IN THE SUPREME COURT OF THE STATE OF NEVADA

Margaret Reddy, Mohan Thalamarla, Max Global, INC. Appellants, vs. MEDAPPEAL, LLC, an Illinois limited liability company Respondent.	Supreme Court No. 83253

APPELLANTS' OPENING BRIEF

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APPELLANTS' 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 in order that the judges of this court may evaluate possible disqualification or recusal.

Appellants MARGARET REDDY and MOHAN THALAMARLA are individuals and have no parent corporations. MAX GLOBAL LLC is a limited liability company with no parent corporations.

The following law firms (with the listed attorneys) have appeared previously in this case:

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The following law firm is expected to appear in this court for Appellants:

//

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. JURISDICTION, ROUTING, STATEMENT OF ISSUES

A. JURISDICTION OVER THE APPEAL

NRAP 3(A) sets for the areas in which the Nevada Supreme Court can take jurisdiction over an appeal. The only applicable statute allowing jurisdiction of this matter, as contained within NRAP 3(A) is NRAP 3A(b)(1), appeal from a final judgment.

Prior Appellants' counsel filed the appeal of the order for Summary Judgment noticed on June 18, 2021 on July 16, 2021. The appeal was timely filed.

Appellants appeal the following decisions:

a) Order granting Plaintiff's Motion for Summary Judgment, entered in this action on the 18th day of June, 2021

b) Order denying Motions to Dismiss, entered in this action on the 4th day of October, 2019

c) Order setting objection to July 14, 2020 DCRR (regarding Defendant Margaret Reddy and Vijay Reddy only) for hearing on August 27, 2020, filed in this action on August 5, 2020; never argued by Defendants' counsel.

C. STANDARD OF REVIEW

The standard of review of Motions for Summary Judgment, pursuant to NRCP 56, from *Wood v. Safeway, Inc.* is that

> "This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court.[1] Summary judgment is appropriate and "shall be rendered forthwith" when the pleadings and other evidence on file demonstrate that no "genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law."[*Id.* at Footnote 2] This court has noted that when reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." [Id. At Footnote 3]. (*Wood v. Safeway, Inc.*, 121 Nev. 724, (2005)).

This court reviews de novo a district court's determination of personal jurisdiction. *Fulbright & Jaworski LLP v. Eighth Judicial District Court*, 342 P.3d 997 (Nev. 2015).

Similarly, this Court reviews questions of law under the de novo standard of review *Frantz v. Johnson*, 116 Nev. 455, 471, 999 P.2d 351, 361 (2000) (citations omitted).

D. ROUTING STATEMENT

This matter is presumptively retained by the Supreme Court and Appellants believe the Supreme Court shall retain this case.

E. ISSUES PRESENTED FOR REVIEW

Remand is necessary for the following questions for review:

Is the District Court's granting of summary judgment improper because questions of material fact, like Appellants' disputed involvement with WEINSTEIN and BROWN and lack of an undisputed definition of "silent partner" preclude such an order?

Does Judicial Estoppel apply to preclude Appellants asserting lack of personal jurisdiction in Nevada, when Appellants were not defendants (but MARGARET was mentioned) in the Illinois matter from which judicial estoppel would have been made?

Does a forum selection clause in a contract grant personal jurisdiction to out of state defendants who were not parties to the contract, and are not officers and directors of other parties?

Do public policy considerations require non-resident limited liability companies to do business in Nevada and be licensed in Nevada to be able to file a lawsuit in Nevada?

Does Appellants' prior counsel's nonappearance at the final Motion to Dismiss hearing on August 20, 2019 constitute abandonment of a vital issue Appellants reasonably and likely should have prevailed on?

I. STATEMENT OF CASE

A. RELEVANT DISTRICT COURT PROCEEDINGS

Illinois:

Complaint (Appellants are not Defendants)	October 1, 2018
Motion to Dismiss Illinois Complaint	December 14, 2018
Order Granting Motion to Dismiss	March 19, 2019

Nevada:

Complaint filed	April 12, 2019
Motion to Dismiss (personal jurisdiction)	August 1, 2019
Con't hearing, Motion to Dismiss, deny	August 20, 2019
First Amended Complaint	August 31, 2019
Order Denying Motion to Dismiss	October 4, 2019
Answer to First Amended Complaint	October 28, 2019
Motion to Compel	June 25, 2020
DCRR	July 14, 2020
Hearing on Objections to DCRR	September 17, 2020
Motion for Summary Judgment	April 29, 2021
Notice of Entry of Order for MSJ filed	June 18, 2021
Notice of Appeal	July 16, 2021

(2) NATURE OF CASE AND DISPOSITION BELOW

Respondent is a company owned by two IL attorney residents licensed to practice in the State of Illinois (*Vol 1, p196 first paragraph*). Respondent's owners contracted on behalf of another company to receive commercial business from 5 other defendants not included in this appeal. *(Vol 1, p9, paras 4-8)*. Respondent was

dissatisfied with the commercial business it received and sued Brown, Weinstein, Vijay Reddy and two companies, Medasset and VBB, in Illinois. *(Vol 1, p13, paras 37-43)*.

In the complaint, Respondent mentions Appellant MARGARET REDDY but does not name her as a defendant (*Vol 1, p11, para27*). MOHAN THALAMARLA and MAX GLOBAL LLC are neither mentioned in the complaint, nor sued in Illinois. *(Vol 1, p8-20)*. The five entities objected to personal jurisdiction assertions in Illinois and prevailed on a Motion to Dismiss, *(Vol II, p270)*.

Respondent, then filed another action in Nevada, naming the same five defendants, plus Appellants as parties in this action (*Vol II, p313 line 24 – p314 line 18*).

All defendants and Appellants filed another Motion to Dismiss asserting lack of personal jurisdiction (*Vol II, p366 lines 20-24*). Appellants filed affidavits stating no contacts with Nevada or with this Respondent (*Vol II, p376, 377, 379*). Respondent asserted that judicial estoppel precluded all 8 defendants, including Appellants who were not named parties in Illinois, estopped them from arguing lack of personal jurisdiction in Nevada (*Vol II, p385 line 21 – p387 line 6*). Appellants' motion was denied on August 20, 2019. (Vol III, p538 lines 14-15). Appellants' attorneys did not attend the 08/20/19 hearing (*Vol III, p526 lines 19-23 and p538 lines 23-24*).

Appellant MARGARET objected to the DCRR that stated that she was to provide additional responses to interrogatories propounded on her. The objection does not seem to be in the record. The hearing on her

DCRR objection was not heard. Another hearing on another DCRR was heard, but Appellant's attorney did not adovocate during that hearing for Appellants (*Vol V, p 1128 lines 1-2*). Regardless, she was compelled to provide new answers. *Id*, lines 3-9).

Respondent filed its Motion for Summary Judgment (*Vol V, p1138*). The Court granted it, after oral argument, on April 19, 2019 (*Vol IX, Ex 41&42*). Notice of Entry of this order was made on June 18, 2021 (Vol IX, *Ex 43*).

Appellants appealed this Order on July 16, 2021 (*Vol IX, Ex 44*).

Appellants filed a Huneycutt motion based on the concept that it is unlawful for a foreign LLC which has not done business in Nevada, and is not licensed in Nevada filed and is still not licensed, to commence a lawsuit in Nevada on April 12, 2019 (*Vol IX Ex 46*). The Court denied this motion (*Vol IX Ex 48*).

STATEMENT OF UNDISPUTED FACTS

For purposes of this appeal, Appellants either dispute or have no knowledge of all facts from the Findings of Fact, Conclusions of Law entered June 18, 2021 (*Vol IX, Exhibit 43*):

Only two facts mention Appellants by name: 43, 44. *Id.*

For Purposes of this appeal, Appellants do not dispute the following facts from the Notice of Entry of Order Denying Motions to Dismiss filed on October 4, 2019. (*Vol IV, p 764-768*).

1: (*Vol IV, p765 lines 21-23*)

15: (*Vol IV, p767, lines 10-11*)

Appellants filed a Motion to Dismiss (in Nevada) separate from anything filed in Illinois in which they argued that they were not subject to personal jurisdiction in Nevada (*Vol II, p366-379*).

Respondent filed a complaint in Cook County, Illinois, arising out of an agreement to purchase a medical appeals and medical credentialing business (the "Purchase Agreement") (*Vol I, p8 para 1*).

There is not any dispute as to the following facts:

a) Respondent did not make Appellants parties in the Illinois litigation. *(Vol I, p8-9)*.

b) Respondent never communicated to any Appellant. (*Vol II, ps 376, 377, 379*).

c) Respondent never had any contact with any Appellant. *(Vol IV, p873 lines 20-24; p896 line 21)*

d) Appellants are not parties to the contract. *(Vol I, p41-43)*

e) MARGARET is Vijay Reddy's wife. *(Exhibit 37, page 21 fn)*

f) Respondent is an LLC, not licensed in the State of Nevada to do business. (*Vol I, p8 para 1*).

g) Respondent has never done business in Nevada, other than to commence this litigation. (*Exhibit 47*).

i) The last time any Appellant received any money from Weinstein was before the Respondent paid money to Weinstein in May of 2018 (*Vol IV, p897 line 22 – p898 line 4*).

k) Defendant BROWN does not know MARGARET (*Ex 37 p 308*).

l) Appellants do not know Respondent, and except for MARGARET working for Weinstein's business, and MARGARET married to V. Reddy, Appellants do not know other Defendants. (*Vol II, p 376, 377, 379*)

(2) STATEMENT OF DISPUTED FACTS

Appellants dispute every single finding of fact in this case from the findings of fact and conclusions of law, except for the preceding two facts cited above.

Additionally, Appellants dispute that:

1) MARGARET is a "silent partner" of any company or any individual, especially if "silent partner" means tortious conspirator (*Vol II p 376, 377, 379 and Vol IV p896 line 12 – 905 line 4*) and more especially when the Michigan Bankruptcy Trustee refers to Weinstein's wife and not Reddy's (*Ex 37 p 506-507*)

2) MARGARET or MOHAN or MAX GLOBAL, LLC received any money from Respondent's contract payments. *(Vol IV p874 lines 21-27; Vol IV p903 line 21 – 904 line 18)*.

3) APPELLANTS were conspirators or joint tortfeasors with defendants as against Respondent. *Ex 37 at 506, 507.*

STATEMENT OF LAW AND DISCUSSION

II.

A. MATERIAL FACTS EXIST THAT PRECLUDE SUMMARY JUDGMENT

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed to "secure the just, speedy and inexpensive determination of every action." *Celotex Corp.*

v. Catrett, 477 U.S. 317, 327 (1986); *Wood v. Safeway, Inc.*, 121 Nev. Adv. Op. No. 73 (2005).

Summary judgment is proper "if the pleadings … show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." NRCP 56(c).

In 2005, the Nevada Supreme Court adopted the Federal Summary Judgment Standard. In *Wood v. Safeway, Inc.* the Court stated that when considering a Motion for Summary Judgment, the Court must perform "the threshold inquiry of determining whether there is a need for trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Wood v. Safeway, Inc.*, 121 Nev. Adv. Op. No. 73 (2005), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Moreover, while facts and inferences are viewed in a light most favorable to the responding party, the responding party cannot merely stand on their pleadings, but must demonstrate that there is a material issue of fact. *Poller v. CBS, Inc.*, 368 U.S. 464 (1962); *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d. 1301, (9th Cir. 1982). The existence of some alleged factual dispute between the parties is not sufficient to defeat a Motion for Summary Judgment. The responding party may not rely "on the gossamer threads of whimsy, speculation and conjecture." *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302 (1983).

The factual dispute must be material; a material fact is one required to prove a basic element of a claim. *Anderson*, at 248. Moreover, the failure to show a fact essential to one element "necessarily renders all other facts immaterial." *Celotex*, at 323. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party. *Wood*, at 121 P.3d 1026 (2005) citing *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986).

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment … against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 323. Once the moving party has met its burden by pointing out to the district court that there is an absence of evidence to support the non-moving party's case, the burden shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 325; *Anderson*, 477 U.S. at 250.

The nonmoving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 110 (1992). Further, **if the factual context makes the … claim implausible**, then the party must come forward with more persuasive evidence than would otherwise be necessary to show there is a genuine issue for trial. *Celotex* at 323.

Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978).

Finally, it is insufficient to meet the non-moving party's burden, where they have the burden of proof at trial, to show a mere metaphysical doubt as to the material facts. *Matsushita, supra*. There must be evidence on which the jury could reasonably find for the party opposing judgment. *Anderson*, 477 U.S. at 247. The Nevada Supreme Court states in *Wood, supra* at 3:

> "As this Court has made abundantly clear, '[w]hen a motion for summary judgment is made and supported as required by NRCP 56, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue."

Additionally, in asserting whether or not facts exist, counsel violates the duty of candor to the court when counsel: (1) proffers a material fact that he knew or should have known to be false, see generally *Sierra Glass & Mirror v. Viking Indus., Inc.*, 107 Nev. 119, 125-26, 808 P.2d 512, 516 (1991) (providing that counsel committed fraud upon the court "in violation of SCR 172(1)(a) and (d)" when he proffered evidence and omitted pertinent portions of a document to "buttress" his client's argument, and that he "knew or should have known" that the omitted portion was harmful to his client's position); cf. *Seleme v. JP Morgan Chase Bank*, 982 N.E.2d 299, 310-11 (Ind. Ct. App. 2012). *Est Adams v. Fallini*, 132 Nev.Adv.Op.81 (2016).

In the instant matter, Appellants, upon the existence of the disputed facts have set forth "by affidavit or otherwise" specific facts which demonstrate the existence of a genuine issue for trial.

Respondent deposed neither MOHAN nor MARGARET. There are numerous statements made by MARGARET's husband Jay, which are precluded by the marital privilege. Further, in this brief, Appellants will examine the propriety of representing Jay and MARGARET and whether it counts as abandonment. In their affidavits provided in the Motion to Dismiss, there are disputed facts, which taken in the context of a light most favorable to Appellants, would demonstrate that there is no jurisdiction in Nevada, that judicial estoppel does not apply to them or Max Global and there is no connection to the other defendants. Respondent alleged nothing about MOHAN or MAX GLOBAL and MARGARET only worked with her husband, ostensibly to help (*Vol I, p8-15, para 27, 30, 62*).

As a matter of law, Appellants show that among other things:

a) Respondent cannot bring the lawsuit in Nevada.
b) Respondent and their attorneys should acknowledge that Appellants were not named parties in Illinois.
c) Respondent cannot unilaterally force MARGARET to abandon her marital privileges solely by refusing to depose her and refusing cease representing her despite the clear conflict.
d) Statements made by a Michigan Bankruptcy Trustee or his representative are inadmissible hearsay in this Court.
e) Appellants prior counsel arguably abandoned them in the middle of the proceedings, by not attending the Motion to Dismiss.

In the instant case, there are no undisputed facts relevant to these Appellants, in the formal findings of face and conclusions of law. However, there is no dispute that no Appellant resides in Nevada (*Vol II, p376, 377, 379*). There is no dispute that the Respondent is a foreign LLC who never did business in Nevada and is

not licensed to do business in Nevada (*Ex 47*). There is no dispute there is no adjudication that Appellants had the minimum contacts necessary for Nevada to claim jurisdiction over them in this case (*Vol III, p541; p767 line 15 – p768 line 8*).

Respondents make a great deal of two highly disputed terms and sets of statements. First, in an unrelated bankruptcy proceeding, Vijay Reddy, stated his wife may be a "silent partner" of WEINSTEIN. Not only is "silent partner" undefined and misconstrued as "conspirator" (*Vol I, p157 lines 3-24*), it is also against the marital privilege MARGARET holds that precludes her husband testifying against her while married; see NRS 49.225(1). MARGARET never gave consent for counsel to waive this conflict with her husband. Additionally, it is all inadmissible speculation. *Id.*

The other issue is the false statement in Respondent's MSJ that the Trustee in Michigan believed that certain transfers were fraudulent and were Margaret's (*Vol V p1159 lines 27-28*). The statement by the Trustee is not made about MARGARET but about Weinstein's wife (*Vol VII p1644 fn 7 and 8*). Regardless, MARGARET completely disputes this concept and as a question of fact, it must be submitted to a jury for determination (*Vol II p376, 377, 379*).

All of these disputed and undisputed facts should be submitted to the jury, as there is a reasonable inference that it is likely Appellants will prevail and as such, there is every reason to remand this case and reverse the granting of summary judgment for Plaintiff.

B. NEVADA HAS NO PERSONAL JURISDICTION OVER APPELLANTS

When a nonresident defendant challenges personal jurisdiction, the plaintiff bears the burden of showing that jurisdiction exists. *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 692, 857 P.2d

740, 743-44 (1993). In so doing, the plaintiff must satisfy the requirements of Nevada's long-arm statute and show that jurisdiction does not offend principles of due process. *Id.* At 698, 857 P.2d at 747; NRS 14.065.

As it is a Federal Constitutional Claim as well as state claim, a nonresident defendant must have sufficient "minimum contacts" with the forum state so that subjecting the defendant to the state's jurisdiction will not "offend traditional notions of fair play and substantial justice." *Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court*, 122 Nev. 509, 512, 134 P.3d 710, 712 (2006).

Additionally,

> "Due process requirements are satisfied if the nonresident defendants[s] contacts are sufficient to obtain either (1) general jurisdiction, or (2) specific personal jurisdiction and it is reasonable to subject the nonresident defendant to suit [in the forum state]." *Viega GmbH v. Eighth Judicial Dist. Court*, 328 P.3d 1152, 1156 (2014).

Nevada's long-arm statute, NRS 14.065, permits personal jurisdiction over a nonresident defendant unless the exercise of jurisdiction would violate due process. Typical Supreme Court inquiry is confined to whether the exercise of jurisdiction over the defendants would comport with due process, see *Fulbright & Jaworski LLP v Eighth Judicial District Court*, 342 P.3d 997 (Nev. 2015).

In order for Respondent to overcome Appellants' motion to dismiss, it needed to make a prima-facie showing of either general or specific personal jurisdiction by:

> "produc[ing] some evidence in support of all facts necessary for a finding of personal jurisdiction." *Trump*, 109 Nev. At 692, 857 P.2d at 744.

In the instant case, the district court did not attempt a prima facia showing of either general or specific personal jurisdiction as

to any of these Appellants (*Vol III p513-539*). The District Court solely ordered the motion to be dismissed because of judicial estoppel and for no other reason (*Vol III, p541; Vol IV p767 line 15 – p768 line 11*).

There is nothing in the record that shows Appellants contacts with the forum state. There is undisputed evidence there is no contact with the forum state (*Vol II, p376, 377, 379*). From their sole evidence of Appellants' declarations, we see that they had no such contacts. *Id.* In fact, there is no evidence that Appellants had anything to do with Respondent, much less the State. *Id.*

To make a prima facia showing of general jurisdiction over a non-resident defendant when its contacts with the forum state are so "continuous and systematic" as to render [the defendant] essentially at home in the forum State." See *Viega*, 328 P.3d at 1156-57 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)); see also *Arbella Mut. Ins. Co.*, 134 P.3d at 712 ("[G]eneral personal jurisdiction exists when the defendant's forum state activities are so substantial or continuous and systematic that it is considered present in that forum and thus subject to suit there, even though the suit's claims are unrelated to that forum."

A general jurisdiction inquiry "calls for an appraisal of a [defendant's] activities in their entirety, nationwide and worldwide." *Daimler AG v. Bauman,* 134 S. Ct. 746, 762 (2014).

In *Fulbright & Jaworski*, this Court found that two attorneys from an out of state law firm sitting in on 2 legislative sessions and making pro hac vice appearances in two lengthy lawsuits in Nevada that result in jury verdicts in their clients' favor are not substantial activities that are so continuous and systematic that

Nevada can be considered the law firm's home; see *Fulbright*, at 1006.

Without a doubt, Nevada has no general jurisdiction.

Specific jurisdiction is proper only where 'the cause of action arises from the defendant's contacts with the forum." *Dogra v. Liles*, 314 P.3d 952, 955 (2013) (quoting *Trump*, 109 Nev. At 699, 857 P.2d at 748). Exercising specific personal jurisdiction over a nonresident defendant, requires a Court to find that:

> "[Ole defendant must purposefully avail himself of the privilege of acting in the forum state or of causing important consequences in that state. The cause of action must arise from the consequences in the forum state of the defendant's activities, and those activities, or the consequences thereof, must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." *Consipio Holding, BV v. Carlberg*, 128 Nev. „ 282 P.3d 751, 755 (2012) (quoting *Jarstad v. Nat'l Farmers Union Prop. & Cas. Co.*, 92 Nev. 380, 387, 552 P.2d 49, 53 (1976)).

Respondent never contended such a contact was present. In the entirety of the Complaint there is no such assertion. As the District Court failed to make any type of assessment, this standard was never satisfied (*Vol IV p767 line 15 – p768 line 11*). Further, Appellants themselves state that they have no assets in Nevada and do not intend any in the future. (*Vol II, p 376, 377, 379*). They don't work in Nevada and they have no contact with Respondent or the other defendants. *Id.* No Special Jurisdiction.

Nevada has no personal jurisdiction over these non-resident Appellants, who were not even a party in the Illinois matter.

C. ILLINOIS' ASSERTION OF JUDICIAL ESTOPPEL ON THE OTHER DEFENDANTS IS BOTH A SHIELD FOR APPELLANTS WHO WERE NOT PARTIES IN THE ILLINOIS LAWSUIT AND A SWORD AGAINST RESPONDENT

Judicial estoppel is an equitable doctrine, in use in every jurisdiction including the US Supreme Court. There is a clear public

policy with judicial estoppel and that is an aim to protect the integrity of the justice system.

The US Supreme Court held an occasion to discuss that doctrine while applying it in the exercise of its original jurisdiction to resolve a border dispute between two states:

> "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. …" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

Judicial estoppel is invoked "… to prevent the perversion of the judicial process …" and to prevent parties from "… playing fast and loose with the courts. …" *New Hampshire*, 532 U.S. at 750, quoting *Allen v. Zurich Insurance Co.*, 667 F.2d 1162, 1166 (4th Cir., 1982) and *Stretch v. Watson*, 6 NJ Superior 456, 469 (1949), respectively.

In Nevada, judicial estoppel works to prevent a party from asserting a position in one proceeding that is contrary to her position in a prior proceeding. *Vaile v. Dist. Ct.*, 118 Nev. 262, 44 P.3d 506 (2002).

Courts in Nevada use a five-factor test to determine whether judicial estoppel applies whether:

> "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position …; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud or mistake." *In re Frei Irrevocable Tr.*, 390 P.3d 646, 652 (2017)

The court's use of judicial estoppel is discretionary and should only be applied when a party's inconsistent position is the result of intentional wrongdoing or an attempt to gain an unfair advantage. *NOLM, LLC v. Cty. Of Clark*, 120 Nev. 736, 743, (2004).

In Illinois, the flexible doctrine of judicial estoppel has five similar elements which assert that:

> (1) the same party in separate actions (2) may not maintain totally inconsistent positions (3) in those separate judicial proceedings (4) when the positions are presented under oath and (5) the party successfully maintained the first position, receiving some benefit thereby. *Bidani v. Lewis*, 285 Ill. App. 3d 545, 550 (1st Dist. 1996).

In the instant case, using the Nevada test, Respondent, an Illinois LLC ran by 2 Illinois attorneys, filed a Complaint in an Illinois District Court asserting that 5 defendants were liable to it for damages associated with contract and tort remedies (*Vol I, p8*). In that Complaint, Appellants were not named. *Id.* There were no DOE and no ROE defendants. *Id.* Further, in that Complaint, Appellant MARGARET was mentioned 3 times (numbers are paragraphs in the Complaint) out of 97 paragraphs: *(Vol I, p11 para 27; p12 para 30 and p15 para 62)*.

> "27. V. Reddy stated that each year he buys business packages from Weinstein, manages and builds them up with the help of his wife and step-daughter, and sells them at a profit. …
>
> 30. At the time of the Calls, V. Reddy never disclosed his vested interest in the deal, either personally, or questionably through his wife. V. Reddy always passed himself off as a business reference and longtime satisfied customer. …
>
> 62. Defendants did not disclose that V. Reddy, their "client reference" was and/or has been part of their business deals and/or his wife would be a beneficiary of the potential transaction."

Ostensibly the reason for including all these 5 defendants together and not the Appellants is contained in paragraph 95 of the Illinois Complaint (Vol I p18 para 95):

> "95. Defendants have been the subject of Civil and/or Criminal lawsuits, threats of litigation, complaints, and/or law enforcement investigations involving the sale of Medical Billing, Medical Appeals, and/or Transcription contracts."

There is no mention of MARGARET REDDY as being a defendant in any lawsuit in Illinois. There is no mention of MOHAN THALAMARLA as being involved in any enterprise with any of these defendants in Illinois. MAX GLOBAL, LLC, is likewise not mentioned either. The Respondent's owners made it clear in their Illinois position that none of the Appellants are involved with Respondent or Defendants.

Respondent filed a complaint in Nevada; it was the same entity, run by the same managers, as in the Illinois Complaint. Respondent took two different positions in the two different complaints. *(Vol I p8 and Vol II p313)*. Respondent took two different positions, and both positions were in a legal setting. The first position, that of the Appellants being non-parties was successful. The Court in Illinois did not require any Appellant to be listed as a party in the complaint for the reason of indispensable parties in the Illinois version of the joinder rules in civil procedure. The complaint filed by the attorney was signed as both the owner and as the attorney for the Respondent. *(Vol I p20)*. The Respondent knew who the Appellants were and included MARGARET. *(Vol I p8-20, paras 27, 30, 62, 95 specifically)*. There has never been any allegation of mistake, fraud

or ignorance. Therefore, judicial estoppel applies to preclude Appellants from being included in the Complaint filed in Nevada.

Respondent's managers are Illinois attorneys who have their own duty in Illinois to not lie to a tribunal. Respondent Illinois appears to be ABA model rules state, like Nevada. Illinois RPC 3.3 states in pertinent part:

> "(a) A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

In this case, Respondent knew about the existence of MARGARET and mentioned her three times in the 97-page Illinois complaint. *Id.*

As an attorney, licensed by the State Bar of Illinois, making a submission to an Illinois Court of a Complaint signed by the attorney and intentionally not listing MARGARET as a defendant, but rather the wife of a Defendant, Respondent took a position that cannot be changed due to the operation of judicial estoppel.

Likewise, Appellants look to the Illinois rule of judicial estoppel to see if that rule applies to preclude the Appellants' position in Nevada as Respondent asserts. There, we see that the first factor of the test, is NOT met. Appellants were not parties in

the Illinois action. As a non-party, the second factor fails, because only a party may maintain a position. Appellants never appeared in the Illinois matter and never made any statement under oath. The last factor is inapplicable because Appellants cannot maintain the position, because it was never made.

Therefore, judicial estoppel cannot be used in Nevada to preclude any argument because it is not applicable in Illinois; Appellants never appeared there. As that is the case, Appellants are not precluded from arguing lack of personal jurisdiction in Nevada. Thus, the matter must be remanded to the District Court for a hearing to determine personal jurisdiction under the Nevada jurisdiction rules and not the Illinois rule of judicial estoppel.

Judicial Estoppel is met in Nevada to preclude the Respondent's attempt to file a Complaint with the Complaint filed in Illinois. Judicial Estoppel does bar Respondent from changing the Complaint filed in Illinois because it was under a duty and under a public policy to respect what it filed there and not change it because there is a different attorney, but the SAME PARTY.

As a result of applying the various rules of Judicial Estoppel to this case, Judicial Estoppel works as a shield to protect these Appellants from being attacked inconsistent with the first complaint and provides a sword to counterattack Respondent for breach of public policy in attempting to subvert the Nevada matter to something counter to the reality of the Illinois matter.

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D. APPELLANTS ARE ENTITLED TO REMAND AND REVERSAL OF SUMMARY JUDGMENT PURSUANT TO OPERATION OF NRS 86.548

The complaint and the amended complaint do NOT aver that Plaintiff is licensed to do business in the State of Nevada.

It appears that this issue is a matter of first appearance before this court. **This is solely because Respondent is a foreign LLC commencing a lawsuit without a license or any legal authority to do any type of business in this court**. (*Ex 47*). Further, and in addition to the statutory penalties that must be levied upon Respondent, there is no jurisdiction for this case to continue with this Court against Appellants by operation of Judicial Estoppel. There is no evidence available that would serve to allow Plaintiff to maintain this action against these Appellants in any event, because of Respondent's assertions that it never was licensed and never did business here. *Id*.

Respondent never cured this defect, to the best of the knowledge of the Appellants. *Id*. Respondent never made that fact known to any Appellant or in any pleading, until after Judgment. (*Ex 46 and 47*). Literally years of litigation occurred while so not licensed, in violation of NRS 86. Simply, MEDAPPEAL cannot maintain this action and any judgment granted to it must be immediately vacated.

Declarations were made and signed during the beginning of this case which in essence, established with certainty, there was no connection with the instant lawsuit and their personal lives in Michigan / India.

MARGARET and MOHAN are non-resident defendants that reside over 1500 miles away. They had never met Medappeal employees or its

officers. They never had any dealings with the Plaintiff on any level. They never spoke about Plaintiff to any other defendant in this case. In the instant matter, Defendants have just found conclusive evidence that Plaintiff could not have and cannot still maintain this action. In the seminal case of *AA Primo Builders, LLC v. Wash.*, 245 P.3d 1190 (Nev. 2010), the Nevada Supreme Court rules in pertinent part, to identify the difference between operating an LLC in a revoked status and operating an LLC without a charter:

> "Doing business as an LLC without filing the initial organizational documents carries significant fines of up to $10,000. NRS 86.213(1). A revoked charter, by contrast, carries no fines, only a $75 penalty reinstatement fee. NRS 86.272(3). As for incentivizing judgment-proof LLCs to litigate with wanton abandon, NRS 86.361 provides that members of an unchartered entity risk individual liability unless the default is cured. See *Nichiryo Am., Inc. v. Oxford Worldwide, LLC,* No. 03:07-CV-00335-LRH-VPC, 2008 WL 2457935 (D.Nev. June 16, 2008); see also *Resort at Summerlin v. Dist. Ct.*, 118 Nev. 110, 40 P.3d 432 (2002) (interpreting NRS 80.210 (now NRS 80.055) to condition commencement and maintenance of a lawsuit for foreign corporations on initial qualification rather than continuous upkeep of its qualification). The Legislature has addressed the penalties for an administrative default leading to charter revocation and loss of capacity to sue is not among them." *Id.*

Currently, NRS 86.213 requires in pertinent part:

> "1. Every person, other than a foreign limited-liability company, who is purporting to do business in this State as a limited-liability company and who willfully fails or neglects to file with the Secretary of State articles of organization is subject to a fine of not less than $1,000 but not more than $10,000, to be recovered in a court of competent jurisdiction."

The analogous statute for foreign limited liability companies is NRS 86.548 which has the same penalty and additionally states in pertinent part:

> "2. Every foreign limited-liability company transacting business in this State which fails or neglects to register with the Secretary of State in accordance with the provisions of NRS 86.544 may not commence or maintain any action, suit or proceeding in any court of this State until it has registered with the Secretary of State."

The Nevada Supreme Court has clearly stated that the penalty for LLCs that never register is not the same as the LLC who has registered but let its registration lapse in revocation status. It is clear, the curing of the willful failure to comply with the requirement to register NEVER gives a company the right to bring or maintain an action in this state.

In the instant case, Respondent is a foreign LLC (licensed to do business in Illinois) (Vol I, p8). It has no right to do business in Nevada. The fact that it has, subjects it to a fine of $10,000.00 and any liability for sanctions are passed through the LLC to its managers, pursuant to *AA Primo Builders LLC*.

Further, Medappeal LLC cannot cure the problem by registering now. It needs to dismiss this action, register and then bring it again. There is simply no way for Medappeal to avail itself of this state's jurisdiction until it follows the simple rules.

Combined with lack of jurisdiction over the Appellants, the only option is to reverse summary judgment and remand the case to the District Court for an order of dismissal.

E. THE *TANDY* RULE ON FORUM SELECTION CLAUSES DISALLOWS THE FORUM SELECTION CLAUSE IMPOSED ON APPELLANTS AND AS SUCH, DOES NOT CONFER OR MANDATE PERSONAL JURISDICTION

The Nevada Supreme Court decided in the seminal case of *Tandy v. Terina's Pizza*, 784 P.2d 7 (Nev. 1989) the defining rule for whether

a forum selection clause is enforceable. First, stating that Nevada is a "*Bremen*" following state, the Court held in pertinent part:

> "The Due Process Clause of the 14th Amendment requires that a defendant be subject to the personal jurisdiction of the court." *World Wide Volkswagen v. Woodson*, 444 *8 U.S. 286, 291, 100 S. Ct. 559, 564, 62 L. Ed. 2d 490 (1980), citing *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Furthermore, "[a] judgment rendered in violation of due process is void in the rendering state and is not entitled to full faith and credit elsewhere." *World Wide Volkswagen v. Woodson*, 444 U.S. at 291, 100 S. Ct. at 564, citing *Pennoyer v. Neff*, 95 U.S. 714, 732-733, 24 L. Ed. 565 (1877)." *Id.*

Further, it went on to state that:

> "While some forum selection clauses are sufficient to subject parties to the personal jurisdiction of out-of-state courts, not all forum selection clauses are enforceable. "Where such forum selection provisions have been obtained through `freely negotiated' agreements and are not `unreasonable and unjust,' their enforcement does not offend Due Process." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n. 14, 105 S. Ct. 2174, 2182 n. 14, 85 L. Ed. 2d 528 (1985). (Citation omitted.)" *Id.*

In the instant case, as in *Tandy*, the forum selection clause at issue is not at all relevant to these Appellants (Vol I, p8-20, and Vol II p270 and p313 24-28). Where *Tandy* defined material relevant factors such as:

> "… there were no negotiations over this forum selection clause. … Thus, the clause was not "a vital part of the agreement," where "the consequences of the forum clause [figured] prominently in their calculations", (*Id.*)

Appellants did not contract with Plaintiff at all. Plaintiff, at the time of contracting, had not even heard of Appellants, nor Appellants of him. These Appellants not only did not know about this forum selection clause, they did not know about the contract either.

In *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13, 15, 92 S. Ct. 1907, 1915, 1916, 32 L. Ed. 2d 513 (1972), the forum selection clause "preceded the date and signature" and "could hardly be ignored." *Id.* at 12-13, n. 14, 92 S. Ct. at 1914 n. 14.

This clause was also not prominent in this commercial transaction and Appellants were not privy to the contract. They are not mentioned in the contract, they are not parties in the contract, they did not sign the contract. Further, as in *Tandy*, nothing in the contract informs the reader that these Appellants were ever provided any notice of the contract, much less of the specific forum selection clause in it. The clause is not even in bold print.

In the instant case, the Order Denying the Motion to Dismiss did not even make any mention of the forum selection clause regarding Appellants. There was no *Tandy* review, there was no application of the *Bremen* factors. There was no mention of any forum selection clause due process of law analysis.

As this Order denying the Motion to Dismiss violates due process, because as in *Tandy*, these Appellants had no idea they would ever be sued in Nevada, Appellants request the entirety of this case be remanded to District Court for trial.

F. COUNSEL FOR APPELLANTS WERE NOT AUTHORIZED TO NOT ATTEND HEARINGS, THUS REMAND IS NECESSARY

Even though the lawyer has authority over the procedural aspects of litigation and, as the client's agent, a lawyer's neglect is generally imputed to the client (see *Daley v. County of Butte*, 227 Cal.App.2d 380, 391 (1964)) the client or his lawyer may be relieved

of a default "taken against him or her through is or her mistake, inadvertence, surprise, or excusable neglect." Another example can be found in *Robinson v. Varela*, 67 Cal.App.3d 611 (1977) where the one factor of many was that the chief trial counsel was ill.

A court may also grant relief to a client if the lawyer's procedural errors are so extreme as to deprive the client of representation (see *Orange Empire Nat'l Bank v. Kirk*, 259 Cal.App.2d 347, 353-54 (1968), where lawyer failed to file an appearance and failed to take any action to set aside default and in essence, did nothing to protect his clients). Another way a court may grant relief to Plaintiffs is if prior counsel impaired the client's cause of action. (see *Central Distribs, Inc. v. M.E.T., Inc.*, 403 F.2d 943, 946 (5th Cir. 1968) in which counsel should be allowed to amend a pre-trial stipulation to permit introduction of evidence to prevent an injustice). Just as Potter III argued on December 11, 2015, granting relief from his error in removing the very person who raped Plaintiff protects Plaintiffs' control over the ultimate resolution of their case. (see *Elston v. City of Turlock*, 38 Cal. 3d. 227, 233 (1985), where granting relief from default supports the policy that the law strongly favors a trial on the merits of Plaintiffs' case).

The body of California law in this area, which has been cited and successfully applied over 78 times in California cases, has been adopted by the Nevada Supreme Court and made the controlling authority in the instant case in the ruling of *Staschel v. Weaver Bros.*, 644 P.2d 512 (1982).

In deciding whether relief is appropriate or not, courts consider several factors, including:

Was relief sought promptly

Would the opposing party suffer prejudice (see *Elston* at 233)

Is the claim meritorious (see *In re Marriage of Park*, 27 Cal. 3d. 337, 342 (1980)

Is there a total breakdown of the attorney/client relationship (see *Orange Empire* at 353)

Do the attorney's actions arise to misconduct (see *Buckert v. Briggs*, 15 Cal.App.3d. 296, 301-02 (1971))

Applying the factors to the facts in the instant case, Appellants WERE NOT represented at the August 20, 2019 hearing. Nothing would prejudice Respondent if the attorney for Appellants arrived. As to the first two factors, Appellants prevail and should receive relief.

As to the next factor, Appellants claim that judicial estoppel does not apply to them is the most important of all factors in this case, outside of Respondent not having the authority to file the instant lawsuit. The Respondent wrote an Order that Judicial Estoppel precluded Appellants from challenging jurisdiction when they made no appearance in Illinois and were not named parties. The key factor and the most clearly inappropriate measure was never argued by Appellants' counsel because no one appeared. This third factor is overwhelmingly in Appellants' favor.

As to the fourth factor, Appellants represented both Vijay Reddy and his wife Appellant MARGARET, a total conflict of interest. This conflict was never waived and MARGARET kept her marital privilege to prevent her husband's statements at a Michigan bankruptcy hearing being used against her in Nevada. This MATERIAL CONFLICT completely

severed the attorney/client relationship. The fourth factor belongs to Appellants.

As to the final factor, non-appearance at a hearing is per se misconduct.

Appellants District Court attorneys achieved a 100% effect in violating each and every factor and committed malpractice as he did it. As such, Appellants should have every right to have relief from the August 20, 2019 ruling and all subsequent orders should reflect that Nevada has no jurisdiction over Appellants.

III. CONCLUSION

For all of the reasons set forth, Appellants request remand of all causes of action.

Dated this 14th day of February, 2022.

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ATTORNEY'S CERTIFICATE

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:

[X] This brief has been prepared in a monospaced typeface using MICROSOFT WORD with Courier New typeface, 12 point 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:

[X] Does not exceed 30 pages and contains 9164 words

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

DATED this 14th day of February, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document and the Appendix was filed electronically with the Nevada Supreme Court on February 14, 2022. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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