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

CHOLOE GREEN, 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.

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Supreme Court No.: 83357

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

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

PATRICIA EGAN DAEHNKE (SBN 4976)
LINDA K. RURANGIRWA (SBN 9172)
COLLINSON, DAEHNKE, INLOW & GRECO
2110 E. Flamingo Road, Suite 212
Las Vegas, Nevada 89119
Attorneys for Petitioner Ali Kia, M.D.

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I. LEGAL ARGUMENT

Petitioner Ali Kia, M.D. respectfully asserts that for the reasons set forth in the Petition for Writ of Mandamus, and herein, Respondent manifestly abused its discretion in denying Dr. Kia's Motion to Dismiss based on the expiration of the statute of limitations.

A. Plaintiff Failed to Add Dr. Kia as a Defendant Prior to the Expiration of the Statute of Limitations.

In her Answer to Petition for Writ of Mandamus ("Answer"), Real Party in Interest Ms. Green contends that the reason Dr. Kia was not named as a Defendant when she initially filed her Complaint was because 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. However, Plaintiff does not contend that she did not know Dr. Kia, nor does she assert that she was unaware he provided care and treatment to her during the relevant hospitalization. *See* Answer, p. 17. Ms. Green made a strategic decision to not name Dr. Kia to her detriment. Dr. Kia should not suffer for this decision.

Ms. Green does not dispute that as of the filing of her Complaint on June 30, 2017, she was aware that the allegation was that her discharge from Sunrise Hospital and Medical Center ("Sunrise Hospital") was negligent. Ms. Green also

does not dispute that her expert Lisa Karamardian, M.D. who provided the affidavit in support of the Complaint averred that 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 nevertheless argues that she learned of her legal injury during Dr. Kia's November 14, 2018, deposition.

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 caused 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.* Thus, Ms. Green's claim that she learned of the "legal injury" when Dr. Kia was deposed is the incorrect measurement of when the one year statute of limitations begins to run.

The statute of limitations begins to run when the patient has before him the facts which would put a reasonable person on inquiry notice of his possible cause of action, whether or not it has occurred to the particular patient to seek further medical advice. *Massey,* 99 Nev. at 727-28. ***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.").

NRS 41A.097 (3) allows for the tolling of the one year statute of limitation if the "provider of health care has concealed any act, error or omission upon which the action is based and which is known or through the use of reasonable diligence should have been known to the provider of health care." A plaintiff who alleges that the limitations period should be tolled for concealment must satisfy a two-prong test: (1) that the physician intentionally withheld information (2) that was "material," meaning the information would have objectively hindered a reasonably diligent plaintiff from timely filing suit. *Winn*, 128 Nev. at 254-55, 277 P.3d at 464. This Court specifically noted that "[a] tolling-for-concealment provision included within a generally applicable statute of limitations is an exception to the general rule, meant to prevent a defendant from taking affirmative action to prevent the plaintiff from filing suit." *Id*. at 466. In other words, Ms. Green must prove that Dr. Kia intentionally withheld information from her to prevent her from filing suit. Concealment for tolling purposes requires "affirmative acts or representations that are calculated to lull or induce a claimant into delaying her claim or to prevent her from discovering her claim; mere silence on the part of the defendant and failure by claimant to learn of a cause of action is not enough." *Wolf v. Bueser*, 664 N.E.2d 197, 205 (1st Dist. Ill. 1996) (doctor's interpretation of mammogram did not give rise to level of affirmative act that was intended to lull plaintiff into delaying discovery of the claim).

Here, there is no allegation Dr. Kia intentionally withheld information that was material. In addition there is no alleged concealment. Thus the one year statute of limitations is not tolled.

In *Winn* this Court noted that determining the accrual date is ordinarily a question of fact for the jury, unless the facts are "uncontroverted" and "irrefutably demonstrate" the accrual date, in which case the district court may determine it as a matter of law. *Winn*, 128 Nev. at 253, 277 P.3d at 464. at 463.

With regard to the one year statute of limitations, Dr. Kia assumed at the latest Ms. Green discovered her injury at the time she filed her Complaint on June 30, 2017. 1 PA0001-7. Pursuant to the expert affidavit of Dr. Karamardian, 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 it was that 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. 1 PA0006. Ms. Green had the obligation to investigate further as to who was involved in the discharge, but did not do so. Instead, it was not until August 24, 2018, after the expiration of the one year statute of limitations on June 30, 2018, that Dr. Kia was served with a subpoena for deposition. 4 PA0538.

It should be noted that Ms. Green does not dispute that the amendment of

Dr. Kia to her Complaint occurred after the expiration of the three year statute of limitations which "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 and postoperative complications. Commencement of the three year limitation period does not require that Ms. Green 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.

B. <u>Sunrise Hospital's Filing of a Third Party Complaint Against Dr. Kia for Indemnity and Contribution Did Not Toll the Statute of Limitations as to Ms. Green.</u>

Ms. Green makes note that in the interim Sunrise Hospital filed a Third Party Complaint against Dr. Kia before the three year statute of limitations expired. This appears to be an argument that this filing somehow saves her claim. *See* Answer p. 6, 10. The Third-Party Complaint was filed on June 14, 2019. 1PA0055-0060. It should be noted the Third Party Complaint was for indemnification and contribution. *Id.* **<u>At no time</u>** during the pendency of this Third-Party Complaint did Ms. Green move to amend her Complaint to add Dr. Kia as a Defendant with regard to a potential medical malpractice claim. Ms. Green provides no legal precedent to support any argument that because Dr. Kia

was brought in as a Third-Party Defendant after the expiration of the statute of limitations, she can now assert a claim for medical malpractice that would otherwise have been time barred. This novel position is contrary to all Nevada statutory and case law and is a naked attempt to make an end-run around the fact that Ms. Green sat on her hands and watched the statute of limitations expire with regard to any potential claim against Dr. Kia for medical malpractice. The facts are that when Sunrise Hospital filed a Third-Party Complaint on June 14, 2019, for indemnification and contribution, Ms. Green once again chose to do nothing. It was not until October 16, 2020, that Ms. Green moved to file an Amended Complaint to add Dr. Kia and NHG as Defendants. 2 PA 018-208.

C. Dr. Kia Did Not Engage in Any Delay that Resulted in the Expiration of the Statute of Limitations Prior to Ms. Green Filing an Amended Complaint.

Ms. Green appears to argue that by not presenting to deposition until November 18, 2018, Dr. Kia somehow caused her to not amend the Complaint within the statutory period. However, he was not served with the deposition subpoena until August 24, 2018, after the expiration of the one year statute of limitations. 4 PA0538. Thereafter, Ms. Green admittedly made the strategic decision, even after Dr. Kia was deposed, not to add him as a Defendant until October 16, 2020, over four years after the date of injury.

D. The Amendment to Add Dr. Kia as a Defendant Should Not Relate Back to the Filing of the Original Complaint

Pursuant to NRCP 15 (c):

> An amendment to a pleading relates back to the date of the original pleading when:
>
> (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
>
> (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
> >
> > (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.

Ms. Green contends that because Dr. Kia received notice of the action by the time he was subpoenaed for deposition, which occurred before she amended the Complaint, the amendment should relate back to the filing of the original complaint. However, Dr. Kia did not have any notice before the expiration of the statute of limitations. Ms. Green's claim was already stale.

In *Servatius v. United Resorts Hotel* 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). In *Echols v. Summa Corp* 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). Ms. Green has not cited to any case law that allows relation back of an amendment adding a new party when the party had no actual notice of the Complaint until after the statute of limitations expired.

Just like in *Garvey v. Clark County*, as cited to in *Badger v. Eighth Judicial Dist. Court*, 132 Nev. 396, 403-404, 373 P.3d 89, 94 (2016), Ms. Green is seeking relation back to the original complaint when Ms. Green, aware of her legal injury for at least 3 years, elected not to name Dr. Kia as a party in the original action. In *Garvey*, this Court expressly refused to allow the Amended Complaint to relate back to the filing of the original Complaint.

E. Dr. Kia Would be Prejudiced Should the Court allow Respondent's Decision Denying the Motion to Dismiss to Stand.

Ms. Green argues that because Dr. Kia participated in discovery when added as a Third-Party Defendant, he would not be prejudiced should the amendment be

allowed to stand. However, Judgment on the Pleadings was granted in favor of Dr. Kia as to the Third-Party Complaint. 1 PA173-185. Any additional costs as a result of litigating this case should it be allowed to continue would not have been otherwise incurred. Furthermore, he is now subject to potential liability for a claim that was stale before he received any notice of it

II. CONCLUSION

Ms. Green was on inquiry notice of her claim against Dr. Kia by June 30, 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 not served with a subpoena for his deposition until August 24, 2018, after the one year statute of limitations expired. Dr. Kia had no notice of the Complaint until after the statute of limitations expired and any amendment relating back to the filing of the original Complaint would be extremely prejudicial to him financially and professionally.

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, when 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, 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. Ms. Green's Complaint should not relate back to the filing of the original Complaint when she elected over the period of over three years not to name Dr. Kia as a party in the original action.

Based on the foregoing and as set forth in Dr. Kia's Petition for Writ of Mandamus, 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: January 20, 2022 COLLINSON, DAEHNKE, INLOW & GRECO

By */s/ Linda Rurangirwa*

Patricia Egan Daehnke (SBN 4976)
Linda K. Rurangirwa (SBN 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 2,975 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 20th day of January, 2022

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 **PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS** was made on January 20, 2022, 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 but was served by electronically filing a courtesy copy with the Clerk of the Court using the Odyssey File & Serve system and via email to Department 23's law clerk at the email address set forth below..

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/ Linda K. Rurangirwa
An Employee of COLLINSON, DAEHNKE, INLOW & GRECO

Linda K. Rurangirwa

From: Linda K. Rurangirwa
Sent: Thursday, January 20, 2022 9:24 PM
To: dept23lc@clarkcountycourts.us
Cc: Vogel, Brent; Jordan, Erin; Mike Prangle; Tyson Dobbs; Eric.Stryker@wilsonelser.com; Daniel Marks; Nicole Young; Patricia Daehnke; Deborah Rocha
Subject: Green v. Kia M.D. et al; A-17-757722-C
Attachments: GREEN p-writ of mandamus reply.pdf

Good evening:

Attached please find Petitioner Ali Kia, M.D.'s Reply in Support of Petition for Writ of Mandamus.

Thank you,

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