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IN THE SUPREME COURT OF THE STATE OF NEVADA

ALI KIA, M.D., and NEVADA HOSPITALIST GROUP, LLP,

Petitioners,

v.

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

Respondents,

and

CHOLOE GREEN, FRANK J. DELEE, M.D.,FRANK J. DELEE, P.C., and SUNRISE HOSPITAL AND MEDICAL CENTER, LLC.

_____/

Case No. 83357

ANSWER TO PETITION FOR WRIT OF MANDAMUS

I. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or 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.

1. Parent Corporations and/or any publically-held company that owns 10% or more of the party's stock:

   NONE

2. Law Firms that have represented Petitioner Choloe Green:

   Law Office of Daniel Marks, Daniel Marks, Esq., and Nicole M. Young, Esq.

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IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether extraordinary writ relief is necessary when the parties seeking dismissal had actual notice of the lawsuit, including participation in discovery as third-party defendants prior to the expiration of the statute of limitations.

V. STATEMENT OF FACTS

A. Factual Background

On July 9, 2016, Frank Delee, M.D. ("Delee"), performed a cesarean section on Choloe Green ("Choloe") at Sunrise Hospital and Medical Center ("Sunrise"). Choloe is an African-American female, who was 29 years old. She was discharged home on "post-operative day one" even though the standard of care for "a routine cesarean is a 3-4 night stay in the hospital." The standard of care was also breached relating to the first discharge because Choloe "had not even attempted to tolerate clear liquids and she had not passed flatus when she was released on post-operative day number one." (APPIV PA0492-94; APPIV PA0495-98.)

On July 14, 2016, Choloe presented at Sunrise's emergency room because she was in extreme pain. She was admitted into Sunrise's "medical/surgical unit because of the diagnosis of sepsis." She was five days post-partum and experiencing "severe abdominal pain and reports of nausea, vomiting, fever, and chills." (APPIV PA0493; APPIV PA0496-97.) She had various conversations with

doctors arranged by Sunrise. Ali Kia, M.D. ("Kia"), was assigned to provide Choloe care. (APPIV PA0555-56; APPIV PA0561.) She had never met him before and did not know who he was. She was treated by various nurses and other doctors, as well. (APPIV PA0500.) During Kia's deposition, it was discovered he does not work for Sunrise, but instead works for Nevada Hospitalist Group, LLP ("NHG") contrary to the statements he made to the Medical Board of California that he practices at and works for Sunrise. (SUPP APP0016-18.)

Choloe was discharged two days later, on July 16, 2016, by Kia. (APPIV PA0496-97.) Choloe's discharge was discussed between Delee and the doctors treating her at Sunrise. (APPIV PA0493; APPIV PA0496-97; APPIV PA0505.)

This discharge violated the standard of care because "[1] she was not able to tolerate a regular diet[,] . . . [2] her KUB showed multiple dilated loops of bowel, thought to be related to a small bowel obstruction, . . . [and] [3] [a]n intraperitoneal abscess was suspected on a CT scan." Despite these issues, both Sunrise, through Kia, and Delee agreed to discharge Choloe home. (APPIV PA0493; APPIV PA0496-97; APPIV PA0505.)

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Dr. Savluk opined Kia's care of Choloe violated the standard of care, as follows:

1. Failure to continue appropriate antibiotics during the patients hospitalizations when she was clearly fighting an infection.

2. Failure to continue antibiotics post-discharge in a patient clearly not having recovered from her infection.

3. Failure to follow up the radiographic studies which were clearly suspicious for an intra-abdominal abscess.

4. Discharging a patient with evidence of a small bowel obstruction or illeus without any explanation or resolution.

5. Pre maturely discharging the patient before she had adequately recovered from the septic process.

(APPIV PA0505-06.)

One day after her second discharge from Sunrise, July 17, 2016, Choloe was admitted into Centennial Hills Hospital ("Centennial"), again in severe pain and with no real bowel movement. The imaging studies at Centennial showed her condition had worsened in the one day since her discharge from Sunrise. (APPIV PA0494; APPIV PA0497; APPIV PA0505.) Choloe remained hospitalized at Centennial through September 2, 2016. (APPI PA0002.) She was then discharged to a rehabilitation facility. (APPIV PA0494; APPIV PA0497; APPIV PA0505.)

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Dr. Karamardian opined that based on the above breaches to the standard of care by Delee, Sunrise, and Kia, Choloe's "hospital course was protracted with multiple complications and . . . [then] discharged to a step down facility once her antibiotic course was felt to be completed, still on a feeding tube and in need of rehabilitation." (APPIV PA0496-97.) Dr. Savluk opined that due to Kia's failures to follow the standard of care, "Choloe Green went on to develop an acute abdomen requiring surgery, intra-abdominal abscess requiring percutaneous drainage and sepsis related ARDS (severe) which required 6 plus weeks in the ICU and resulted in severe physical deconditioning and prolonged sub-acute care." (APPIV PA0506.)

Choloe turned 30 years old during her second admission at Sunrise. (APPIV PA0511.) After she was discharged from Centennial and then the rehabilitation facility, she had to undergo a huge change of lifestyle, especially for a 30-year-old, single woman with four children. During her time at Centennial and the rehabilitation facility, she was diagnosed with chronic obstructive pulmonary disease ("COPD") and now requires constant, 24-hour use of oxygen tanks. She also suffers other health issues related to COPD. (APPIV PA0513.) Choloe was not discharged from the rehabilitation facility until October 25, 2016, more than three months after the cesarian section that lead to her prolonged hospitalization.

(APPIV PA0641-51.) Choloe needed rehabilitation care because it was determined she "require[d] 24hr physician oversight for medical management." (APPIV PA0644.)

These health issues caused by Delee, Kia, NHG, and Sunrise burden the State of Nevada through Medicaid, her insurance provider. (APPIV PA0512.) These health issues also prevent Choloe from obtaining meaningful employment to care for her family. (APPIV PA0517-18.)

B. Procedural History

Choloe filed her initial Complaint for Medical Malpractice against Delee and Sunrise on June 30, 2017. The reason Kia was not named as a defendant, at that time, is because it was not clear from the medical records who made the decision to discharge Choloe's second Sunrise admission. Delee and Sunrise both filed answers to the complaint and the parties began discovery. Delee's deposition was taken on September 20, 2018.

In her attempt to obtain more information regarding Sunrise's breach of the standard of care, Choloe properly noticed and served Kia with a Notice of Deposition to be taken on September 21, 2018. (APPIV PA0530-42.) Kia did not

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appear for that deposition or request it be rescheduled. Kia's deposition was ultimately taken on November 14, 2018. During his deposition, he testified that he works at Sunrise through NHG. (APPIV PA0554; APPIV PA0555.)

1. *Kia's negligence, which was first discovered during his deposition, caused Sunrise to attempt to avoid liability for ostensible agency and file a third-party complaint for indemnity.*

On January 15, 2019, Sunrise filed its original partial motion for summary judgment on the issue of ostensible agency. The district court denied that motion because it found there was a genuine issue of material fact regarding the ostensible agency relationship between Sunrise and Kia. (SUPP APP001-005.) Judge Smith decided the original motion for partial summary judgment, which was heard on March 12, 2019. He then retired from the bench, and this case was assigned to Judge Silva on April 29, 2019.

After Judge Smith denied the partial motion for summary judgment, Sunrise sought leave to add Kia and NHG, Kia's "employer," to a third-party complaint for indemnity, which was granted by the district court. (APPI PA0053-54.) Sunrise's third-party complaint was filed on June 14, 2019. This complaint was filed less than three years after Chloe's second discharge from Sunrise and less than one year after the discovery of Choloe's legal injury by Kia. Kia filed his answer to

that complaint on August 2, 2019. NHG did not file its answer until December 27, 2019. It is unknown why NHG took so long to file any responsive pleading or why Sunrise did not obtain a default judgment for failure to file a timely answer or motion to dismiss.

Judge Silva signed the order regarding Judge Smith's denial of Sunrise's motion for summary judgment on March 5, 2020, almost one year after the hearing on that motion. (SUPP APP001-005.) NHG then filed a motion for judgment on the pleadings on twenty days later, which Kia joined. When Judge Silva granted that motion, she invited reconsideration of the ostensible agency relationship issue. (APPI PA0178-79.) Sunrise then renewed its motion for partial summary judgment regarding ostensible agency on May 20, 2020.

Choloe opposed that motion and also filed a motion seeking leave to amend her complaint to add ostensible agency and corporate negligence/negligent supervision theories of liability against Sunrise on June 3, 2020.

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2. *The district court began considering the relation back doctrine and any potential statute of limitations issues dating back to the Summer of 2020.*

The present issue before this Court dates back to July of 2020 when the district court granted Sunrise partial summary judgment on the issue of ostensible agency and denied Choloe's motion to amend her complaint. As part of that order, the district court specifically found:

> 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 (1) receives actual notice of the action; (2) knows that it is the proper party; and (3) has not been misled to its prejudice by the amendment. *Echols v. Summa Corp.*, 95 Nev. 720, 722, 601 P.2d 716, 717 (1979).
>
> NRCP 15(c) is to be liberally construed to allow relation back of the amended pleading where the opposing party will be put to no disadvantage. *See E.W. French & Sons, Inc. v. General Portland Inc.*, 885 F.2d 1392, 1396 (9th Cir.1989) (discussing Federal Rule of Civil Procedure 15).

(SUPP APP0036-56.)

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Choloe sought reconsideration of that order on October 12, 2020, and also filed a new motion for leave to amend her complaint to add Kia and NHG back into the case on October 16, 2020. Judge Silva denied reconsideration but granted leave to add Kia and NHG back into the case. (SUPP APP0066-77; APPII PA0294-0300.)

Choloe filed her Amended Complaint on December 16, 2020. Both Kia and NHG accepted service of that complaint. (SUPP APP0078-81.)

Choloe filed a Petition for a Writ of Mandamus with this Court on January 21, 2021, regarding the issues of ostensible agency and corporate negligence/negligent supervision arising out of Judge Silva's reversal of Judge Smith's decision. (*See Green v. Dist. Ct. (Delee, M.D.)*, Case No. 83357).[1] That writ petition was denied on March 9, 2021.

3. *Kia and NHG ignore their multiple and intentional delays of this case, which shows they have not been misled to their prejudice.*

At the time Choloe filed her original complaint, it was unclear who, out of the many healthcare providers that treated Choloe, made the decisions resulting in the negligent care. Choloe attempted to gain additional information regarding

[1] Choloe filed a motion for reconsideration of that petition in that action, concurrently herewith, because the issues presented in that petition are related to the instant petition.

Sunrise's breach of the standard of care through discovery. Choloe properly noticed and served Kia with a Notice of Deposition to be taken on September 21, 2018. (APP IV PA0530-42.) Kia did not appear for that deposition and does not explain why. Kia's deposition was ultimately taken on November 14, 2018. During his deposition, he testified that he works at Sunrise through NHG. (APPIV PA0554; APPIV PA0555.) Kia's testimony, during his deposition, put both himself and his counsel on notice that his care of Choloe was directly at issue and his involvement in this case would be critical. His testimony led to the discovery by both Choloe and Sunrise that his actions caused legal injury. The legal injury would have been discovered two months earlier if he had actually appeared at the originally scheduled deposition.

Sunrise filed its third-party complaint on June 14, 2019, after unsuccessfully seeking partial summary judgment on the issue of ostensible agency relating to Kia's care of Choloe. This complaint was filed less than three years after Chloe's second discharge from Sunrise and less than one year after the discovery of Choloe's legal injury by Kia.

Kia filed his answer to that complaint on August 2, 2019. NHG did not file its answer until December 27, 2019. It remains unknown why NHG failed to file a timely responsive pleading or why Sunrise failed to obtain a default.

NHG filed a motion for judgment on the pleadings on March 25, 2020, which Kia joined. When Judge Silva granted that motion, she invited reconsideration of the ostensible agency relationship issue in her minute order. (APPI PA0178-79.)

If Kia had shown up to his original deposition and NHG had not waited over six months to answer Sunrise's third-party complaint, only to seek judgment on the pleadings three months later, then timing would not be at issue. Kia and NHG created this issue to avoid liability on the merits of this case.

VI. LEGAL ARGUMENT

A. Extraordinary writ relief is not appropriate because the district court properly exercised its discretion.

The original jurisdiction to issue a writ of mandamus lies with this Court. *Segovia v. Eighth Jud. Dist. Ct.*, 133 Nev. 910, 911, 407 P.3d 783, 785 (2017). "A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary and capricious exercise of discretion." *Id.* at 912.

Extraordinary writ relief is available when there is no "plain, speedy and adequate remedy in the ordinary course of law." *Id.* Writ petitions "challenging the denial of a motion to dismiss" are generally denied. *Chur v. Eighth Jud. Dist Ct.,*

136 Nev. Adv. Rep. 7, 458 P.3d 336, 339 (2020). There are only two bases to review an order denying a motion to dismiss: "(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 or granting the petition." *Id.*

Here, Kia and NHG's instant petition fails to meet either of the *Chur* bases to allow this Court to grant the writ relief requested. The facts show the district court properly exercised its discretion when it denied the motion to dismiss because each of the *Echols v. Summa* elements were met. In addition, Kia and NHG have failed to show a need for clarification of an important legal issue or consideration of sound judicial economy because they both improperly delayed this case. These delays (Kia's failure to appear at his original deposition and NHG's failure to file a timely responsive pleading to Sunrise's third-party complaint) show Kia and NHG are not severely prejudiced but rather have orchestrated a means to avoid liability.

Kia and NHG's intentional delays speak volumes in connection to the instant petition. Both Kia and NHG have been on notice of the underlying lawsuit since 2018, when Choloe deposed Kia and discovered he caused her legal injury.

(APPIV PA0543-619.) Both Kia and NHG were third-party defendants since 2019. (APPI PA0055-60.) The multiple judicial reassignments this case endured is the reason this case has such a unique procedural journey. Despite the reassignments and the conflicting rulings between Judge Smith and Judge Silva, Judge Lilly-Spells' denial of Kia and NHG's motion to dismiss was well-within her discretion and not subject to writ relief. (APPIV PA0696-707.)

B. The district court properly exercised its discretion when it denied Kia and NHG's motion to dismiss.

A plaintiff's complaint may be dismissed only when it fails "to state a claim upon which relief may be granted." NRCP 12(b)(5). Under NRCP 8(a)(1), a properly pled complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." All allegations of material fact made by the plaintiff must be taken as true and construed in favor of the plaintiff. *Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966 (1997). This is a rigorous standard to overcome, as every fair inference must be construed in the nonmoving party's favor. *Id.* Dismissal is only appropriate if the moving party can prove "beyond a doubt" that under no set of facts would the plaintiff be entitled to relief. *Id.*

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There is a strong presumption against dismissal for failure to state a claim. *See Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir.1997). The issue is not whether the plaintiff ultimately will prevail, but whether the plaintiff is entitled to offer evidence in support of her claims. *See Jackson v.Carey*, 353 F.3d 750, 755 (9th Cir. 2003).

Because Kia/NHG became parties to this action within the applicable statute of limitations, although they were improperly dismissed by Judge Silva, and Choloe's Amended Complaint properly relates back to her original complaint to allow adding Kia and NHG back into this case, this Court should deny the instant writ petition.

1. *Kia and NHG were properly brought into this case well-within the statute of limitations.*

Under NRS 41A.097(2), an action for professional negligence must be brought within three years of the date of injury or within one year after the plaintiff discovers the injury. "Injury," as used in that statute includes both physical damage and the negligence causing the damage, which the Nevada Supreme Court refers to as "legal injury." *Massey v. Litton*, 99 Nev. 723, 726, 669

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P.2d 248, 250 (1983). The existence of a "legal injury" is important in the professional negligence context because not all injuries suffered give rise to a professional negligence claim. The *Massey* Court reasoned:

> [W]hen injuries are suffered that have been caused by an unknown act of negligence by an expert, the law ought not to be construed to destroy a right of action before a person even becomes aware of the existence of that right.
>
> Furthermore, to adopt a construction that encourages a person who experiences an injury, dysfunction or ailment, and has no knowledge of its cause, to file a lawsuit against a health care provider to prevent a statute of limitations from running is not consistent with the unarguably sound proposition that unfounded claims should be strongly discouraged.

Id. at 727.

The expert affidavit requirement of NRS 41A.071 only requires the affidavit contain the following:

1. Supports the allegations contained in the action;

2. Is submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence;

3. Identifies by name, ***or describes by conduct***, each provider of health care who is alleged to be negligent; and

4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

(Emphasis added).

NRS 41A.071, a procedural rule, governs the threshold initial pleading requirements in professional negligence actions, including the expert affidavit requirement. *Borger v. Eighth Jud. Dist. Ct.*, 120 Nev. 1021, 1028, 102 P.3d 600, 605 (2004). That statute does not govern the ultimate trial, so this Court is required to "liberally construe this procedural rule of pleading in a manner that is consistent with our NRCP 12 jurisprudence." *Id.*

Here, the only reason Judge Silva granted judgment on the pleadings, dismissing Kia and NHG from the instant suit, was based on her incorrect interpretation of NRS 41A.071's affidavit requirement. Judge Silva did not believe the affidavit attached to Sunrise's complaint (Dr. Karamardian's affidavit attached to Choloe's original complaint) described Kia/NHG's conduct because they were not listed by name. Counsel for Choloe, Delee, and Sunrise all agreed that Kia/NHG's conduct was properly described in that affidavit to keep Kia and NHG in the case. (APPI PA0149-62.) At that time, Kia/NHG did not argue any statute of limitations issues. Judge Silva then invited Sunrise to renew its motion for partial summary judgment on ostensible agency, which she granted. (APPI PA0144-62.)

Judge Silva then invited Choloe to file a motion to amend her complaint to add Kia and NHG back into this case. (SUPP APP0044-46.) Choloe then had to incur the expense of obtaining expert affidavits to add Kia and NHG back into the

case. She obtained an affidavit from Dr. Savluk to detail Kia's violations of the standard of care. (APPIV PA0502-08.) Dr. Karamardian also amended her affidavit to clarify that the second discharge from Sunrise that she described in her orginal affidavit was ordered by Kia. (APPIV PA0495-98.) Judge Silva granted Choloe leave to add Kia and NHG back into the case despite dismissing them less than one year prior. (APPII PA0301-9.) Additionally, Judge Silva denied Kia's request for costs related to his motion for judgment on the pleadings because Choloe's motion to add Kia and NHG back into the case was pending. (SUPP APP0057-65.)

When Choloe originally brought this case, it was unclear who the main actors at Sunrise were relative to Choloe's care. She was treated by various doctors and nurses, and she did not want to bring multiple individuals into this case when their involvement was not clear based on the pre-litigation medical records she received from Sunrise. The *Massey* Court's interpretation of the applicable statute of limitations confirms this decision because a plaintiff should not be encouraged to add every single healthcare provider to the lawsuit to avoid a statute of limitations issue. 99 Nev. at 727. That would lead to the absurd result of having 10-20 defendants (or more) in every professional negligence lawsuit.

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When considering the application of statute of limitations, this court must consider when Choloe discovered her legal injury by Kia/NHG. *Massey* cautions plaintiffs against filing professional negligence claims against healthcare providers simply to prevent the running of the statute of limitations. This Court must remember that after Choloe's second discharge from Sunrise, she was hospitalized from July 17, 2016 to October 25, 2016, when she was released from the rehabilitation facility. (APPIV PA0514-15 & PA0641-51.) She was in no condition to comprehend what had happened to her and who was at fault that treated her. She was treated by various doctors and nurses, and she did not want to bring multiple individuals into this case when their involvement was not clear based on her recollection and the pre-litigation medical records she received from Sunrise. The *Massey* Court's interpretation of the applicable statute of limitations confirms this decision because a plaintiff should not be encouraged to add every single healthcare provider to the lawsuit to avoid a statute of limitations issue. 99 Nev. at 727.

Choloe discovered she suffered a "legal injury" by Kia during his November 14, 2018, deposition. She would have discovered that injury earlier if Kia had shown up to his original deposition. During his deposition, Kia confirmed he made

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the decision to discharge Choloe. (APPIV PA0603-04.) The deposition focused on why he would discharge her with a small bowel obstruction and high white blood cell count (leukocytosis). (APPIV PA0590.)

At the time Dr. Karamaradian executed her initial affidavit on this case, it was not clear who was in charge of Choloe's care during her second stay at Sunrise. The relevant portion of her affidavit states:

> 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.

(APPIV PA0493.)

Kia's deposition confirmed he controlled her care. That is why Sunrise filed a third-party complaint against Kia and NHG. Sunrise added Kia and NHG into this action less than one year later, on June 14, 2019 after Judge Smith denied Sunrise's motion for partial summary judgment on ostensible agency. (APPI PA061-75.) NHG then delayed this lawsuit by waiting until December 27, 2019, to answer that complaint. (APPI PA0076-82.)

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When this court dismissed Kia and NHG from this case, Choloe immediately sought to rectify the situation, as can be seen through the motion practice that has occurred since.

If Kia had shown up to his original deposition and NHG had not waited over six months to answer Sunrise's third-party complaint, timing would not be at issue. Kia and NHG created this statute of limitations issue to avoid liability on the merits of this case.

2. ***Even if this Court finds the instant suit against Kia and NHG was brought outside the statute of limitations, NRCP prevents dismissal because the addition of those parties relates back to the original complaint.***

Amendments to pleadings before trial upon leave of court, which is freely given. NRCP 15(a)(2). NRCP 15(c) governs amendments to pleadings, including "relation back amendments, and states:

> An amendment to a pleading relates back to the date of the original pleading when:
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> > (1) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or
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> > (2) the amendment changes a party or the naming of a party against whom a claim is asserted, if Rule 15(c)(1) is satisfied and if, within the period provided by Rule 4(e) for serving the summons and complaint, the party to be brought in by amendment:

> (A) received such notice of the action that it will not be prejudiced in defending on the merits; and
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> (B) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Sections (a) and (c) of NRCP 15 are meant to be read together based on the rule's plain meaning. *See MGM Mirage v. Nev. Ins. Guar. Ass'n.*, 125 Nev. 223, 228-29, 209 P.3d 766, 769 (2009). "An amended pleading adding a defendant that is filed after the statute of limitations has run will relate back to the date of the original pleading under NRCP 15(c) if "the proper defendant (1) receives actual notice of the action; (2) knows that it is the proper party; and (3) has not been misled to its prejudice by the amendment." *Costello v. Casler*, 127 Nev. 436, 440-41, 254 P.3d 631, 634 (2011) (citing *Echols v. Summa Corp.*, 95 Nev. 720, 722, 601 P.2d 716, 717 (1979). The district court must liberally construe NRCP 15(c) "to to allow relation back of the amended pleading where the opposing party will be put to no disadvantage." *Id.* (citing *E.W. French & Sons. Inc. v. General Portland Inc.*, 885 F.2d 1392, 1396 (9th Cir. 1989) ("[C]ourts should apply the relation back doctrine

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of [Federal] Rule 15(c) liberally."). "Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties." *Id.*

First, the claims brought against Kia and NHG arose out of the same conduct, transaction, and occurrence that Choloe attempted to set out in her original complaint and supporting affidavit. *See* NRCP 15(c)(1). Choloe complained her second discharge from Sunrise violated the standard of care in her original complaint, and it was later discovered Kia/NHG's conduct resulted in Choloe's second discharge from Sunrise. (APPIV PA0493; APPIV PA0496-97.) There should be no question whether Kia/NHG's involvement in this case arose out of the same conduct, transaction, and occurrence complained of in the original complaint.

Second, Kia and NHG were served with the Amended Complaint and Summons in accordance with NRCP 4(e). (APPII PA0310-24; SUPP APP0078-81.)Kia/NHG argue they somehow did not receive service properly under this rule, arguing the time should be calculated based on the filing of the original complaint, but that argument defies common sense. The very fact an amendment had to first

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be obtained shows that the NRCP 4(e) timing for service must be based on when the court grants leave to amend the complaint and the date the amended complaint was filed, not the original complaint.

Third, both Kia and NHG received actual notice of this case prior to the filing of the instant Amended Complaint. Kia first received notice when he was served the Notice of Deposition on August 24, 2018. (APPIV PA0538-42.) Kia received notice as to his actual involvement in the substance of this case during his deposition on November 14, 2018. (APPIV PA0543-619.) Finally, Kia and NHG were added as actual parties to this case beginning June 14, 2019, when Sunrise filed its third-party complaint. (APPI PA055-60.) There is no question, based on these facts, that Kia and NHG know they are proper parties to this case.

Neither Kia or NHG have been mislead to their prejudice regarding being added back into this case. Judge Silva denied their request for costs because she planned on granting Choloe leave to add them back in.

The reason why Kia and NHG were not included in the original complaint is because it was not clear that Choloe suffered a legal injury by Kia based on the pre-litigation medical records. Choloe did not want to sue multiple healthcare providers on the off chance that they could be liable. NRS 41A discourages including parties simply to avoid statute of limitations issues. *See Massey*, 99 Nev.

at 727. Choloe did not discover Kia caused her legal injury until his November of 2018 deposition. She further did not learn of Kia's affiliation with NHG until that deposition.

Kia's reliance on *Servatius v. United Resort Hotels*, 85 Nev. 371, 455 P.2d 621 (1969), is misplaced. The district court's reference to that case when citing to the *Echols* standard was simply to show that standard's long-term acceptance in Nevada. The issue in *Servatius* dealt with the dismissal of a complaint because the wrong corporate identity was named. Kia confuses this legal issue. The *Echols* standard, in accordance with NRCP 15(c)'s relation back standard, overcomes any potential statute of limitations issues. *Servatius* does not change that exception.

Choloe has fulfilled her duty under NRCP 15(c) and *Echols*, showing Kia and NHG are proper parties to this action. Kia and NHG had actual notice of this action since November 14, 2019, during Kia's deposition. Kia and NHG have failed to provide any evidence they were ever misled to their prejudice by the amendment. Kia and NHG claim to suffer extreme prejudice, yet they are unable to articulate the how's and why's in light of their extreme delays of this case.

Neither Kia nor NHG are disadvantaged by their addition to this case. When they were third-party defendants in this case, they received a copy of all discovery conducted and even engaged in the discovery process, including their attendance

at Choloe's deposition. Kia and NHG's actions in this case have actually worked to the disadvantage of Choloe, Delee, and Sunrise. Choloe would have discovered Kia caused her legal injury sooner if he had actually shown up to his original deposition. (APPIV PA0531-35.) NHG caused this case to be delayed over six months because it simply refused to file an answer or any other kind of responsive pleading prior to its December 27, 2019, answer to Sunrise's third-party complaint. (APPI PA0076-82.) Kia and NHG omitted those facts from their instant petition. Because they suffer no disadvantage, and actually disadvantaged all other parties in this case, this Court should liberally construe NRCP 15(c) because the modern rules of procedure intend this case be heard on the merits and not dismissed on "technical niceties." *See Costello*, 127 Nev. at 441.

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VII. CONCLUSION

Because Kia and NHG cannot reconcile their delays of this case to claim they have been misled to their prejudice by the amendment, the instant writ petition should be denied. *Echols'* third element regarding whether the amendment mislead Kia/NHG to their prejudice is key, and Kia/NHG have failed to show how the denial to dismiss is clearly erroneous based on that element.

At the end of the day, this case should be heard on the merits. The affidavits filed in support of the original complaint and Amended Complaint show Choloe has a good faith basis to have her case heard on the merits, as NRS 41A.071 contemplates, and there should be no further procedural delays in this case. Therefore, Kia/NHG's Petition for Writ of Mandamus should be denied.

DATED this 13 day of December, 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer 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 WordPerfect X9 in 14 point font and Times New Roman.

2. I further certify that this answer complies with the page- or type-volume limitations of NRAP 21(d) because, excluding the parts of the answer exempted by NRAP 32 (a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more and contains 5,396 words.

3. Finally, I hereby certify that I have read this answer, 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 answer complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the answer 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.

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4. I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellant Procedure.

DATED this 13 day of December, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS, and that on the 13 day of December, 2021, I did serve by way of electronic filing, a true and correct copy of the above and foregoing **ANSWER TO PETITION FOR WRIT OF MANDAMUS** on the following:

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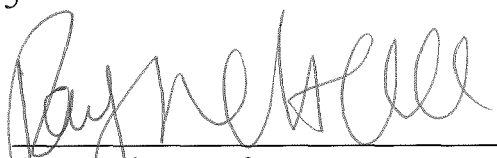
I further certify that I did deposit in the U.S. Mail in Las Vegas, Nevada, with first class postage fully prepaid thereon a true and correct copy of the **ANSWER TO PETITION FOR WRIT OF MANDAMUS** to the addresses as follows:

The Honorable Jasmin Lilly-Spells
Eighth Judicial District Court
Department XXXIII
200 Lewis Avenue
Las Vegas, Nevada 89155



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