connection between the intended Defendants and the conduct, activity, or omission. The DOE paragraph at issue in *Nurenberger* stated:

> Fictitious Defendants DOES I-V, XYZ Partnerships I-V and ABC Corporations I-V are those parties whose identities currently are unknown to Plaintiff but who may have caused or contributed to the conduct and or omissions complained of by Plaintiff herein. When the true names of those fictitious Defendants are discovered, they will be substituted into this Complaint accordingly.

Very similarly, Plaintiffs' DOE paragraph in the instant case states (1 P.A. 0010):

> The true names and capacities of Defendants DOE Individuals 1 through 100, are presently unknown to Plaintiffs, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes, and

> thereupon alleges that each Defendant designated as DOE Individuals 1 through 100 are legally responsible for the events referred to herein. The First Amended Complaint will be amended to include them when their true names and capacities become known.

Plaintiffs' vague DOE/ROE allegations did not indicate the basis for naming the DOE Defendants by other than their true identity, nor did the Complaint specify any connection between the intended Defendants and the conduct or activity upon which the cause of action is based. Thus, Plaintiffs' originally plead DOE/ROE paragraph is insufficient to allow relation back of the amendment under NRCP 10. See *Cruz v. Durbin*, 2014 WL 5449710, at *3–4 (D. Nev. Oct. 17, 2014):

> Neither prong is satisfied. Regarding the second prong, Cruz's original complaint named Roe Defendants that "are responsible in some manner" for the accident. (Compl.(# 1–3) at ¶ 5). This generalized allegation is what Nurenberger precludes: precautionary placeholders. To satisfy Nurenberger's second prong, the original pleading must allege facts that point to an intended-but-presently-unidentified defendant. Nurenberger states that the original pleading must show who the "intended," "target[ed]," or "contemplate[d]" defendant is, "notwithstanding the uncertainty of their true identit[y]". Nurenberger, 107 Nev. at 880–81 (citations omitted).

Additionally, the body of Plaintiffs' First Amended Complaint only asserts actual allegations against Defendants GNL and Landrys. There are no other specific allegations against any other Defendant, not even a DOE or ROE Defendant. (1 P.A. 0009-0014.) Nevada case law clearly provides that DOE Defendants are not allowed to be utilized simply as a precautionary measure to avoid the statute of limitations. *Nurenberger Hercules-Werke GMBH v. Virostek*, *supra* at 1105-06:

> First, and most obvious, the rule we now provide is applicable only where a plaintiff has utilized the pleading latitude afforded by Rule 10(a). Second, it should be clear that fictitious defendants may not be properly included in a

> complaint merely as a precautionary measure in the event theories of liability other than those set forth in the complaint are later sought to be added by amendment. In other words, there must be a clear correlation between the fictitious defendants and the pleaded factual basis for liability. This element of the rule supplies the basis for recognizing the intended defendants who, in legal contemplation, are parties to the cause of action.

Pursuant to *Nurenberger* and *Cruz*, such allegations are what these cases specifically prohibit, including DOE Defendants in a complaint listed merely as a precautionary measure. Plaintiffs' First Amended Complaint did not identify any DOE defendant as a potential defendant, with the intention to conduct discovery, and then substitute the true name for a DOE defendant as required by *Nurenberger:*

> Third, and last, Rule 10(a) was not intended to reward indolence or lack of diligence by giving plaintiffs an automatic method of circumventing statutes of limitations. Plaintiffs utilizing the pleading latitude provided by Rule 10(a) must exercise reasonable diligence in pursuing discovery and other means of ascertaining the true identity of the intended defendants, and then promptly move to amend their complaints pursuant to Rule 10(a).

Plaintiffs never intended to utilize NRCP 10 as a method to substitute TKE for a DOE Defendant. Plaintiffs did not intend to exercise reasonable diligence in conducting discovery of the escalator maintenance company's name because they already knew it was TKE, yet they did not sue TKE in the Complaint nor First Amended Complaint nor after TKE became a Third-Party Defendant, nor before the running of the statute of limitations.

Plaintiffs did not fail to name TKE because they lacked information as to TKE's identity. They already knew it. This knowledge and intent precludes amendment under NRCP 10(a). See *Ocasio v. Perez*, 2017 WL 1097190, at *6 (D.

Nev. Mar. 22, 2017), appeal dismissed sub nom. *Ocasio v. Gruner,* 17-15741, 2017 WL 3124200 (9th Cir. June 15, 2017):

> Rule 10(a) cannot avail Plaintiff here, however, because this is not a case where "despite reasonable diligence, the true identity of culpable parties is uncertain or unknown to plaintiff." *Nurenberger*, 822 P.2d at 1103. Indeed, Plaintiff admits that his original Complaint failed to name Tanner not because he lacked information to discover Tanner's identity, but because "Plaintiff did not have his notes with him at the time he drafted the complaint and was writing it off the top of his head." (Resp. 14:19–21).
>
> Consequently, Plaintiff cannot invoke Rule 10(a) to avoid the statute of limitations as to Tanner, and the Court therefore DISMISSES Plaintiff's claims against Tanner with prejudice.

The allegations in Plaintiffs' First Amended Complaint, the ECC production, and the delay by Plaintiffs are clearly adverse to any purported intention to timely and properly discover and plead the true name of an unknown escalator maintenance company. All of the actual evidence shows that Plaintiffs included DOE Defendants in the initial Complaint as a mere precaution or as part of a cut and paste form, which is clearly insufficient under *Nurenberger*.

In addition, under NRCP 10(a), Plaintiffs must be proactive. Plaintiffs cannot wait for unknown defendants to be made known, but they must proactively seek to identify such defendants if they want the protections of NRCP 10(a). *Sparks v. Alpha Tau Omega Fraternity, Inc.*, 127 Nev. 287, 294, 255 P.3d 238, 243 (2011):

> In *Nurenberger*, we recognized that plaintiffs must proactively seek to identify unknown defendants in order for an amendment made pursuant to NRCP 10(a) to relate back to the filing date of the original complaint, and we therefore included a reasonable diligence requirement as the third factor. 107 Nev. at 881, 822 P.2d at 1105. The reasonable diligence requirement is intended to guard against the abuse of Doe and Roe defendants as placeholders during the commencement of litigation and "was not intended

> to reward indolence or lack of diligence by giving plaintiffs an automatic method of circumventing statutes of limitations."

Waiting more than a year after the statute of limitations ran to move to amend the Complaint is not timely. The trial court's decision was in error when it allowed for amendment of the Complaint.

The trial court transcript does not justify the trial court's ruling allowing amendment of the Complaint. The trial court correctly stated the lack of specificity contained in Plaintiff's DOE paragraph. (2 P.A. 0407-0408):

> THE COURT: Part of Thyssenkrupp's argument is on the Roes, right? So paragraph 7 is your Roes.
>
> The true names and capacities of Defendants DOE Individuals 1 through 100, are presently unknown to Plaintiffs, who therefore sues said Defendants by such fictitious names. Plaintiff is informed and believes, and thereupon alleges that each Defendant designated as DOE Individuals 1 through 100 are legally responsible for the events referred to herein. The First Amended Complaint will be amended to include them when their true names and capacities become known. So would you argue that that is or is not sufficient to put –

However, the trial court then found that "all the circumstances" justified amendment. But the applicable law under NRCP 10 requires actual compliance with the *Nurenberger* factors. These factors were not satisfied.

Despite the trial court discussing NRCP 10 and DOE defendants at the hearing, the court never addressed any of the *Nurenberger* factors in the order itself. There are no findings of fact or conclusions of law addressing whether the plaintiff (1) originally plead "fictitious or doe defendants in the caption of the complaint," (2) originally plead "the basis for naming defendants by other than their true identity, and clearly specifying the connection between the intended defendants and the conduct, activity, or omission upon which the cause of action is

based" and (3) exercised "reasonable diligence in ascertaining the true identity of the intended defendants and promptly moving to amend the complaint in order to substitute the actual for the fictional." *Nurenberger, supra.*

By failing to include any findings on the proper standard under NRCP 10, the order allowing amendment cannot be upheld as in compliance with *Neurenberger*. Thus, TKE is entitled to dismissal of the Second Amended Complaint, to the extent that it is a direct defendant.

## IV.

## CONCLUSION

Thyssenkrupp Elevator Corporation requests this writ Petition be granted. The trial court's order never addressed the proper standards for amendment under NRCP 10, 14 or 15, and did not account for the prejudice to TKE as a result of the running of the statute of limitations. The trial courts order did not show compliance with any of the applicable rules by Plaintiffs, and Plaintiffs should not have been allowed to amend the complaint to add TKE as a direct defendant.

DATED this ____ day of October, 2018.

ROGERS, MASTRANGELO,
CARVALHO & MITCHELL

Rebecca L. Mastrangelo, Esq.
Nevada Bar No. 5417
Charles A. Michalek, Esq.
Nevada Bar No. 5721
700 S. Third Street
Las Vegas, Nevada 89101
Attorney for Petitioners
THYSSENKRUPP ELEVATOR
CORPORATION

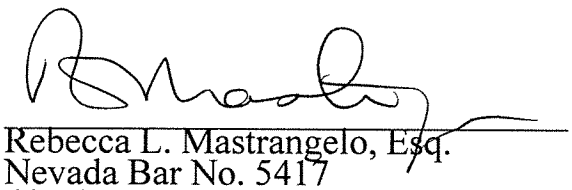
## CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a) (6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 11 Times New Roman 14 pt font. 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 does not exceed 30 pages.

I hereby certify that I have read this Petition, 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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 16th day of October, 2018.

ROGERS, MASTRANGELO,
CARVALHO & MITCHELL



Rebecca L. Mastrangelo, Esq.
Nevada Bar No. 5417
Charles A. Michalek, Esq.
Nevada Bar No. 5721
700 S. Third Street
Las Vegas, Nevada 89101
Attorney for Petitioners
THYSSENKRUPP ELEVATOR
CORPORATION

## ADDENDUM OF NEVADA AND FEDERAL RULES

FRCP 14

(a) When a Defending Party May Bring in a Third Party.

(1) Timing of the Summons and Complaint. A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer.

(2) Third-Party Defendant's Claims and Defenses. The person served with the summons and third-party complaint--the "third-party defendant":

(A) must assert any defense against the third-party plaintiff's claim under Rule 12;

(B) must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);

(C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

(D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

(3) Plaintiff's Claims Against a Third-Party Defendant. The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

(4) Motion to Strike, Sever, or Try Separately. Any party may move to strike the third-party claim, to sever it, or to try it separately.

(5) Third-Party Defendant's Claim Against a Nonparty. A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(6) Third-Party Complaint In Rem. If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(a)(i) in the property arrested.

(b) When a Plaintiff May Bring in a Third Party. When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

FRCP 15

(a) Amendments Before Trial.

\

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment--to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) Notice to the United States. When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

NRCP 10

(a) Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court and county, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties. A party whose name is not known may be designated by any name, and when the true name is discovered, the pleading may be amended accordingly.

(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

NRCP 14

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter

called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

NRCP 15

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

## CERTIFICATE OF SERVICE

Pursuant to NRCP 5(a), and EDCR 7.26(a), I hereby certify that I am an employee of Rogers, Mastrangelo, Carvalho & Mitchell, and on the 18 day of October, 2018, a true and correct copy of the foregoing **PETITION FOR WRIT OF MANDAMUS; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING EXHIBITS** was served via Supreme Court E-Service and/or Hand Delivery, upon the following:

***Served Via Supreme Court Electronic Service***

Mohamed A. Iqbal, Jr., Esq.
Christopher Mathews, Esq.
101 Convention Center Drive, Suite 1175
Las Vegas, Nevada 89109
Attorneys for Plaintiffs

Annalisa N. Grant, Esq.
Alexandra McLeod, Esq.
GRANT & ASSOCIATES
7455 Arroyo Crossing Parkway, Suite 300
Las Vegas, Nevada 89113
Attorneys for Defendant/Third-Party Plaintiff

***Served Via Hand Delivery***

Judge Joanna Kishner
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
*District Court Judge*

An Employee of
Rogers, Mastrangelo, Carvalho & Mitchell