IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER GARDNER AND CHRISTIAN GARDNER, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILD, LELAND GARDNER, Appellants, v. R & O CONSTRUCTION, INC., Respondent.	)	Case No.: 77261

RESPONDENT'S OPPOSITION TO MOTION TO REASSIGN ON REMAND AND PARTIAL OPPOSITION TO EXPEDITE APPEAL

Respondent R&O Construction Company ("R&O"), erroneously identified as R&O Construction, Inc., through its undersigned counsel, hereby responds in opposition ("Opposition") to Appellants' Motion to Reassign on Remand and Expedite Appeal ("Motion"), and in opposition thereto states as follows:

I. INTRODUCTION

Appellants request that this Honorable Court adopt a standard for "reassignment upon remand" that has not previously been recognized in Nevada and which directly contradicts time-honored statutes and caselaw governing disqualification of judges, both in substance and in applying the facts of the instant matter.

Although phrased as a request for "reassignment upon remand," the substance of the relief sought by Appellants is a disqualification of the Honorable Judge Wiese based upon his ruling and actions during the course of his official judicial proceedings. The procedural and factual

prerequisites for obtaining a judicial disqualification are clearly established in Nevada, and Appellants' Motion directly purports to have disregarded all such prerequisites.

Additionally, Appellants make an unclear request to expedite the consideration of this appeal. As set forth below, while Appellants do not propose a revised briefing schedule, the simplest and fairest means to expedite consideration of this appeal is for Appellants to expedite or waive their Reply brief.

II. ARGUMENT

A. The Basis Upon Which Appellants Seek Reassignment is Inadequate and Directly Contravenes the Established Rule Governing This Issue as Articulated by This Honorable Court

1. Nevada case law governing disqualification.

As recognized by this Honorable Court, the substantive and procedural grounds for disqualifying a judge other than Supreme Court justices or judges of the Court of Appeals are set forth in N.R.S. §§ 1.230 and 1.235, respectively. *Towbin Dodge, LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 112 P.3d 1063, 1066, (Nev., 2005) ("Nevada has two statutes governing disqualification of district court judges. NRS 1.230 lists substantive grounds for disqualification, and NRS 1.235 sets forth a procedure for disqualifying district court judges.").

The substantive grounds for disqualification, as set forth in N.R.S. § 1.230, are as follows:

> 1. A judge shall not act as such in an action or proceeding when the judge entertains actual bias or prejudice for or against one of the parties to the action.
>
> 2. A judge shall not act as such in an action or proceeding when implied bias exists in any of the following respects:
>
> (a) When the judge is a party to or interested in the action or proceeding.
>
> (b) When the judge is related to either party by consanguinity or affinity within the third degree.

> (c) When the judge has been attorney or counsel for either of the parties in the particular action or proceeding before the court.
>
> (d) When the judge is related to an attorney or counselor for either of the parties by consanguinity or affinity within the third degree. This paragraph does not apply to the presentation of ex parte or uncontested matters, except in fixing fees for an attorney so related to the judge.

The applicable procedures that a movant must comply with to accomplish disqualification based on the substantive grounds stated above, as set forth in N.R.S. § 1.235, are as follows:

> 1. Any party to an action or proceeding pending in any court other than the Supreme Court or the Court of Appeals, who seeks to disqualify a judge for actual or implied bias or prejudice must file an affidavit specifying the facts upon which the disqualification is sought. The affidavit of a party represented by an attorney must be accompanied by a certificate of the attorney of record that the affidavit is filed in good faith and not interposed for delay. Except as otherwise provided in subsections 2 and 3, the affidavit must be filed:
>
> (a) Not less than 20 days before the date set for trial or hearing of the case; or
>
> (b) Not less than 3 days before the date set for the hearing of any pretrial matter.
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> ***
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> 4. At the time the affidavit is filed, a copy must be served upon the judge sought to be disqualified. Service must be made by delivering the copy to the judge personally or by leaving it at the judge's chambers with some person of suitable age and discretion employed therein.

This Honorable Court has additionally addressed the burden of the movant in establishing the factual prerequisites of a disqualification action.

> As a general rule, a judge has a duty to "preside to the conclusion of all proceedings, in the absence of some statute, rule of court, ethical standard, or other compelling reason to the contrary." *Ham v. District Court,* 93 Nev. 409, 415, 566 P.2d 420, 424 (1977); *see also* NCJC Canon 3(B)(1) ("A judge shall hear and decide matters assigned to the judge except those in which disqualification is

> required."). Further, a judge is presumed to be impartial, and the party asserting a challenge carries the burden of establishing sufficient factual and legal grounds warranting disqualification. *See Hogan v. Warden,* 112 Nev. 553, 559–60, 916 P.2d 805, 809 (1996).

City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court ex rel. County of Clark, 5 P.3d 1059, 1061–62, (Nev., 2000).

> A judge is presumed to be unbiased, and "the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification." *Id.* at 649, 764 P.2d at 1299. A judge cannot preside over an action or proceeding if he or she is biased or prejudiced against one of the parties to the action. NRS 1.230(1). To disqualify a judge based on personal bias, the moving party must allege bias that " 'stem[s] from an extrajudicial source and result [s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case.' " *In re Petition to Recall Dunleavy,* 104 Nev. 784, 790, 769 P.2d 1271, 1275 (1988) (quoting *United States v. Beneke,* 449 F.2d 1259, 1260–61 (8th Cir.1971)). **"[W]here the challenge fails to allege legally cognizable grounds supporting a reasonable inference of bias or prejudice," a court should summarily dismiss a motion to disqualify a judge**. *Id.* at 789, 769 P.2d at 1274.

Rivero v. Rivero, 216 P.3d 213, 233, 125 Nev. 410, 439 (Nev., 2009) [emphasis added].

> **Moreover, rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification.** *See United States v. Board of Sch. Com'rs, Indianapolis, Ind.,* 503 F.2d 68, 81 (7th Cir.1974), *cert. denied,* 439 U.S. 824, 99 S.Ct. 93, 58 L.Ed.2d 116. The personal bias necessary to disqualify must "stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Beneke,* 449 F.2d 1259, 1260–61 (8th Cir.1971) *citing United States v. Grinnell Corp.,* 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). **To permit an allegation of bias, partially founded upon a justice's performance of his constitutionally mandated responsibilities, to disqualify that justice from discharging those duties would nullify the court's authority and permit manipulation of justice, as well as the court**. *See State v. Rome,* 235 Kan. 642, 685 P.2d 290, 295–96 (1984); *see also Tynan v. United States,* 376 F.2d 761 (D.C.Cir.1967), *cert. denied,* 389 U.S. 845, 88 S.Ct. 95, 19 L.Ed.2d 111.

Matter of Dunleavy, 769 P.2d 1271, 1275 (Nev.,1988) [emphasis added][1].

2. Application of disqualification case law to the instant matter.

In the instant matter, while styled differently, Appellants seek relief identical to disqualification of the Honorable Judge Wiese on account of his ruling and actions during the course of the official judicial proceedings in this matter. Specifically, Appellants claim that the trial court's ruling denying their motion to file a second amended complaint and add several individual defendants, which ruling was subsequently reversed by this Court, bolstered by cherry-picked quotes from throughout this litigation and a currently pending appeal of the trial court's dismissal without prejudice of R&O, support a claim that the Judge "desire[s] to bar the Gardners from pursuing alter ego theories at trial or otherwise expanding the scope of this case. . . ." *See* Motion at 5.

As discussed above, to obtain disqualification of a judge, the movant must establish the substantive basis for the disqualification, which bases are set forth in N.R.S. § 1.230, and comply with the procedural requirements set forth in N.R.S. § 1.235. Appellants have done neither.

[1] *See also Mkhitaryan v. Eighth Judicial District Court,* 2016 WL 5957647, at *1 (Unpublished Opinion, NV Sup. Ct. Docket No. 71177, October 13, 2016) ("Disqualification for personal bias requires an extreme showing of bias. *Millen v. Eighth Judicial Dist. Court,* 122 Nev. 1245, 1254, 148 P.3d 694, 701 (2006). Further, this court has generally recognized that bias must stem from an "extrajudicial source," something other than what the judge learned from his or her participation in the case, *Rivero v. Rivero,* 125 Nev. 410, 439, 216 P.3d 213, 233 (2009), and that adverse judicial rulings during the proceedings are not a basis to disqualify a judge, *In re Petition to Recall Dunleavy,* 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). Summary dismissal is warranted where sufficient factual allegations are not alleged in the motion. *Hogan v. Warden,* 112 Nev. 553, 560, 916 P.2d 805, 809 (1996)."); *Walker v. Eighth Judicial District Court of State in and for County of Clark*, 2016 WL 5400149, at *1 (Unpublished Opinion, NV Sup. Ct. Docket No. 70766, September 16, 2016) ("Judges have a "duty to preside ... in the absence of some statute, rule of court, ethical standard, or other compelling reason to the contrary." *Goldman v. Bryan,* 104 Nev. 644, 649, 764 P.2d 1296, 1299 (2007) (internal quotation marks omitted). Further, "[a] judge is presumed to be impartial, and the party asserting the challenge carries the burden of establishing sufficient factual grounds warranting disqualification." *Rippo v. State*, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997). "Disqualification must be based on facts, rather than on mere speculation." *Id.* "[R]ulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification." *In re Petition to Recall Dunleavy,* 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988).").

Appellants admit in their Motion that they "do not contend that Judge Wiese carries an outright bias or prejudice against them that requires disqualification under NRS 1.230." *See* Motion at 2. Neither did Appellants comply with the procedural prerequisites set forth in N.R.S. § 1.235. Yet, compliance with the substantive and procedural requirements of disqualification is the only established means in Nevada through which a movant may obtain the relief sought by Appellants[2].

Although Appellants provided citations to multiple Nevada cases that they allege support the relief they seek—reassignment on remand without compliance with the statutory provisions governing disqualification—the cases are either clearly distinguishable from the instant matter or do not offer guidance to this Court on whether it should accept the California rule espoused by Appellants for reassignment, which rule expressly contradicts established case law governing disqualification.

Specifically, the *Perez*[3] and *Coulter*[4] cases cited by Appellants are unpublished decisions from criminal proceeding which were remanded for new trials and, on remand, this Honorable Court instructed the district court clerk to reassign the case to a different department, without

[2] Further, pursuant to several recent decisions put forth by this Honorable Court, the facts upon which Appellants assert the need for reassignment are not sufficient to support the same. *See, e.g., Walker,* 2016 WL 5400149, at *1 (Unpublished Opinion, NV Sup. Ct. Docket No. 70766, September 16, 2016) (Movant filed a motion to disqualify a judge "based upon rulings and comments she made during the litigation." The movant asserted that the judge's "**statements clearly indicated that she had impermissibly closed her mind to the presentation of additional evidence**. " [emphasis added]. This Honorable Court denied the relief sought on the basis that "[R]ulings and actions of the judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification.").

[3] *Perez v. State*, 2017 WL 2591340, at *2 (Unpublished Opinion, NV Sup. Ct Docket No. 66598, June 13, 2017), cited in Appellants' brief without compliance with Nev. R. App. P. 36(c)(3).

[4] *Coulter v. State*, 2015 WL 5554588, at *3 (Unpublished Opinion, NV Sup. Ct Docket No. 61106, September 18, 2015), inappropriately cited in Appellants' brief notwithstanding Nev. R. App. P. 36(c)(3).

expressly stating the reason for the reassignment. The *Zollo*[5] case is an unpublished decision from a civil proceeding that was remanded due to multiple failures of the trial court to properly articulate the factual basis for its dismissal of the case on grounds that the plaintiff had not established excusable neglect. On remand, this Honorable Court again instructed the district court clerk to reassign the case to a different department, without expressly stating the reason for the reassignment. The *FCH1*[6] case cited by Appellants references a reassignment request granted by this Honorable Court due to the fact that the judge, who presided over a bench trial, admitted and considered evidence that should have been excluded and entered a ruling on the merits of the case based on all considered evidence. Finally, in the *Boulder City*[7] case cited by Appellants, which also appears to have been issued on an appeal of a bench trial ruling, this Honorable Court assigned a new trial judge on remand "[i]n fairness to the district court judge and the litigants," but did not provide explanation about what facts triggered the fairness reassignment. Thus, these cases do not provide support for Appellants' request that this Court adopt the rule promulgated by the Ninth Circuit regarding reassignment, which rule directly contravenes established Nevada case law governing disqualification.

The Ninth Circuit rule that Appellants' request that this Court adopt, as set forth in pages 4-5 of their Motion, permits reassignment of judges without a showing of bias or prejudice in "rare and extraordinary circumstances." *Krechman v. County of Riverside*, 723 F.3d 1104, 1111–12 (C.A.9 (Cal.),2013). The factors that the Ninth Circuit have adopted to determine whether such

[5] *Zollo v. Terrible Herbst, Inc.*, 2015 WL 3766856, at *1 (Unpublished Opinion, NV Sup. Ct Docket No. 65581, June 12, 2015), inappropriately cited in Appellants' brief notwithstanding Nev. R. App. P. 36(c)(3).

[6] *FCH1, LLC v. Rodriguez*, 335 P.3d 183, 190, 130 Nev. 425, 435 (Nev.,2014)

[7] *Boulder City v. Cinnamon Hills Associates*, 871 P.2d 320, 327, 110 Nev. 238, 250 (Nev.,1994)

unusual circumstances exist to permit reassignment without a showing of bias or prejudice are as follows:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind *1112 previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *United States v. Jacobs,* 855 F.2d 652, 656 (9th Cir.1988) (quoting *Cintron v. Union Pac. R.R. Co.,* 813 F.2d 917, 921 (9th Cir.1987)). The first two factors are equally important and a finding of either is sufficient to support reassignment on remand. *Id.* (citing *United States v. Sears, Roebuck & Co.,* 785 F.2d 777, 780 (9th Cir.1986)).

Id. at 1111–12.

Respondent does not dispute that this Honorable Court and the chief judge of the Eighth Judicial District have authority to assign or reassign matters as convenience or necessity requires, EDCR 1.60(a); EDCR 1.30(b)(15), and that there may be some circumstances that require reassignment without a showing of bias or prejudice. *See. e.g., Halverson v. Hardcastle,* 163 P.3d 428, 447 (Nev., 2007) (chief judge reassigned judge's criminal caseload for reasons of convenience).

However, the factors set forth above generally permit parties to petition for reassignment of judges based solely upon unfavorable rulings and actions taken by the judge during the course of his or her official judicial proceedings, which expressly contravenes established Nevada case law governing disqualification. This case law, discussed at length herein, which, among other things, presumes a judge to be impartial, requires a showing of personal bias or prejudice based upon an extrajudicial source to seek disqualification and expressly states that "rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable

grounds for disqualification." *Matter of Dunleavy*, 769 P.2d at 1275. Further, this Honorable Court has also ruled that

> To permit an allegation of bias, partially founded upon a justice's performance of his constitutionally mandated responsibilities, to disqualify that justice from discharging those duties would nullify the court's authority and permit manipulation of justice, as well as the court.

Id. To permit removal of a judge without an allegation of bias and founded upon that judge's performance of his constitutionally mandated responsibilities only heightens the slippery slope that this Honorable Court sought to avoid through the foregoing rulings. To create a wholly new category of "reassignment" motions permitting reassignment on grounds that are expressly insufficient for disqualification would create a loophole that would literally swallow the rule, and dramatically undermine well established Nevada jurisprudence[8].

B. Appellants' Request Is Premature and Presumes the Outcome Of This Appeal

Appellants' request in the underlying appeal—that they be permitted to assert a reverse-veil piercing *alter ego* claim against R&O *before there is any judgment* against its alleged *alter ego* Defendant Orfluff Ophiekens, *let alone any suggestion* that a judgment against Mr. Opheikens would be uncollectable—is a case of putting the cart well ahead of the horse. Similarly, their request that, *in the event of remand*, this entire case should be reassigned from Judge Wiese is plainly premature. The basis of Appellants' wholly-unfounded request is their presumption—before this Honorable Court has ruled on the instant appeal—that Judge Wiese has *again made a grievous error of law*, and that he simply cannot be trusted with the challenging legal reasoning and judicial discretion that this case will require.

[8] As an additional aside, there are several non-parties to this appeal who are parties to the underlying action and who would be prejudiced by the removal of Judge Wiese.

C. It Would Be Inappropriate to Expedite the Briefing Schedule In This Case

3. Appellants have had ample time to prepare their opening brief, and now seek to shorten the time for Respondent's brief without good cause, and in an unclear manner which would certainly prejudice Respondents.

Judge Wiese dismissed Appellants' claims against Respondent R&O at oral argument on October 10, 2018, after which Appellants immediately stated their intent to appeal. **55 days later,** Appellants filed their Opening Brief and the instant Motion. Under Nevada's Rules of Appellate Procedure, Respondent's Brief would normally be due 30 days later on January 3, 2019, and Appellants' Reply Brief would normally be due 30 days after that, on February 4, 2019. *See* Rule 31(a)(1)(B-C). Respondent's Response to the instant Motion is due December 13, 2018 (Due 7 days after service per Rule 27(a)(3)(A), but Rule 26(a)(2) omits Saturdays and Sundays for time periods less than 11 days). Here, Appellants request "the completion of briefing within 30 days," Motion at 10, presumably meaning 30 days from the filing of the Motion, which would create a deadline of January 3, 2019. Appellants do not specify which portion of that 30 days should be permitted for Respondent's Brief, nor which portion for Appellants' Reply. Appellants could solve this issue on their own by waiving their Reply Brief, though it appears *they* do not wish to be prejudiced in such a way, *see* Appellants' Opening Brief at 17 & n.10, so presumably they are asking this Court to reduce Respondent's time to file its Response Brief by some unspecified amount.

Regardless of whether Appellants are implicitly asking this Honorable Court to split the 30-day time period 50/50 (which would make Respondent's Response Brief due in 6 days on December 19, 2018), or if Appellants would be willing to complete their Reply Brief in 2 days (making Respondent's Response Brief due on January 1, 2019), the result will be the same: Appellants have voluntarily taken nearly 2 months to prepare and file their Opening Brief, and now ask this Court to shorten Respondent's response time and cause it to fall at some unknown

point during the holiday season. There is simply no reasonable basis, nor case-law or other objective standard upon which to grant this request. Indeed, if Appellants feel that the need to expedite the consideration of this appeal is so great, they should be willing to receive Respondent's brief when it is due on January 3rd and then expedite their own reply, perhaps filing it by the following Monday, January 7th.

4. However, once fully briefed, Respondent has no objection to Appellants' request that this Court expedite consideration of this matter on its Spring calendar

Ultimately, Appellants' request may be largely moot. While Respondent should be given a full and fair opportunity to brief this complex legal issue, whether briefing is concluded by January 3rd (as Appellants propose) or by January 7th (as Respondent suggests could be done without motion by Appellants, *supra*) will have no substantive effect on the timing in which this Court can consider the appeal.

III. CONCLUSION

Based on the foregoing, Respondent R&O respectfully requests that the Court deny the Motion.

Dated: December 13, 2018

GODFREY JOHNSON, P.C.

By: /s/ Karen Porter

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 13th day of December 2018, I caused true and correct copies of the foregoing Motion to Reassign on Remand and Expedite Appeal to be delivered to the following counsel and parties:

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