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8 *Special Litigation Counsel for Mark J. Gardberg, Esq., in his capacity as Receiver for,*
9 *and acting on behalf of, Flamingo-Pecos Surgery Center, LLC*

Electronically Filed
Nov 28 2021 07:52 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

6 **DISTRICT COURT**
7 **CLARK COUNTY, NEVADA**

8 MARK J. GARDBERG, ESQ., in his capacity
9 as Receiver for, and acting on behalf of,
10 FLAMINGO-PECOS SURGERY CENTER,
11 LLC a Nevada limited liability company;

12 Plaintiff,

13 vs.

14 William Smith MD et al.;

15 Defendants.

Case No.: A-17-750926-B
[consolidated with A-18-769693-C]
Dept. No.: XXII

CASE APPEAL STATEMENT

16 **1. Name of appellant filing this case appeal statement:**

17 Plaintiff Mark J. Gardberg, Esq., in his capacity as Receiver for, and acting on behalf of,
18 Flamingo-Pecos Surgery Center, LLC.

19 **2. Identify the judge issuing the decision, judgment, or order appealed from:**

20 The Honorable Susan H. Johnson

21 **3. Identify each appellant and the name and address of counsel for each appellant:**

22 Appellant: Plaintiff Mark J. Gardberg, Esq., in his capacity as Receiver for, and acting
23 on behalf of, Flamingo-Pecos Surgery Center, LLC
24 Counsel: Mohamed A. Iqbal, Jr., Esq.
25 IQBAL LAW PLLC
26 101 Convention Center Dr., Suite 1175
27 Las Vegas, Nevada 89109
28 Tel: 702-750-2950

4. Identify each respondent and the name and address of appellate counsel:

Respondent: Defendant William Smith MD
Counsel: Marc P. Cook, Esq.
COOK & KELESIS, LTD.
517 S. Ninth St.
Las Vegas, Nevada 89101

CASE APPEAL STATEMENT

1 of 5

Docket 83805 Document 2021-33880

Tel: 702-737-7702

Respondent: Defendant Sheldon Freedman MD
Counsel: Marc P. Cook, Esq.
COOK & KELESIS, LTD.
517 S. Ninth St.
Las Vegas, Nevada 89101
Tel: 702-737-7702

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42:

All counsel listed above are licensed to practice in Nevada.

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Appellant was represented by retained counsel in the District Court (listed above).

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Appellant is represented by retained counsel on this appeal (listed above).

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

Not applicable.

9. Indicate the date the proceedings commenced in the district court (e.g., date of complaint, indictment, information, or petition was filed):

The original complaint was filed on February 10, 2017 and assigned to the Honorable Judge Joesph P. Hardy, Jr. of Department XV. (It was subsequently assigned to the Honorable Judge Elizabeth G. Gonzalez of Department XI and, very recently, reassigned to the Honorable Judge Susan H. Johnson of Department XXII).

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

Plaintiff appeals from a Notice of Entry of Order granting Defendants' Application for Attorney's Fees and Costs, and a Notice of Entry of Final Judgment. The underlying action—subject to a pending appeal (case no. 83556)—involves duty of care and duty of loyalty violations and gross negligence on the part of board members who did nothing and were asleep at the wheel

1 while their employee (bookkeeper Robert W. Barnes) robbed Plaintiff, an entity, blind for four (4)
2 years—and which board members continued to fail their obligations to Plaintiff in the years
3 following the discovery of the embezzlement.

4 Plaintiff was created on or about January 1, 2002, pursuant to an operating agreement dated
5 December 10, 2001. FPSC was a surgical center/medical services company, frequently operating
6 under the name Surgery Center of Southern Nevada.

7 Barnes was hired in 2006 and, as he would later admit in his criminal guilty plea agreement,
8 embezzled \$1.3 million from FPSC from approximately 2010 to 2013. Defendants Smith and
9 Freedman—both of whom served on Plaintiff’s board (the “Board”)—had duties of loyalty and
10 care to Plaintiff that they failed completely. Freedman was part of the Board that hired Barnes and
11 then failed to oversee him, ever. Smith joined Freedman in empowering and emboldening Barnes.
12 Smith and the Board, among other things, failed to review the company’s finances and credit card
13 statements for *four (4) years* before the embezzlement was discovered; failed to install safeguards
14 and credit card policies before and after the discovery of the theft; vested in the embezzler (Barnes)
15 such sweepingly broad authority that he was no longer managed or constrained by the Board, or
16 even had to inform them of his actions; awarded sole authority for obtaining \$1.8 million in loan
17 funds to the embezzler, violating the operating agreement’s requirement that the Board
18 affirmatively approve any action to borrow money or otherwise obtain credit; demonstrated naked
19 *self-dealing* by failing to pursue the grossly negligent management company (Epiphany)
20 responsible for the embezzler because, well, Defendants owned shares in the management
21 company; allowed, for years following the discovery of the embezzlement, *seven-figures worth*
22 of accounts receivable to go to waste, uncollected and rendered worthless; and failed to pursue the
23 embezzler in any reasonable sense. Defendants stranded FPSC following the September 10, 2015
24 notice of dismissal of the chapter 11 bankruptcy Defendant Smith initiated (and represented FPSC
25 in) December 31, 2014. (14-18480-ABL, U.S. Bankruptcy Court for the District of Nevada).

1 Plaintiff, the current Receiver appointed by the Honorable Judge Nancy L. Allf in 2017,¹
2 has maintained and/or initiated separate actions in the Eighth Judicial District Court, against
3 Robert Barnes individually, Robert Barnes and his ex-wife, and, in this case—initially—*six*
4 individual defendants who led FPSC—during *and after* Barnes’ rampage—to ruin. The
5 Receiver’s settlements with four of the six defendants were approved by the Honorable Elizabeth
6 Gonzalez in the fall of 2019. The two remaining Defendants, Smith and Freedman, having failed
7 to prevail on prior motions to dismiss and a motion for summary judgment, recently and finally
8 prevailed on summary judgment on August 5, 2021.

9 Thereafter, Defendants Smith and Freedman each filed applications for attorney’s fees and
10 costs and memorandum of costs, which the District Court granted on October 20, 2021—despite
11 clear evidence that Defendants submitted false findings of fact and conclusions of law that were
12 relied on for the attorneys’ fees award and that formed the basis for Defendants’ judgment. Also
13 on October 20, 2021, a notice of entry of order granting Defendants’ respective applications for
14 attorney’s fees and costs and a notice of entry of final judgment were filed. This instant appeal
15 followed and Plaintiff/Appellant will seek to consolidate the pending matters currently on appeal.

16 **11. Indicate whether the case has previously been the subject of an appeal to or original writ**
17 **proceeding in the Supreme Court and, if so, the caption and Supreme Court docket**
18 **number of the prior proceeding:**

19 Case No.: 74726

20 Caption:

21 SHELDON FREEDMAN, M.D.; PANKAJ BHATANAGAR, M.D.; AND MATHEW
22 NG, M.D., Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE
23 STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE
24 HONORABLE JOSEPH HARDY, JR., DISTRICT JUDGE, Respondents, and MARK J.
25 GARDBERG, ESQ., IN HIS CAPACITY AS RECEIVER FOR AND ACTING ON
26 BEHALF OF, FLAMINGO-PECOS SURGERY CENTER, LLC, A NEVADA LIMITED
27 LIABILITY COMPANY, Real Parties in Interest.

28 *(Case closed).*

29 ¹ A-16-733627-B, *Patriot-Reading Associates, LLC v. Flamingo Pecos Surgery Center,*
30 *LLC*. For the avoidance of confusion, the original receiver was appointed in 2016, and the current
31 Receiver took his place pursuant to a July 20, 2017 Notice of Entry of Order.

Case No.: 83556

Caption:

MARK J. GARDBERG, ESQ., IN HIS CAPACITY AS RECEIVER FOR, AND ACTING
ON BEHALF OF, FLAMINGO-PECOS SURGERY CENTER, LLC, A NEVADA
LIMITED LIABILITY COMPANY,

Appellant,

vs.

WILLIAM D. SMITH M.D., AN INDIVIDUAL; AND SHELDON FREEDMAN, M.D.,
AN INDIVIDUAL,

Respondents.

12. Indicate whether this appeal involves child custody or visitation:

This appeal does not involve child custody or visitation.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

This appeal does involve the possibility of settlement, and Appellant is willing to engage
in good faith settlement discussions.

Dated November 28, 2021.

Respectfully submitted by:

IQBAL LAW PLLC

By: /s/ Mohamed A. Iqbal, Jr.

Mohamed A. Iqbal, Jr. (NSB 10623)

*Special Litigation Counsel for Mark J.
Gardberg, Esq., in his capacity as Receiver
for, and acting on behalf of, Flamingo-Pecos
Surgery Center, LLC*

CERTIFICATE OF SERVICE

I certify that I served the foregoing **CASE APPEAL STATEMENT** on all counsel of record in
this matter using the Court's e-file/e-service system on November 28, 2021.

By: /s/ Marie-Claire Alsanjakli

An employee of IQBAL LAW PLLC