IN THE SUPREME COURT OF THE STATE OF NEVADA

ALI KIA, M.D.

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JASMIN LILLY-SPELLS.

Respondents,

and

FRANK J. DELEE, M.D., an individual; FRANK J. DELEE MD, PC, a Domestic Professional Corporation, SUNRISE HOSPITAL AND MEDICAL CENTER, LLC, a Foreign Limited-Liability Company; and NEVADA HOSPITALIST GROUP, LLP.

Real Parties in Interest.

Electronically Filed
Aug 12 2021 08:34 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No.:

District Court No.: A-17-757722-C

PETITION FOR WRIT OF MANDAMUS

PATRICIA EGAN DAEHNKE
Nevada Bar No.: 4976
Patricia.Daehnke@cdiglaw.com
LINDA K. RURANGIRWA
Nevada Bar No.: 9172
Linda.Rurangirwa@cdiglaw.com
COLLINSON, DAEHNKE, INLOW & GRECO
2110 E. Flamingo Road, Suite 212
Las Vegas, Nevada 89119
Attorneys for Petitioner Ali Kia, M.D.

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 judges of this court may evaluate possible disqualification or recusal.

Petitioner Ali Kia, M.D. is a party to this suit and is represented by the law firm Collinson, Daehnke, Inlow & Greco. Petitioner is an individual and therefore there are no parent corporations or parties owning more than 10% stock as to Dr. Kia.

Dated this 11th day of August, 2021

By */s/ Linda Rurangirwa*

PATRICIA EGAN DAEHNKE
Nevada Bar No. 4976
LINDA K. RURANGIRWA
Nevada Bar No. 9172
COLLINSON, DAEHNKE, INLOW & GRECO
2110 E. Flamingo Road, Suite 212
Las Vegas, Nevada 89119
Tel. (702) 979-2132
Attorneys for Petitioner Ali Kia, M.D.

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DECLARATION OF VERIFICATION IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

1. I, Linda K. Rurangirwa, declare:

2. I am licensed to practice law in the State of Nevada and am a Partner with the law office of Collinson, Daehnke, Inlow & Greco, attorneys of record for Petitioner Ali Kia, M.D. and hereby make this Declaration in support of Petitioner's Writ of Mandamus pursuant to NRAP 21(a)(5).

3. The facts and procedural history contained in the foregoing Petition for Writ of Mandamus and the following Memorandum of Points and Authorities are based upon my own personal knowledge as counsel for Petitioner. This Declaration is not made by Petitioner personally because the salient issues involve procedural developments and legal analysis.

4. The contents of the foregoing Petition for Writ of Mandamus and the Memorandum of Points and Authorities are true and based upon my personal knowledge, except as to those matters stated on information and belief.

5. All documents contained in the Petitioner's Appendix, filed herewith, are true and correct copies of the pleadings and documents that are represented to be in the Petitioner's Appendix and as cited herein.

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I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on this 11th day of August, 2021 at Livermore, California.

/s/ Linda Rurangirwa
Linda K. Rurangirwa

ROUTING STATEMENT

This Petition raises as a principal issue a question of statewide public importance in compliance with NRAP 17 (a) (12). As such, jurisdiction over this matter is properly retained by the Nevada Supreme Court. There is no existing authority which would require the Nevada Court of Appeals to hear this matter and it does not fall within any of the categories presumptively assigned to the Court of Appeals pursuant to Nevada Rule of Appellate Procedure 17 (b).

This Petition raises issues which bear directly upon all persons in the state of Nevada who were, or will be, protected from stale claims by the expiration of the statute of limitations, including Dr. Kia. The District Court erroneously interpreted NRCP 15 and the cases of *Servatius vs. United Resort Hotels* and *Echols vs. Summa Corp*., to determine that a newly added party who had no notice of the existence of an action until after the expiration of the statute of limitations is not prejudiced by a subsequent amendment, and the amendment, which occurred long after the expiration of the statute of limitations can therefore relate back to the filing of the original Complaint. The District Court further failed to take into account the deliberate decision by the Plaintiff not to add Dr. Kia as a party until over two years after Dr. Kia had notice of the action to Dr. Kia's prejudice. The District Court's finding creates unjust and illogical results which essentially nullify the purpose of the statute of limitations and unfairly prejudice and burden unnamed

parties in the State of Nevada who would otherwise be protected by the statute of limitations.

PETITION FOR WRIT OF MANDAMUS

Petitioner Ali Kia, M.D., by and through his counsel of record, Patricia Egan Daehnke and the law firm of Collinson, Daehnke, Inlow & Greco, hereby respectfully petitions this Court for the issuance of a Writ of Mandamus, directing Respondent to dismiss all claims brought by Real Party in Interest, Choloe Green in the above entitled action pursuant to NRCP 12 (b) (5) and NRS 41A.097 (2).

I.

ISSUES PRESENTED

1. Whether a party who had no notice of an action until after the statute of limitations expired and is not added as a new Defendant until over two years later is prejudiced by the amendment precluding relation back of the filing to the date of the original Complaint.
2. Whether an amendment to the Complaint adding a new Defendant relates back to the filing of the original Complaint when the Plaintiff makes a conscious decision not to amend the Complaint until long after the statute of limitations has expired.

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II.

INTRODUCTION

Petitioner respectfully requests this Court take immediate action to prevent prejudice to Petitioner Ali Kia, M.D. as a result of Respondent's misinterpretation of the relation back doctrine as it applies to defendants added to a Complaint pursuant to NRCP 15 after expiration of the statute of limitations.

The undisputed facts in this case show that the one-year statute of limitations for inquiry notice in medical malpractice cases expired before Petitioner had notice of this action and both the one year and three year statute of limitations expired before Real Party in Interest Choloe Green filed a motion for leave to amend her Complaint to add Dr. Kia as a defendant.

Ms. Green filed her Complaint alleging medical malpractice against Frank J. DeLee, M.D., Frank J. DeLee, MD, PC and Sunrise Hospital and Medical Center, LLC ("Sunrise Hospital") on June 30, 2017. The Complaint did not name any Doe Defendants and was filed with the supporting affidavit of Lisa Karamardian, M.D. signed on June 29, 2017, alleging that, after review of the records from Sunrise Hospital, the decision to discharge Ms. Green from Sunrise Hospital on July 16, 2017, by Sunrise Hospital and Dr. DeLee was below the standard of care. Dr. Kia was the discharging physician during that hospitalization and the records clearly reflect such. However, neither the Complaint nor the Affidavit named Dr. Kia. By

June 29, 2017, Ms. Green was aware that she was alleging she was negligently discharged from Sunrise Hospital on July 16, 2016. Thus, she was on inquiry notice at that time to investigate further who was responsible for discharging her. She failed to do so and the one year statute of limitations as to Dr. Kia expired at the latest on June 29, 2018.

Dr. Kia received notice of the existence of the Complaint on or about August 24, 2018, when he was served with a deposition subpoena. Dr. Kia was deposed on November 14, 2018, and Ms. Green did not make any attempt to add him as a defendant at that time. On May 1, 2019, Sunrise Hospital filed a Motion for Leave to File a Third-Party Complaint on the grounds that Dr. Kia was the discharging physician on July 16, 2016, and sought to hold him liable for contribution and indemnity in the event a jury found Dr. Kia's actions were negligent and the hospital was found vicariously liable on a theory of ostensible agency. The motion was granted and the Third-Party Complaint was filed on June 14, 2019. Ms. Green made the conscious decision not to add Dr. Kia as a defendant at that time.

On April 29, 2020, Judgment on the Pleadings was granted against Third-Party Plaintiff Sunrise Hospital and in favor of Dr. Kia for failure to attach a supporting expert affidavit as required by NRS 41A.071. The Order granting Judgment on the Pleadings was entered on June 3, 2020. It was not until October

16, 2020, that Ms. Green filed a Moton for Leave to Amend the Complaint to add Dr. Kia as a defendant.

Dr. Kia did not have any notice of the action until after the one year medical malpractice statute of limitations expired, however it was not until after the three year statute of limitations had expired that Ms. Green moved to amend the Complaint to add Dr. Kia as a defendant. The three year statute of limitations begins to run when a plaintiff suffers an appreciable manifestation of the injury regardless of whether the plaintiff is aware of the injury's cause. Ms. Green in this case became aware of her alleged injury when she was hospitalized at Centennial Hills Hospital from July 17, 2016, through September 2, 2016, where she underwent surgery and suffered further postoperative complications. Thus, the three year statute of limitations began to run as late as September 2, 2016, and expired on September 2, 2019.

Ms. Green made a conscious decision not to file a motion for leave to amend the Complaint until October 16, 2020, long after the expiration of both the one year statute of limitations (June 29, 2018) and the three year statute of limitations (September 2, 2019) applicable to medical malpractice cases. Dr. Kia moved to dismiss the amended Complaint as untimely, however the District Court reached the unreasonable conclusion that as long as Dr. Kia knew about the Complaint (even though he did not have notice until after expiration of the statute of

limitations) and was aware he was a proper party before the Complaint was amended (over two years later), the amendment relates back to the filing of the original Complaint. This conclusion is in direct contradiction to the purpose of the statutes of limitation. Immediate intervention by the Court is warranted as this misapplication of the relation back doctrines impacts future cases pending in the Eighth Judicial District Court and other Nevada courts.

III.

STATEMENT OF FACTS AND RELIEF SOUGHT

Petitioner is a Defendant in the case of Choloe Green v. Frank J. DeLee, M.D., et al., Nevada District Court Case No. A-17-757722-C, in the Eighth Judicial District Court. The Complaint for medical malpractice was filed on June 30, 2017, against Frank J. DeLee, M.D., Frank J. DeLee, M.D., P.C. and Sunrise Hospital and Medical Center ("Sunrise") arising from the care and treatment provided to Plaintiff between July 9, 2016, and July 17, 2016. 1 PA0001-7.[1]

The Complaint was filed with the supporting affidavit of Lisa Karamardian, M.D. signed on June 29, 2017. Neither the Complaint, nor the affidavit made mention of Dr. Kia. The affidavit stated:

> 4. A review of the medical records reveals that on July 9, 2016, Ms. Green had a cesarean section birth at Sunrise Hospital with Dr.

[1] Citations to the Appendix are by volume and page number. For instance, 1 PA 0001 is Petitioner's Appendix, Volume 1, Bates No. PA0001.

> DeLee as the obstetrician. She was released home on post-operative day number one. This was a breach of the standard of care by Dr. DeLee and Sunrise Hospital . . .
>
> 5. A review of the medical records also reveals that on July 14, 2016, Ms. Green presented again to Sunrise Hospital, now five (5) days post-partum, with severe abdominal pain and reports of nausea, vomiting, fever, and chills. She was admitted to the medical/surgical unit because of the diagnosis of sepsis. She was discharged on July 16, 2016. The discharge was discussed and confirmed by Dr. DeLee. This discharge violated the standard of care. Ms. Green was discharged despite the fact that she was not able to tolerate a regular diet. Further, on the day of her discharge, her KUB showed multiple dilated loops of bowel, thought to be related to a small bowel obstruction, yet she was sent home. An intraperitoneal abscess was suspected on a CT scan, yet she was still sent home. This was a violation of the standard of care by Sunrise Hospital and Dr. DeLee.

1 PA0006. In her Affidavit, Dr. Karamardian noted she reviewed "Plaintiff Choloe Green's medical records relating to the care and treatment she received from Dr. Frank DeLee, Sunrise Hospital and Medical Center, Valley Hospital Medical Center and Centennial Hills Medical Center." 1 PA0006.

Ms. Green contended that as a result of the alleged negligence, she was admitted to Centennial Hills Hospital from July 17, 2016, through September 2, 2016 where she underwent surgery and had postoperative complications. 1 PA0002, ¶ 9.

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On August 24, 2018, Petitioner was served with a subpoena for his deposition in this matter. 4 PA0538. The deposition took place on November 14, 2018. 4 PA0544.

On May 1, 2019, Real Party in Interest Sunrise Hospital filed a Motion for Leave to File a Third-Party Complaint on the grounds that Dr. Kia was the discharging physician on July 16, 2016, and sought to hold him liable for contribution and indemnity in the event a jury found Dr. Kia's actions were negligent and the hospital was found vicariously liable on a theory of ostensible agency. 1 PA0021-0048. The motion was granted (1 PA0049-0054) and the Third-Party Complaint was filed on June 14, 2019. 1 PA0055-0060. In order to satisfy the expert affidavit requirement set forth in NRS 41A.071, Sunrise Hospital relied on the expert affidavit of Dr. Karamardian that was filed with Plaintiff's Complaint. 1 PA0027.

On March 19, 2020, Third-Party Defendant Nevada Hospitalist Group, LLP ("NHG") filed a Motion for Judgment on the Pleadings on the grounds that Sunrise Hospital did not attach an affidavit of merit specifying breaches in the standard of care by Dr. Kia or NHG. 1 PA0083-90. Dr. Kia filed a Joinder to such motion on April 13, 2020. 1 PA0140-143. The Motion was heard on April 29, 2020, and granted. *See* 1 PA0144-0163. The Order granting the Motion for Judgment on the Pleadings and Dr. Kia's Joinder was entered on June 30, 2020. 1 PA173-185.

On October 16, 2020, Ms. Green filed a Motion for Leave of Court to Amend the Complaint to add Dr. Kia as a Defendant. 2 PA0186-208. The Motion was granted in part, allowing the amendment of Dr. Kia as a new party. 2 PA0294-300. The Amended Complaint was filed on December 16, 2020. 2 PA0310-324.

On January 21, 2021, Dr. Kia filed a Motion to Dismiss Plaintiff's Amended Complaint on the grounds that the Amended Complaint was barred by the statute of limitations and did not relate back to the filing of the Complaint. 3 PA0340-0474. Plaintiff filed her Opposition to the Motion to Dismiss on February 4, 2021. 4 PA0478-651. Defendant filed his Reply in Support of Motion to Dismiss on February 16, 2021. 4 PA0652-0666.

The Court heard oral argument on the Motion on March 16, 2021. *See* 4 PA0681-0695. At the hearing, the Court denied the Motion to Dismiss finding that the Court had previously determined in granting the motion to amend the Complaint that the amendment related back to the filing of the Original Complaint and further that the requirements of *Echols v. Summa Corp.* were met allowing the addition of Dr. Kia to relate back to the Complaint:

> Specifically in the Court's prior order by Judge Silva, I believe it's line 2, she did consider the statute of limitations and she wrote, This Court finds that amended pleadings arising out of the same transaction or occurrence set forth in the original pleadings may relate back to the date of the original filing, see NRCP 15(c). The same remains true

> when an amended pleading adds a defendant that is filed after the statute of limitations so long as the proper defendant; one, receives actual notice of the action; two, knows that it is the proper party; and three, has not been misled to prejudice by the amendment. And she cited *Echols v Summa Corp.*, 95 Nev. 720, a 1979 case.
>
> 4 PA0690:23 – 0691:7.

However, Plaintiff's Motion for Leave to File an Amended Complaint pursuant to NRCP 15 (a) did not seek an Order from the Court requesting that the amendment of the Complaint adding Dr. Kia relate back to the filing of the original Complaint. *See* 2 PA0186-0208. Furthermore, at the hearing on the Motion to Amend on November 17, 2020, Judge Silva expressly had reservations about the statute of limitations and notice stating: "Well, I agree that there's some amendments that are allowed to be made. But you still have to address statute of limitation issues, whether or not there's new causes of action that are being raised for the very first time, and I think that is the issue specifically that Sunrise Hospital has raised in their Opposition." *See* 2 PA0281:12-18.

Although Judge Silva raised the statute of limitations issue, Ms. Green argued that was an issue that should be briefed by the parties by filing a Motion to Dismiss stating: "Obviously, they could file a motion to do what they're going to do when they're served. But, right now, it's within the time frame of the scheduling order to set – you don't deal with the statute of limitations at this point.

That would come at a later time, based on what Dr. Kia is going to file." 2 PA0283:8-13.

The District Court in further determining that Amended Complaint related back to the filing of the Complaint stated:

> Furthermore, a proper defendant may be brought into the action after the statute of limitations has run if the proper defendant; one, receives actual notice of the action; two, knows that it is the proper party, and three, has not been misled to its prejudice by the amendment. And that is both cited in *Servatius versus United Resort Hotels*, and that's S-E-R-V-A-T-I-U-S, cite is 85 Nev. 371 it's a 1969 case, and also cited in the *Echols* case that Judge Silva cited in her prior order, and that's *Echols versus Summa Corp*., that's 95 Nev. 720, that's a 1979 case.
>
> The Court finds that Dr. Kia and NHG received notice in June 2019 when a Third-Party Complaint was filed at that time, as well as with their depositions. It was clear that Dr. Kia and NHG were proper parties to the case.
>
> The Court finds that Dr. Kia and Nevada Hospitalist Group have not been misled to its prejudice because of the procedural default here. I think that it was known to them that should plaintiff obtain the necessary affidavits that they could be added to the case. It was known to them that at the time that there was a Third Party Complaint. It was known to them at the time that the motion for summary judgment would have been granted based upon the reason that it was granted. And it was further known to those parties at the time that Judge Silva issued her order on September 25th, 2020.
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> 4 PA0692:13 – 0693:8.

On April 9, 2021, Dr. Kia filed a Motion for Reconsideration on the grounds that the statute of limitations had expired prior to Dr. Kia receiving notice of the claim and he has been prejudiced to his detriment and, as such, the amendment

should not relate back to the filing of the original Complaint. 5 PA0728-0967. On April 22, 2021, Ms. Green filed an Opposition to such Motion. 6 PA1178-1187. Dr. Kia's Reply was filed on May 6, 2021. 6 PA1188-1195. On July 2, 2021, the Court entered an Order denying Defendant Ali Kia, M.D.'s Motion for Reconsideration. 6 PA1196-1204. The Notice of Entry or Order Denying Defendant Ali Kia, M.D.'s Motion for Reconsideration was filed on July 6, 2021. 6 PA1205-1215.

The amendment of Dr. Kia as a new party should not have related back to the filing of the original Complaint as Dr. Kia had no notice of the action until after the statute of limitations expired. This is not a case like *Servatius* where the facts tended to show that the amendment to the Complaint did not bring in a new defendant, but correctly identified a party defendant already before the court. Dr. Kia was not previously named and there were no Doe Defendants named in the Complaint.

Furthermore, the amendment should not have been allowed to relate back to the filing of the original Complaint pursuant to *Echols* as, unlike in *Echols* where the statute of limitations had not expired and therefore there was no prejudice, Dr. Kia did not have notice that he could be a proper defendant until after the expiration of the statute of limitations. At the time Dr. Kia received notice of this action, the statute of limitations had expired and he had no reason to anticipate that

he would have to expend significant cost in defending a lawsuit that by all rights he should have been protected against.

Finally, the amendment to the Complaint should not have been allowed to relate back to the filing of the original Complaint where Ms. Green made the conscious decision over a period of over three years not to add Dr. Kia as a defendant.

Petitioner respectfully petitions this Court for a Writ of Mandamus directing Respondent to reverse its ruling denying Dr. Kia's Motion to Dismiss. As a result of Respondent's erroneous determination that the amendment of Dr. Kia relates back to the filing of the original Complaint, Petitioner will be significantly prejudiced. He has already suffered significant damages in defending against the Third-Party Complaint for indemnification and contribution initially brought by Sunrise Hospital and will continue to suffer future significant damages as a result of the actions of the Respondent as he is now forced to expend time and resources preparing for trial in this case that he had no notice of until after the statute of limitations had expired.

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IV.

STATEMENT OF REASONS WHY WRIT SHOULD ISSUE.

A. Writ of Mandamus Standard

This Court has jurisdiction to grant Dr. Kia's requested relief pursuant to Article 6 Section 4 of the Nevada Constitution, which states: "The court shall also have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus and also all writs necessary or proper to the complete exercise of its appellate jurisdiction." NRS 34.160 provides a writ of mandamus may be issued by this Court "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station," or to "control an arbitrary or capricious exercise of discretion," or a "manifest abuse" of discretion. NRS 34.160; *Int'l Game Tech, Inc. v. Second Judicial Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *D.R. Horton v. Dist. Ct.*, 123 Nev. Adv. Op. 45, 168 P.3d 731, 736 (2007).

A petitioner bears the burden of demonstrating that this Court's extraordinary intervention is warranted. *Pan v. Eighth Judicial Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Writ relief is generally available only when there is no plain, speedy and adequate remedy in the ordinary course of law. NRS 34.170, NRS 34.330, *Pan*, 120 Nev. at 224, 88 P.3d at 841. Whether a future appeal is sufficiently adequate and speedy necessarily turns on the underlying

proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented." *D.R. Horton v. Dist. Ct.*, 123 Nev. Adv. Op. 45, 168 P.3d at 736. *See also Libby v. Eighth Judicial Dist. Ct.*, 130 Nev. Adv. Op. 39, 225 P.3d 1276 (2014) (granting a writ petition because the district courts had inconsistently applied a statute and to clarify a question of law, where the facts were not disputed); *Wheble v. Eighth Judicial Dist. Ct.*, 128 Nev. Adv. Op. 11, 272 P.3d 134, 136 (2012) (entertaining a writ petition when district courts might contradictorily interpret and apply a statute); *State v. Eighth Judicial Dist. Ct.*, 118 Nev. 140, 147, 42 P.3d 233, 238 (2004) (granting mandamus review because of the "serious, well-publicized" nature of the allegations and the important questions of law presented supported judicial economy).

This Court generally declines to exercise its discretion to consider writ petitions challenging orders denying a motion to dismiss. *Chur v. Eighth Judicial Dist. Court of Nev*., 136 Nev. 68 458 P.3d 336, 339 (2020). However, this Court will exercise its discretion to consider a writ petition denying a motion to dismiss when "(1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule, or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Id.* (internal citations

omitted).

B. Respondent Manifestly Abused its Discretion When it Held the Amendment to the Complaint Adding Dr. Kia relates back to the Original Complaint Even Though he Had no Notice until after Expiration of the Statute of Limitations.

The applicable statute of limitations for medical malpractice/professional negligence claims that accrue on or after October 1, 2002, is set forth in NRS 41A.097(2) which provides in pertinent part:

> [A]n action for injury or death against a provider of health care may not be commenced more than 3 years after the date of injury or 1 year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, ***whichever occurs first***." (Emphasis added).

With regard to the one-year discovery period, a plaintiff "discovers" his injury when "he knows or, through the use of reasonable diligence, ***should have known*** of facts that would put a reasonable person on ***inquiry notice*** of his cause of action." *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983). A person is placed on "inquiry notice" when he or she "should have known of facts that would lead an ordinarily prudent person to investigate the matter further." *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 251-52, 277 P.3d 458, 462 (2012) (internal quotation marks omitted). The accrual period does not refer to when the plaintiff discovers the precise facts pertaining to his legal theory, but only to the general belief that someone's negligence may have cause the

injury**.** *Id.* (citing *Massey*, 99 Nev. at 728, 669 P.2d at 252). The plaintiff "discovers" the injury when "he had facts before him that would have led an ordinarily prudent person to investigate further into whether [the] injury may have been caused by someone's negligence." *Id.* ***The focus is on the access to facts and knowledge of facts, rather than on knowledge of legal theories.*** *Id.* Plaintiffs cannot "close their eyes" to the information available to them. *See Siragusa v. Brown*, 114 Nev. 1384, 1394, 971 P.2d 801, 807 (1988) (*quoting Spitler v. Dean*, 436 N.W.2d 308, 310-11 (Wis. 1989) ("Plaintiffs may not close their eyes to means of information reasonably available to them and must in faith apply their attention to those particulars within their reach.").

With regard to the one-year statute of limitations, Petitioner assumed for the purpose of his Motion to Dismiss that Ms. Green discovered her injury at the latest the time she filed her Complaint on June 30, 2017. However, pursuant to the expert affidavit of Dr. Karamardian attached to the Complaint, which was based on a review of Ms. Green's medical record including those from Sunrise Hospital the discovery rule was triggered by the latest on June 29, 2017, when Ms. Green's expert, Dr. Karamardian executed her affidavit. *See Kushnir v. Eighth Judicial Dist. Court*, 137 Nev. Adv. Op. 41, p. 7 (Ct. of Nev., August 05, 2021) ("In its answering brief, the Estate concedes and agrees with Dr. Kushnir that the Estate received Gaetano's complete medical records in August 2016. Further, Dr.

Gabitelli's expert affidavit, which was attached to the November 2017 complaint, states that his expert medical opinions contained therein are based on his "education, training, 40 years of medical practice, *review of the medical records* and facts o[f] this case." (Emphasis added.) Thus, the undisputed facts establish that the discovery rule was triggered in August 2016 when Garbitelli "had facts before him that would have led an ordinarily prudent person to investigate further." Thereby putting him on inquiry notice of the cause of action."). Dr. Karmardian possessed the complete medical records from Sunrise Hospital as late as June 29, 2017, that had all the information necessary to discovery the alleged medical malpractice and prepare her expert affidavit. *See id.*, p. 9.

Ms. Green was aware of not only the facts pertaining to her legal theory but had sufficient facts that would lead an ordinary prudent person to investigate the matter further as to who was involved in the discharge. In fact, Dr. Karamardian explicitly stated there was alleged negligence in discharging Ms. Green from Sunrise Hospital on July 14, 2016. Ms. Green, therefore, had the obligation to investigate further as to who discharged her, but did not do so. Instead, Ms. Green waited until August 24, 2018, after the expiration of the one-year statute of limitations to serve Dr. Kia with a Notice of Deposition and did not move for leave to file the Complaint until over two years later, on October 16, 2020.

The three year limitation period provided in NRS 41A.097(2) "begins to run

when a plaintiff suffers appreciable harm [appreciable manifestation of the plaintiff's injury], regardless of whether the plaintiff is aware of the injury's cause." *Libby v. Eighth Judicial Dist. Ct.*, 130 Nev. Adv. Rep. 39, 325 P.3d 1276, 1280 (2014). Ms. Green in this case became aware of her alleged injury when she was hospitalized at Centennial Hills Hospital from July 17, 2016, through September 2, 2016, where she underwent surgery with subsequent postoperative complications. Commencement of the three year limitation period does not require that Plaintiff be aware of the *cause* of her injury. Such a requirement would "render NRS 41A.097(2)'s three year limitation period irrelevant." *Libby*, 277 P.3d at 1280. Any attempt by Ms. Green to impose a "discovery" rule on the three-year statute of limitations provided in NRS 41A.097(2) is incorrect and directly contrary to the holding in *Libby*.

In *Libby*, the Nevada Supreme Court looked to California authority for guidance on application of the three-year limitation period for medical malpractice matters (as the California and Nevada statutes are identical). The Court noted California cases have reasoned the purpose for the three-year limitation period is "to put an outside cap on the commencements of actions of medical malpractice, to be measured from the date of injury, regardless of whether or when the plaintiff discovered its negligent cause." *Libby*, 277 P.3d at 1280.

The holding of *Garabet v. Superior Court*, 151 Cal.App.4th 1538, 60

Cal.Rptr.3d 800 (Ct.App. 2007) was specifically cited with authority in *Libby*. Similar to the instant matter, the plaintiff in *Garabet* claimed injury stemming from surgery; however, the plaintiff did not file a medical malpractice lawsuit until six years after the surgery. The *Garabet* Court dismissed the plaintiff's complaint as time-barred under California's three year statute of limitations, holding the ***limitations period started running when the plaintiff began to experience adverse symptoms after the surgery***. *Id.* at 809.

The three-year limitation period set forth in NRS 41A.097(2) commenced, *at the latest,* in September 2016 and expired in September 2019. The date Ms. Green learned of (discovered) the alleged cause of her injury is irrelevant for purposes of the current Motion. Ms. Green did not move to amend her Complaint until October 16, 2020, and did not file the Complaint until December 16, 2020.

Thus, by the time Ms. Green moved to amend the Complaint on October 16, 2020, seeking to add Dr. Kia as a new party, both the one and the three year statute of limitations applicable to medical malpractice cases had expired.

Respondent in explaining its rationale for denying Dr. Kia's Motion to Dismiss and determining that the amendment of the Complaint related back to the filing of the original Complaint, relied on both *Echols v. Summa Corp* and *Servatius v. United Resort Hotels*. In *Servatius* the Court noted that "[w]hile an amendment may be made to correct a mistake in the name of a party, a new party

may not be brought into an action once the statute of limitations has run because such an amendment amounts to a new and independent cause of action." *Servatius v. United Resort Hotels*, 85 Nev. 371, 372-73, 455 P.2d 621, 622 (1969). The Court further stated:

> There appear to be three factors governing the determination when a "proper defendant" might be brought into an action by amendment even though the statute of limitations might have run. They are that the proper party defendant (1) have actual notice of the institution of the action; (2) knew that it was the proper defendant in the action, and (3) was not in any way misled to its prejudice.

Id., 85 Nev. at 373, 455 P.2d at 622-23.

The Court in *Servatius* found the factors to be present in that case as the amended complaint ***corrected*** a mistake in the name of a party already before the district court. The Court noted:

> The record shows that Joan D. Hays was resident agent for both Aku, Inc., the Nevada corporation, and United Resort Hotels, Inc., the Delaware corporation, and was served in that capacity for both corporations; that both corporations have the same principal place of business; that there are four persons on the board of directors of Aku, Inc.; that those same four persons, plus two others, constitute the board of directors of United Resort Hotels, Inc.; that the same law firm, at least for the purpose of this case, represents both corporations.

Id., 85 Nev. at 372, 455 P.2d at 622.

Respondent also cited to *Echols v. Summa Corp* in making its decision that the amendment adding Dr. Kia could relate back to the filing of the original Complaint. However, in *Echols* the Court noted that the new defendant Summa

Corp. received actual notice of the action before the expiration of the two year statute of limitations. "Having actual notice of the action ***before the expiration of the two-year period***, Summa was neither misled nor prejudiced by the subsequent amendment." *Echols v. Summa Corp.*, 95 Nev. 720, 722, 601 P.2d 716, 717 (1979) (emphasis added).

Respondent's interpretation of *Servatius* and *Echols* with regard to denying the Motion to Dismiss was clearly erroneous. Dr. Kia was a newly added Defendant. He was not added to correctly name a previously misidentified defendant and he had no notice of this action until ***after*** the expiration of the one year statute of limitations. Ms. Green failed to do her due diligence in the year after she filed her Complaint to determine who was responsible for her discharge. As a result, when Dr. Kia received notice of the action, the one year statute of limitations had expired. Furthermore, after Dr. Kia received notice of the action, Ms. Green made no attempt to amend her Complaint to add Dr. Kia as a defendant until after the expiration of the medical malpractice three year statute of limitations. Thus, by the time the motion to amend the Complaint was filed on October 16, 2020, Dr. Kia would have had no reason to believe that he could be held liable to Ms. Green for any alleged malpractice and allowing the case to proceed against him would be highly prejudicial.

A plaintiff's right to have his or her claim heard on its merits despite

technical difficulties must be balanced against "a defendant's right to be protected from stale claims and the attendant uncertainty they cause." *Costello v. Casler*, 127 Nev. 436, 441, 254 P.3d 631, 635 (2011). Ms. Green had no technical difficulties in this case. She was on inquiry notice that Dr. Kia could have been a defendant at the time she filed her Complaint and sat on her rights until after the one year statute of limitations expired. She subsequently consciously elected to wait over another two years before attempting to bring Dr. Kia in as a defendant. Dr. Kia, on the other hand, had no notice of this action until the claim was already stale and should have been protected by the statute of limitations.

Dr. Kia has been, and will continue to be, severely prejudiced should the District Court's ruling stand, subjecting him to potential liability for a claim that was stale before he received notice of such.

C. Respondent Manifestly Abused its Discretion When it Determined the Amendment to Add Dr. Kia Related Back to the Filing of the Original Complaint Even Though Ms. Green Made a Conscious Decision Not to Amend Until After the Statute of Limitations Expired

In *Badger v. Eighth Judicial District Court*, the Nevada Supreme Court noted:

> Under NRCP 15(c), "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." The relation-back doctrine applies to both the addition and substitution of parties, and will be liberally construed unless the opposing party is disadvantaged by relation back. However, in *Garvey v. Clark County*, this court expressly refused to allow an amended complaint to relate back after a limitations period had run where the plaintiff elected not

to name the proposed defendant as a party in the original action. *Badger v. Eighth Judicial Dist. Court*, 132 Nev. 396, 403-404, 373 P.3d 89, 94 (2016) (internal citations omitted).

Ms. Green was on inquiry notice of her claim against Dr. Kia by June 29, 2017, but failed to further investigate and add him as a defendant prior to the expiration of the one year statute of limitations. Dr. Kia was deposed on November 14, 2018, and Ms. Green elected not to amend the Complaint to add him as a defendant at that time. Furthermore, Sunrise Hospital filed a Motion for Leave to File a Third-Party Complaint for indemnification and contribution against Dr. Kia on May 1, 2019, prior to the expiration of the three year statute of limitations, and Ms. Green still elected not to amend her Complaint to add Dr. Kia as a defendant. It was not until over a year later, on October 16, 2020, long after expiration of the three year statute of limitations, that Ms. Green filed her Motion for Leave to Amend the Complaint. Ms. Green had sufficient time prior to the expiration of the statute of limitations to determine that Dr. Kia was a proper party but failed to do so. Once she did so learn, she made the conscious decision over a period of over two years to not amend the Complaint to name Dr. Kia as a defendant. Pursuant to precedent as set forth in *Garvey v. Clark County*, 61 Nev. 127, 532 P.2d 269 (1975), Respondent should have expressly refused to allow the Amended Complaint to relate back to the filing of the original Complaint.

Respondent's failure to do so was a manifest abuse of discretion.

V.

CONCLUSION

Dr. Kia respectfully requests this Court issue a Writ of Mandamus and vacate the Respondent's Order denying Defendant Ali Kia, M.D.'s Motion to Dismiss and Order the Respondent grant dismissal in favor of Ali Kia, M.D. as the filing of the Amended Complaint does not relate back to the original Complaint based on the relevant case law and the undisputed material facts in the District Court.

Dated: August 11, 2021 COLLINSON, DAEHNKE, INLOW & GRECO

By */s/ Linda Rurangirwa*

Patricia Egan Daehnke
Nevada Bar No. 4976
Linda K. Rurangirwa
Nevada Bar No. 9172
2110 E. Flamingo Road, Suite 212
Las Vegas, NV 89119
Attorneys for Petitioner Ali Kia, M.D.

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 in 14 point Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 21 (d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5,954 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.

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4. 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 records 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 11th day of August, 2021

By */s/ Linda Rurangirwa*

PATRICIA EGAN DAEHNKE
Nevada Bar No. 4976
LINDA K. RURANGIRWA
Nevada Bar No. 9172
COLLINSON, DAEHNKE, INLOW & GRECO
2110 E. Flamingo Road
Las Vegas, Nevada 89119
Tel. (702) 979-2132
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of COLLINSON, DAEHNKE, INLOW & GRECO; that service of the foregoing **PETITION FOR WRIT OF MANDAMUS** was made on August 11, 2021, via mandatory electronic service, proof of electronic service attached to any copy filed with the Court. Pursuant to Eighth Judicial District Court Administrative Order 21-04, filed June 4, 2021, Respondent does not accept any paper copies and thus was not served by mail. Pursuant to agreement of Real Parties in Interest, proof of which is attached, mail service of the foregoing is waived.

DANIEL MARKS, ESQ.
NICOLE M. YOUNG, ESQ.
Law Office of Daniel Marks
610 South Ninth Street
Las Vegas, Nevada 89101
(702) 386-0536
DMarks@danielmarks.net
NYoung@danielmarks.net
Attorneys for Real Party in Interest
Choloe Green

ERIC K. STRYKER, ESQ.
BRIGETTE FOLEY, ESQ.
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
6689 Las Vegas Blvd., Suite 200
Las Vegas, NV 89119
11th Floor
(702) 727-1400
Eric.stryker@wilsonelser.com
Brigette.Foley@wilsonelser.com
Attorneys for Real Parties in Interest
Frank J. Delee, M.D. and Frank J. Delee, M.D., P.C.

MICHAEL E. PRANGLE, ESQ.
TYSON J. DOBBS, ESQ.
HALL PRANGLE AND SCHOONVELD LLC
1140 North Town Center Drive Suite 350
20 Las Vegas, Nevada 89144
mprangle@HPSLAW.COM
tdobbs@HPSLAW.COM
Attorneys for Real Party in Interest
Sunrise Hospital and Medical Center, LLC

S. BRENT VOGEL, ESQ.
ERIN E. JORDAN, ESQ.
LEWSI BRISBOIS BISGAARD & SMITH, LLP
6385 Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Brent.Vogel@lewisbrisbois.com
Erin.Jordan@lewisbrisbois.com
Attorneys for Real Party in Interest
Nevada Hospitalist Group, LLP

THE HONORABLE JASMIN LILLY-SPEARS
The Eighth Judicial District Court
Department 23
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155
dept23lc@clarkcountycourts.us
Respondent

/s/ Lacey Ambro
An Employee of COLLINSON, DAEHNKE, INLOW & GRECO

Deborah Rocha

From: Stryker, Eric K. <Eric.Stryker@wilsonelser.com>
Sent: Monday, August 9, 2021 12:23 PM
To: Linda K. Rurangirwa; Daniel Marks; Jordan, Erin; Vogel, Brent; Tyson Dobbs; Mike Prangle
Cc: Deborah Rocha; Nicole Young; Foley, Brigette E.; Clark, Angela; Lord, Nicole N.; Office; Nicole M. Etienne
Subject: RE: Green v. Sunrise Hospital

Yes, thanks.

Eric K. Stryker
Attorney at Law
Wilson Elser Moskowitz Edelman & Dicker LLP
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, NV 89119
702.727.1242 (Direct)
702.727.1400 (Main)
702.727.1401 (Fax)
eric.stryker@wilsonelser.com

From: Linda K. Rurangirwa [mailto:Linda.Rurangirwa@cdiglaw.com]
Sent: Monday, August 9, 2021 12:16 PM
To: Daniel Marks <DMarks@danielmarks.net>; Stryker, Eric K. <Eric.Stryker@wilsonelser.com>; Jordan, Erin <Erin.Jordan@lewisbrisbois.com>; Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Tyson Dobbs <tdobbs@HPSLAW.COM>; Mike Prangle <mprangle@hpslaw.com>
Cc: Deborah Rocha <deborah.rocha@cdiglaw.com>; Nicole Young <NYoung@danielmarks.net>; Foley, Brigette E. <Brigette.Foley@wilsonelser.com>; Clark, Angela <Angela.Clark@wilsonelser.com>; Lord, Nicole N. <Nicole.Lord@wilsonelser.com>; Office <office@danielmarks.net>; Nicole M. Etienne <netienne@HPSLAW.COM>
Subject: Green v. Sunrise Hospital

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Linda

Linda K. Rurangirwa | Partner
Collinson, Daehnke, Inlow & Greco – Attorneys at Law
2110 E. Flamingo Road, Suite 212, Las Vegas, NV 89119
Phone: (702) 979-2132 | Facsimile: (702) 979-2133
linda.rurangirwa@cdiglaw.com | www.cdiglaw.com

Deborah Rocha

From: Nicole Young <NYoung@danielmarks.net>
Sent: Monday, August 9, 2021 2:38 PM
To: Tyson Dobbs; Vogel, Brent; Linda K. Rurangirwa; Daniel Marks; Stryker, Eric K.; Jordan, Erin; Mike Prangle
Cc: Deborah Rocha; Foley, Brigette E.; Clark, Angela; Lord, Nicole N.; Office; Nicole M. Etienne
Subject: RE: Green v. Sunrise Hospital

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Nicole M. Young, Esq.
Associate Attorney
Law Office of Daniel Marks
610 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-0536
Facsimile: (702) 386-6812

From: Tyson Dobbs [mailto:tdobbs@HPSLAW.COM]
Sent: Monday, August 09, 2021 12:42 PM
To: Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Linda K. Rurangirwa <Linda.Rurangirwa@cdiglaw.com>; Daniel Marks <DMarks@danielmarks.net>; Stryker, Eric K. <Eric.Stryker@wilsonelser.com>; Jordan, Erin <Erin.Jordan@lewisbrisbois.com>; Mike Prangle <mprangle@HPSLAW.COM>
Cc: Deborah Rocha <deborah.rocha@cdiglaw.com>; Nicole Young <NYoung@danielmarks.net>; Foley, Brigette E. <Brigette.Foley@wilsonelser.com>; Clark, Angela <Angela.Clark@wilsonelser.com>; Lord, Nicole N. <Nicole.Lord@wilsonelser.com>; Office <office@danielmarks.net>; Nicole M. Etienne <netienne@HPSLAW.COM>
Subject: RE: Green v. Sunrise Hospital

Fine with us as well.

HALL PRANGLE+ SCHOONVELD LLC
WHERE TRIAL LAWYERS ARE THE NORM

1140 North Town Center Dr.
Suite 350
Las Vegas, NV 89144
F: 702.384.6025

Tyson Dobbs
Partner
O: 702.212.1457
Email: tdobbs@HPSLAW.COM

Legal Assistant: Nicole Etienne
O: 702.212.1446
Email: netienne@hpslaw.com

From: Vogel, Brent <Brent.Vogel@lewisbrisbois.com>
Sent: Monday, August 9, 2021 12:29 PM
To: Linda K. Rurangirwa <Linda.Rurangirwa@cdiglaw.com>; Daniel Marks <DMarks@danielmarks.net>; Stryker, Eric K. <Eric.Stryker@wilsonelser.com>; Jordan, Erin <Erin.Jordan@lewisbrisbois.com>; Tyson Dobbs <tdobbs@HPSLAW.COM>; Mike Prangle <mprangle@HPSLAW.COM>
Cc: Deborah Rocha <deborah.rocha@cdiglaw.com>; Nicole Young <NYoung@danielmarks.net>; Foley, Brigette E. <Brigette.Foley@wilsonelser.com>; Clark, Angela <Angela.Clark@wilsonelser.com>; Lord, Nicole N. <Nicole.Lord@wilsonelser.com>; Office <office@danielmarks.net>; Nicole M. Etienne <netienne@HPSLAW.COM>
Subject: RE: Green v. Sunrise Hospital

[External Email] CAUTION!.

Yes, that's fine. Thank you.

Brent Vogel
Partner
Brent.Vogel@lewisbrisbois.com

T: 702.693.4320 F: 702.893.3789

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV 89118 | **LewisBrisbois.com**

From: Linda K. Rurangirwa <Linda.Rurangirwa@cdiglaw.com>
Sent: Monday, August 9, 2021 12:16 PM
To: Daniel Marks <DMarks@danielmarks.net>; Stryker, Eric K. <Eric.Stryker@wilsonelser.com>; Jordan, Erin <Erin.Jordan@lewisbrisbois.com>; Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Tyson Dobbs <tdobbs@HPSLAW.COM>; Mike Prangle <mprangle@hpslaw.com>
Cc: Deborah Rocha <deborah.rocha@cdiglaw.com>; Nicole Young <NYoung@danielmarks.net>; Foley, Brigette E. <Brigette.Foley@wilsonelser.com>; Clark, Angela <Angela.Clark@wilsonelser.com>; Lord, Nicole N. <Nicole.Lord@wilsonelser.com>; Office <office@danielmarks.net>; Nicole M. Etienne <netienne@HPSLAW.COM>
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Linda

Linda K. Rurangirwa | Partner
Collinson, Daehnke, Inlow & Greco – Attorneys at Law
2110 E. Flamingo Road, Suite 212, Las Vegas, NV 89119
Phone: (702) 979-2132 | Facsimile: (702) 979-2133
linda.rurangirwa@cdiglaw.com | www.cdiglaw.com