IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID DEZZANI; and ROCHELLE DEZZANI, Appellants, vs. KERN & ASSOCIATES, LTD.; and GAYLE A. KERN, Respondent.	Case Nos.: 69410/69896 Appeal from the Second Judicial District Court, the Honorable Elliot A. Sattler Presiding

STATE BAR OF NEVADA'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REVIEW

Marquis Aurbach Coffing
Micah S. Echols, Esq.
Nevada Bar No. 8437
Adele V. Karoum, Esq.
Nevada Bar No. 11172
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
mechols@maclaw.com
akaroum@maclaw.com
Attorneys for Amicus Curiae, State Bar of Nevada

MAC:08988-138 2962760_1

NRAP 26.1 DISCLOSURE

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

1. The State Bar of Nevada is a public corporation that operates under the supervision of the Nevada Supreme Court. The State Bar of Nevada is not owned in whole or in part by a publicly traded company.

2. Attorneys Micah S. Echols, Esq. and Adele V. Karoum, Esq. of Marquis Aurbach Coffing have appeared for amicus curiae, the State Bar of Nevada, in this case.

Dated this 12th day of January, 2017.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
Micah S. Echols, Esq.
Nevada Bar No. 8437
Adele V. Karoum, Esq.
Nevada Bar No. 11172
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Amicus Curiae,
State Bar of Nevada

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

STATUTES

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The State Bar of Nevada ("State Bar") is a public corporation that operates under the supervision of the Nevada Supreme Court. The State Bar regulates attorneys in Nevada and provides education and development programs for the legal profession and the public. The State Bar is tasked with, in relation to regulation and service of the members of the bar, protecting the public interest.

The State Bar has an interest in this case because the outcome is likely to impact its members' ability to zealously practice law as required under the Rules of Professional Conduct ("RPC"). The scope of personal liability for attorneys in Nevada is likewise important to the State Bar, given its role to govern the legal profession in Nevada, under this Court's supervision.

II. SUMMARY OF CASE AND ARGUMENT

Homeowners David and Rochelle Dezzani ("the Dezzanis") filed a complaint in the district court against attorney, Gayle A. Kern, and her law firm, Kern & Associates, Ltd. (collectively "Kern") alleging retaliation based on NRS 116.31183. The district court properly dismissed the claims, holding that NRS 116.31183 did not permit an action directly against Kern, and awarded attorney fees and costs to her based upon a finding that the Dezzanis' claims were frivolous and intended to harass Kern. Respondents' Appendix ("RA") 1:142–145.

The Dezzanis appealed, and the case was assigned to the Nevada Court of Appeals. On November 16, 2016, the Court of Appeals affirmed the dismissal ("the decision").

Although the decision affirmed the dismissal of Kern, it did so based on "a different reason than the one on which the district court's decision was based." Decision at 2–3. Rather than affirming that a private action by a homeowner against an attorney was impermissible, the Court of Appeals held that the Dezzanis' claims required an interpretation of the CC&Rs, and, therefore, the claim should have been submitted to mandatory mediation or dispute resolution according to NRS 38.310.

The decision will negatively impact Nevada attorneys. The decision specifically concerns attorneys who represent HOAs, within the scope of NRS 38.310's mandatory mediation requirements. The decision may be cited as authority according to SCR 123 and, thus, has the possibility of being applied to all direct claims against an opposing party's attorney, where no claim should exist. As such, the State Bar calls on this Court to clarify that NRS 116.31183 and the statutory scheme does not create a direct cause of action against attorneys. *Cf. Club Vista Fin. Servs. v. Dist. Ct.*, 276 P.3d 246, 250 (Nev. 2012) ("While we have not encountered rampant attorney depositions in Nevada, we are

wholeheartedly concerned with this vehicle of discovery and its imaginable ability to create an undue burden.”). The State Bar respectfully submits that this Court provide that clarity by granting Kern’s petition for review for the following reasons:

A. The decision allows homeowners to directly interfere with an HOA attorney’s duty to zealously represent a client and to act on behalf of a client.

B. The decision may affect an attorney’s duty of loyalty to a client by potentially placing an attorney in a position that may be adverse to a client. An attorney would have a decided conflict if forced to mediate individually to defend actions taken on behalf of a client while ostensibly remaining a zealous advocate for the client.

C. Mandatory mediations involving a homeowner and an association’s attorney risk revealing attorney-client privileged material and attorney work product.

D. The decision imperils attorneys’ ability to maintain malpractice insurance and creates an unprecedented level of personal liability and risk for attorneys, requiring attorneys to now appear in mediations to defend their professional actions against opposing parties. For these reasons, the State Bar

urges this Court to grant Kern's petition for review and side with the District Court's reasoning that Kern cannot be sued individually by the Dezzanis.

III. LEGAL ARGUMENT

A. THE DECISION ALLOWS HOMEOWNERS TO INTERFERE WITH AN HOA ATTORNEY'S DUTY TO ZEALOUSLY ADVOCATE FOR A CLIENT AND ACT ON BEHALF OF A CLIENT.

Attorneys have a duty to act with diligence in representing a client (RPC 1.3) and must zealously advocate for their clients. The decision interprets a statute requiring mediation or dispute resolution in a manner that leads to an absurd result. *See D.R. Horton, Inc. v. Dist. Ct.*, 123 Nev. 468, 477, 168 P.3d 731, 738 (2007) ("[N]o part of a statute [may] be rendered meaningless and its language should not be read to produce absurd or unreasonable results.") (internal quotation marks omitted). This Court, in discussing the litigation privilege, has stated that the litigation privilege is to "ensure that attorneys have the utmost freedom to engage in zealous advocacy and are not constrained in their quest to fully pursue the interests of, and obtain justice for, their clients." *Greenberg Traurig v. Frias Holding Co.*, 331 P.3d 901, 904 (Nev. 2014). Cases from other jurisdictions addressing lawsuits against an adversary's attorney have reached similar holdings. *See, e.g., Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 750 P.2d 118, 122 (N.M. 1988) ("The role of the attorney therein is to represent and advocate a

client's cause of action as vigorously as the rules of law and professional ethics will permit. For that reason an attorney's exclusive and paramount duty must be to the client alone and this duty cannot run to the client's adversary. Not only would the adversary's interests interfere with the client's interests, but the attorney's ongoing and justifiable concern with being sued for negligence would detrimentally interfere with the attorney-client relationship."). Not only do attorneys ***not*** owe a duty to third-party adversaries, but attorneys for corporations do ***not*** owe a duty to individual shareholders. *See McCabe v. Arcidy*, 635 A.2d 446, 450 (N.H. 1993); *Lee v. Mitchell*, 953 P.2d 414, 426 (Or. App. 1998) ("[A]n attorney who represents a corporation owes a duty of loyalty to the corporation and not to its officers, directors and shareholders in their personal capacity...."). Similarly, an HOA is a non-profit corporation, and an attorney does not owe a duty to the individual homeowners in the community.

The decision subjects attorneys to adversarial mediation with individuals to whom the attorney owes no duty, interfering with the attorney's zealous advocacy on behalf of his client. Attorneys must be able to pursue the interests of their clients, without concern that they will be dragged individually into mediation for that representation. *See* NRS 162.310(1): "An attorney who represents a fiduciary does not, solely as a result of such attorney-client relationship, assume a

corresponding duty of care or other fiduciary duty to a principal." (enacted in response to *Charleson v. Hardesty*, 108 Nev. 878, 882–883, 839 P.2d 1303, 1306–1307 (1992); Hearing on S.B. 221 Before the Senate Judiciary Comm., 76th Leg. (Nev., March 21, 2011); Hearing on S.B. 221 Before the Assembly Judiciary Comm., 76th Leg. (Nev., May 2, 2011)).

B. THE DECISION IMPACTS AN ATTORNEY'S DUTY OF LOYALTY TO A CLIENT BY POTENTIALLY PLACING AN ATTORNEY IN A POSITION THAT MAY BE ADVERSE TO A CLIENT.

By requiring, allowing, or encouraging homeowner adversaries to drag an HOA's attorneys into adverse, mandatory mediation to question the conduct of the attorney in representing his client, the decision impacts an attorney's duty of loyalty to his client. This Court has stated, "[RPC] 1.7 imposes a duty of loyalty on lawyers that prohibits representation of more than one client if the representation involves a concurrent conflict of interest or a significant risk that the dual representation will materially limit the lawyer's ability to represent one or both clients." *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009) (citations and internal quotation marks omitted). An attorney will be conflicted by self-interest in defending himself in mediation, while also being bound by the duty of loyalty and confidence to his client. This process is comparable to a conflict of

interest involving current clients, which would limit the attorney's ability to represent either the HOA or himself. RPC 1.8.

The Legislature was silent as to whether NRS 38.310 required attorneys to be parties to mediations for actions taken on behalf of their clients. Because the statute is ambiguous, "this court must interpret the statute in light of the policy and the spirit of the law, and the interpretation should avoid absurd results." *Westpark Owners' Ass'n v. Dist. Ct.*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007) (citations and internal quotation marks omitted). Here, this Court should grant review of the decision to avoid absurd results.

C. MANDATORY MEDIATIONS INVOLVING A HOMEOWNER AND AN ASSOCIATION'S ATTORNEY RISK REVEALING ATTORNEY-CLIENT PRIVILEGED MATERIAL AND ATTORNEY WORK PRODUCT.

The decision subjects attorneys to mandatory mediation to defend their actions taken on behalf of a client now provides a context where attorney-client privileged material, confidential communications, or attorney work product has the likelihood of being disclosed. Mediations brought by homeowners against attorneys for HOAs will require attorneys to answer to an adversary as to why the attorney took the actions on behalf of his client, putting the attorney at risk of divulging attorney-client privileged material, confidences of his clients, and attorney work product in this process of defending his own actions.

This Court's discussion on depositions of attorneys by opposing parties points to similar concerns. In *Club Vista Fin. Servs. v. Dist. Ct.*, 276 P.3d 246, 250 (Nev. 2012), this Court looked to other jurisdictions and stated, "Forcing an opposing party's trial counsel to personally participate in trial as a witness has long been discouraged and recognized as disrupting the adversarial nature of our judicial system." *Id.* at 249 (citing *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986)). "[S]uch depositions could provide a back-door method for attorneys to glean privileged information about an opponent's litigation strategy from the opposing attorney's awareness of various documents." *Id.* at 250 (citing *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 70 (2d Cir. 2003) and *McMurry v. Eckert*, 833 S.W.2d 828, 830–831 (Ky. 1992) (potential for harm created by attorney depositions is too great to permit them to be routinely performed)). In *Club Vista*, this Court adopted a test from the Eighth Circuit requiring the examination of three factors prior to subjecting attorneys to depositions by opposing parties. *Club Vista*, 276 P.3d at 250–251 (citing *Shelton*, 805 F.2d at 1327). These factors include an assessment of whether the information sought is relevant and non-privileged, whether no other means exist to obtain the information than to depose opposing counsel, and whether the information is crucial to the preparation of the case. *Id.*

The decision does not set any limits for when attorneys will be required to attend mediations to defend their actions taken on behalf of HOA clients. The decision also does not consider whether, like depositions of an adversary's attorney, these mediations could be a back-door attempt to gain work product or attorney-client privileged material. The District Court, on the other hand, based its dismissal on the absence of an attorney's liability to an adverse party for actions taken on behalf of his client (RA 1:142–145) and specifically noted that "to permit such causes of action against Kern would result in a chilling effect on individuals' ability to hire and retain counsel." RA 1:144. Therefore, this Court should grant the petition for review to adopt the District Court's framework that considered the protection of an attorney's work on behalf of organizational clients, like HOAs.

D. THE DECISION IMPERILS ATTORNEYS' ABILITY TO MAINTAIN MALPRACTICE INSURANCE AND SUBJECTS ATTORNEYS TO AN UNACCEPTABLE RISK OF PERSONAL LIABILITY.

The decision effectively not only permits but states that the proper procedure for a homeowner's dispute, related to actions taken by an HOA, is to mediate with the HOA's attorney. *See* Decision at 2–4. This holding requires an attorney to potentially be personally liable for actions taken on behalf of an organizational client, based upon nothing more than an adversary's belief or bare allegation that an action was "retaliatory." Litigation involving HOAs is often contentious, and

homeowners are frequently dissatisfied with HOA actions. To open the door to all homeowners to require an HOA's attorneys to prepare for and attend mediations as "agents" of the HOA under NRS 116.31183 places an unprecedented and undue burden upon attorneys. The fallout of the decision could make it difficult or impossible for Nevada attorneys representing HOAs, and other organizational clients, to obtain affordable malpractice insurance in light of the increased risk of personal liability. These policy reasons further support this Court granting Kern's petition for review.

IV. CONCLUSION

The State Bar of Nevada, as amicus curiae, urges this Court to grant Kern's petition for review. The decision creates a problematic result that (1) interferes with an attorney's duty to zealously advocate for his client; (2) impacts an attorney's duty of loyalty; (3) may reveal attorney work product and privileged or confidential materials; and (4) results in unprecedented potential for personal liability against an attorney for actions taken on behalf of his clients, and may make malpractice insurance difficult or impossible to obtain. For the foregoing

reasons, the State Bar of Nevada, on behalf of its members, files this brief in support of Kern's petition for review.

Dated this 12th day of January, 2017.

MARQUIS AURBACH COFFING

By /s/ Micah Echols
Micah S. Echols, Esq.
Nevada Bar No. 8437
Adele V. Karoum, Esq.
Nevada Bar No. 11172
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Amicus Curiae, State Bar of Nevada

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 2,204 words; or

☐ does not exceed _____ pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 12th day of January, 2017.

MARQUIS AURBACH COFFING

By /s/ Micah Echols

Micah S. Echols, Esq.
Nevada Bar No. 8437
Adele V. Karoum, Esq.
Nevada Bar No. 11172
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Amicus Curiae, State Bar of Nevada

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **STATE BAR OF NEVADA'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REVIEW** was filed electronically with the Nevada Supreme Court on the 12th day of January, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Gayle Kern, Esq.
Debbie Leonard, Esq.

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

David and Rochelle Dezzani
17 Camino Lienzo
San Clemente, California 92673

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing