

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

PETER GARDNER AND CHRISTIAN )  
GARDNER, INDIVIDUALLY AND ON )  
BEHALF OF MINOR CHILD, LELAND )  
GARDNER, )  
 )  
Appellants, )  
 )  
v. )  
 )  
R & O CONSTRUCTION, INC., )  
 )  
Respondent. )  
\_\_\_\_\_ )

Case No.: 77261

Electronically Filed  
Dec 14 2018 02:23 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPELLANTS' REPLY IN SUPPORT OF MOTION TO REASSIGN ON  
REMAND AND EXPEDITE APPEAL**

Appellants Peter and Christian Gardner, individually and on behalf of minor child, Leland Gardner, through their undersigned counsel, hereby submit the following Reply in Support of Motion to Reassign on Remand and Expedite Appeal.

**I. INTRODUCTION**

Noticeably absent from R&O's Opposition is any challenge to the substance of the Gardners' request for reassignment on remand. R&O did not question the accuracy of the Gardners' portrayal of Judge Wiese's conduct in the underlying action. Nor did R&O contest the import of his erroneous rulings in this matter. R&O also did not deny that it sought to capitalize on Judge Wiese's opinion that the Gardners are improperly pleading claims designed to "get a deep pocket." More importantly, R&O never suggested that Judge Wiese will be able to disregard his

previously-expressed views on remand or that his continued participation will not detract from the appearance of justice in this proceeding.

Instead, R&O opposed the Gardners' request on purely technical grounds. While R&O concedes (as it must) that this Court has previously reassigned cases on remand without a finding of bias, R&O nonetheless contends that the Ninth Circuit's test for reassignment contravenes Nevada law governing judicial disqualification. R&O, however, overlooks that federal law imposes the same requirements as Nevada for judicial disqualification, but also permits reassignment on remand in "unusual circumstances."<sup>1</sup> R&O's only other point of contention is that the Gardners' request for reassignment is premature, but the Gardners previously acknowledged that this Court should defer ruling on the Motion until after it decides the instant appeal. The Gardners will address these and R&O's other arguments below.

## **II. ARGUMENT**

### **A. Reassignment Is Available Without A Finding Of Judicial Bias.**

The Gardners have not alleged that Judge Wiese holds a bias such that disqualification is warranted under NRS 1.230. *See* Mot. at 2. Rather, the Gardners submitted that this case presented "unusual circumstances" that fell squarely within

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<sup>1</sup> The application of this test for reassignment on remand is not limited to the Ninth Circuit. *See, e.g., Martens v. Thomann*, 273 F.2d 159, 174 (2d Cir. 2001); *United States v. North Carolina*, 180 F.3d 574, 582-83 (4th Cir. 1999); *United States v. Wolff*, 127 F.3d 84, 88 (D.C. Cir. 1997).

the federal standard for reassignment. *Id.* at 3-8. In response, R&O acknowledged that this Court has the inherent authority to reassign matters on remand—as it has in other cases—and conceded “that there may be some circumstances that require reassignment without a showing of bias or prejudice.” *See Opp.* at 8. Nevertheless, R&O asserted that the Gardners’ request “directly contravenes established Nevada case law governing disqualification.” *Id.* at 7.

R&O’s position that reassignment in “unusual circumstances” conflicts with Nevada law governing disqualification is incorrect. Like Nevada, the United States Code provides for judicial disqualification upon a showing of bias or prejudice. *Compare* 28 U.S.C. §§ 144, 455 *with* NRS 1.225-1.235. Also like Nevada, the United States Code imposes procedural requirements for seeking disqualification, including (i) filing an affidavit supported by facts, (ii) filing a certificate of good cause from counsel, and (iii) doing so within a certain number of days before trial. *Id.*

Finally, both Nevada and federal law presume that a judge will be impartial, *see Perry v. Schwarzenegger*, 790 F.Supp.2d 1119, 1129 (N.D. Cal. 1119) (“Since a federal judge is presumed to be impartial...”), and that “[u]favorable rulings alone are legally insufficient to require recusal[.]” *Redding v. Prosight Specialty Mgmt. Co., Inc.*, 90 F.Supp.3d 1109, 1127 (D. Mt. 2015); *United States v. Ridley*, 783 F.2d 934, 939 (9th Cir. 1986) (“The alleged prejudice must result from an extrajudicial source; a judge’s prior adverse ruling is not sufficient cause for recusal.”).

In short, Nevada law and federal law in this area are substantively identical, yet federal courts have still recognized that reassignment is appropriate in “unusual circumstances.” Moreover, this alternative mechanism for reassignment has not “create[d] a loophole that [ ] literally swallow[s] the rule[,]” *see* Opp. at 9, as federal law is clear that reassignment under this standard is “reserved for rare and extraordinary circumstances.” *See* Mot. at 3. Regardless, the Gardners cited the federal standard for reassignment merely as guidance on a remedy this Court has granted on multiple occasions despite the absence of specific Nevada precedent. For the reasons stated in the Motion, this Court should reassign this matter on remand especially where, as here, R&O has failed to challenge the substantive basis of the Gardners’ request.

**B. This Court Should Defer Its Ruling On The Gardners’ Reassignment Request Until Its Ultimate Decision.**

R&O contends that the Gardners’ request for reassignment is premature in the absence of a favorable ruling in the instant appeal. *See* Opp. at 9. We agree. For that reason, the Gardners previously advised “that their request for reassignment on remand is contingent on the Court’s reversal of the district court’s dismissing their reverse veil-piercing claim against R&O. As a result, the Gardners ask that the Court defer its ruling on that request until its ultimate decision on the instant appeal.” *See* Mot. at 10. R&O’s ripeness argument is thus inconsequential to the merits of the Gardners’ request.

**C. The Court Should Expedite This Matter To The Extent Its Calendar Permits.**

R&O's complaint about the Gardners' request to expedite is much ado about nothing. As is common practice in this Court, the Gardners simply sought a shortened briefing schedule to accommodate the expedited consideration of this appeal. Because more than ten days have passed since the filing of this Motion, there is likely no longer a reason to shorten R&O's time to respond. In addition, the Gardners control the timing of their Reply brief.<sup>2</sup> As such, the Gardners simply request—and R&O does not oppose—that the Court rule on the merits of this appeal before the discovery deadline expires on April 19, 2019.

Dated: December 14, 2018      CAMPBELL & WILLIAMS

By /s/ Donald J. Campbell

DONALD J. CAMPBELL, ESQ. (1216)

J. COLBY WILLIAMS, ESQ. (5549)

PHILIP R. ERWIN, ESQ. (11563)

SAMUEL R. MIRKOVICH (11662)

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<sup>2</sup> The Gardners do wish to address R&O's claim that they sat on their hands before filing the instant Motion. R&O is correct that the Gardners intended to proceed apace from the moment the district court issued its order. But on November 1, 2018—one day after this appeal was exempted from the settlement program—Judge Wiese entered a “Mandatory Rule 1.90 Conference Order” directing the parties' counsel, the clients themselves, and Defendants' insurance representatives to appear in his courtroom for an ostensible settlement conference. *See* Exhibit “1,” EDCR 1.90 Order. In light of this unexpected development, the Gardners opted to wait until after the EDCR 1.90 conference before filing their Opening Brief and seeking reassignment. Judge Wiese conducted the EDCR 1.90 conference on November 27, 2018 and the Gardners filed their papers just days later on December 3, 2018. There is no undue delay here.

## CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 14th day of December 2018, I caused true and correct copies of the foregoing Reply in Support of Motion to Reassign on Remand and Expedite Appeal to be delivered to the following counsel and parties:

### VIA HAND DELIVERY:

Judge Jerry A. Wiese II  
Eighth Judicial District Court of Clark County, Nevada  
Regional Justice Center  
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Las Vegas, Nevada 89155

### VIA ELECTRONIC AND U.S. MAIL:

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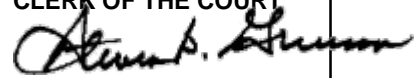
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/s/ **John Y. Chong**  
An employee of Campbell & Williams

# EXHIBIT 1



**DISTRICT COURT  
CLARK COUNTY, NEVADA**

Peter Gardner, Plaintiff(s)

Case No.: A-15-722259-C

vs.

Department 30

Henderson Water Park, LLC,

Defendant(s)

**MANDATORY RULE 1.90 CONFERENCE ORDER**

A Joint Case Conference Report, or at least one Individual Case Conference Report having been filed in this matter, a Motion to extend discovery deadlines was vacated from the 11/2/18 discovery calendar, and good cause appearing, the Court will conduct a Rule 1.90 case management conference with lead counsel and the parties in the above referenced matter to assist in securing the ...”just, speedy, and inexpensive determination” of this case. (See NRCP 16(c)(14), NRCP 1, and EDCR 1.90).

One of the purposes for this Rule 16 Pretrial Conference is to discuss the contents of a Scheduling Order which will issue at the conclusion of the Conference. A Scheduling Order will not issue from the Discovery Commissioner in this case, but will issue directly from Department 30, pursuant to NRCP 16(b).

At least one of the attorneys for each party who participates in this conference shall have authority to enter into stipulations, and all parties must also be present, and accompanied by insurance representatives (with full settlement authority) if applicable.

Some of the goals of the conference are to determine the following:



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- 1) Status of settlement negotiations and the need for specifically identified discovery matters necessary before the parties can enter into a meaningful settlement conference;
- 2) Present medical status of plaintiff if a personal injury matter;
- 3) Specific, itemized amount of plaintiff's damages to date for every type of action, be it negligence, contract, employment, etc.;
- 4) Names and addresses of relevant witnesses not set forth in 16.1 report;
- 5) What experts, if any, are needed and a timetable for engaging the same;
- 6) Nature and timing of all proposed discovery, including the names and addresses of all persons each party needs to depose before a settlement conference, not all who are required to be deposed before trial;
- 7) Simplification of issues;
- 8) Alternate dispute resolution techniques which may be applied to the case;
- 9) Estimated costs for each party to take case through trial;
- 10) Estimated attorneys' fees to take case through trial;
- 11) Whether there is any provision by contract or statute which would allow the prevailing attorney to recover some of its attorney's fees;
- 12) Any special case management procedure appropriate to the case;
- 13) Scheduling a settlement conference/mediation;
- 14) Trial setting; and
- 15) Any other matter that may aid in the prompt disposition and resolution of this action.

**THEREFORE, IT IS HEREBY ORDERED THAT:**

- A. **Lead counsel and the client** or, if entity, an authorized representative of the client with full authority over the case **MUST** attend the conference, as well as an insurance representative (with full settlement authority) if applicable.
- B. If it has not already been done, no later than 10 days prior to the conference, each attorney shall provide to the other attorney(s) the following items:

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3 (1) A signed medical release form for each medical provider seen by the  
4 Plaintiff for the injuries complained of in the complaint, if applicable.

5 (2) A copy of the declaration page of **every** insurance policy which **might**  
6 offer coverage for the alleged injury/damage, if applicable.

7 (3) An itemized list of damages known to date.

8 C. Each party and attorney participating should be familiar with, and prepared to  
9 discuss all of the issues set forth in NRCP 16.

10 D. The conference shall be held in the Regional Justice Center, 14<sup>th</sup> Floor,  
11 Department XXX, Courtroom 14A of the Eighth Judicial District Court, 200  
12 Lewis Avenue, Las Vegas 89155.

13 E. Counsel shall agree on one of the following dates and contact Department  
14 XXX in writing **before 11/09/2018 at 12:30pm** to confirm the date agreed  
15 upon, by group email (all parties copied) to: ristict@clarkcountycourts.us:

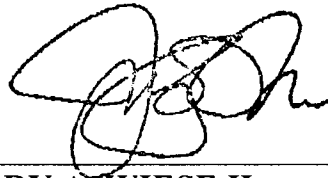
16 **Tuesday, 11/27/2018 at 12:30pm or**

17 **Thursday, 11/29/2018 at 12:30pm**

18 (it is anticipated that this conference will last approximately 30  
19 minutes)

20 **F. Failure of any party to participate in good faith in the Mandatory**  
21 **Conference may result in the imposition of sanctions in accordance with**  
22 **NRCP 16 and NRCP 26.**

23 DATED this 1st day of November, 2018.

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27 **JERRY A. WIESE II**  
28 **DISTRICT COURT JUDGE**

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**CERTIFICATE OF SERVICE**

I hereby certify that on the date filed, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system, or, if no e-mail was provided, mailed or placed in the Clerk’s Office attorney folder for:

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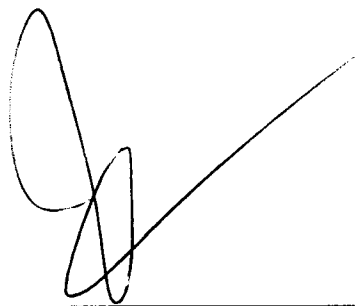
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A handwritten signature in black ink, consisting of a large loop followed by a series of smaller loops and a long diagonal stroke extending upwards and to the right.

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Tatyana Ristic  
Judicial Executive Assistant