IN THE SUPREME COURT OF THE STATE OF NEVADA

JANE NELSON,

Petitioner

v.

EIGHTH JUDICIAL DISTRICT COURT IN AND FOR CLARK COUNTY, NEVADA, HON. SUSAN JOHNSON, Presiding;

Respondent

MUHAMMAD SAEED SABIR, M.D. and PIONEER HEALTH CARE, LLC

Real Parties in Interest

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SUPREME COURT CASE NO.

ORIGINAL PETITION FOR WRIT OF MANDAMUS

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Petitioner JANE NELSON is a Plaintiff in a personal injury lawsuit wherein the Real Parties in Interest are represented by the defense law firm of McBride Hall. Nelson hereby seeks a Writ of Mandamus directing the District Court to grant her Motion for Disqualification of McBride Hall or directing the District Court to hold the required evidentiary hearing on said motion. The basis for the imputed disqualification is that McBride Hall, in the middle of the litigation, hired away the paralegal of Nelson's counsel who is privy to all confidential information regarding Plaintiff Nelson's litigation strategy and mental impressions of Nelson's attorney. This original Writ Petition is submitted pursuant to NRS § 34.160 and NRS § 34.330, NRAP 32 and the Nevada Constitution Art. 6, Sec. 4, and seeks issuance of a Writ of Mandamus to direct the Eighth Judicial District Court to grant the motion for imputed disqualification or to hold the required evidentiary hearing on screening measures.

Dated this 3rd day of January, 2022.

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ROUTING STATEMENT

The Petitioner requests that the Nevada Supreme Court retain this Writ Petition under NRAP 17(a)(11) & (12) to clarify the legal standard for imputed disqualification of a law firm based on the hiring of nonlawyer staff from an opposing law firm and when screening measures are disallowed. Thus far, the Court's jurisprudence on this topic concerned only nonlawyer staff that had no or minimal confidential information, thus the prior jurisprudence has leaned toward permitting screening in most cases. This case, however, presents the most severe facts *favoring* imputed disqualification, i.e. a paralegal with personal knowledge of *all* confidential information and litigation strategy of Plaintiff Nelson's lawyer who has switched sides and is now working for the defense law firm mid-litigation. This writ also asks the Court to apply the holding of *Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc.*, 128 Nev. 289 (2012) (District Court must hold an evidentiary hearing and make specific findings of fact and conclusions of law as to screening efforts of attorneys to avoid imputed disqualification) to nonlawyer staff as well. This case presents a clear extension of *Ryan's Express* but the Supreme Court has yet to explicitly apply that case to nonlawyer staff in addition to lawyers.

DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

Pursuant to NRAP 26.1, Petitioner's counsel Adam J. Breeden, Esq. hereby discloses the following: There are no corporations or business entities involved in this Petition and, therefore, there are no related or parent companies to disclose. The only counsel appearing or expected to appear for the Petitioner is Adam J. Breeden, Esq. of the Breeden & Associates, PLLC law firm. The Petitioner is not using a pseudonym.

I. STATEMENT OF ISSUES IN WRIT/RELIEF SOUGHT

First, did the District Court err when it required Nelson to establish *actual prejudice* to her through leaked or shared confidential information when the paralegal assigned to her case was hired by opposing counsel given this Court's prior jurisprudence that such facts contain a *presumption* of imputed disqualification?

Second, is screening of the nonlawyer paralegal permitted in any case such as this one where the paralegal has the most confidential, privileged information about the case possible or do the facts of this case require imputed disqualification per se?

Third, does this Court's decision in *Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc.*, 128 Nev. 289 (2012) requiring the District Court to hold an evidentiary hearing and make specific findings of fact and conclusions of law apply to nonlawyer paralegals as well as lawyers and, if so, did the District Court err in failing to hold such a hearing and issue such specific findings of fact and conclusions of law as to screening and why it would (or would not) be effective on the particular facts of the case?

Nelson seeks a writ of mandamus either instructing the District Court to grant her motion for imputed disqualification of the McBride Hall law firm on its face or at a minimum to vacate its ruling and hold the required evidentiary hearing as to attempted screening of the paralegal involved.

II. STATEMENT OF FACTS

Petitioner Jane Nelson is a plaintiff in a personal injury claim in the Eighth Judicial District Court, Hon. Susan Johnson presiding. (Appx. at 1-15). Nelson alleges that the Defendants in that underlying case, medical providers at a short-term rehabilitation facility, failed to timely diagnose and treat her heparin induced thrombocytopenia (HIT), thus causing her to sustain bilateral pulmonary emboli and nearly die. (Appx. at 3-4). The case was filed on October 19, 2020, discovery closes on April 21, 2022, and the matter is set for trial on August 1, 2022. (Appx. at 25-27)

In the underlying action, Nelson is represented by the law firm of Breeden & Associates, PLLC. (Appx. at 1-8, 31) Two of the Defendants in that action—Real Parties in Interest in this writ petition—are Dr. Muhammad Sabir and Pioneer Health Care, LLC. (Appx. at 16-23). The Real Parties in Interest are represented by the law firm of McBride Hall. (Appx. at 16-23, 31-35)

During litigation, McBride Hall made an offer of employment to a paralegal at Breeden & Associates, PLLC, Kristy Johnson, which she accepted. (Appx. at 34-35, 50-51, 59-60) Ms. Johnson notified Breeden & Associates of this on October 25, 2021. As far as Nelson's attorney knows, her last day of employment at Breeden & Associates was Friday, November 12, 2021 and her first day of employment at McBride Hall was three days later on Monday, November 15, 2021. At the time she

switched law firms, Ms. Johnson was the paralegal assigned to the Nelson file at Breeden & Associates. She had worked directly for Nelson's counsel, Mr. Breeden, for four years. At Breeden & Associates, Ms. Johnson worked closely with Mr. Breeden every day and independently managed some aspects of cases such as discovery disclosures. Mr. Breeden shared all confidential and privileged information as well as the attorney's mental impressions and strategy as to every case at his firm with Ms. Johnson. Ms. Johnson worked on the Nelson file specifically at Breeden & Associates since the case's inception at the firm in May of 2020. This included drafting legal documents, being copied on all attorney-client communications between Breeden & Nelson, meeting and speaking to Nelson several times, including sitting in on parts of client meetings with the attorney, and working on a comprehensive status letter to the client outlining to Nelson all of Mr. Breeden's mental impressions of the case, the assigned judicial officer, opposing counsel, the opposing insurer, discovery and expert strategy, offer of judgment strategy, trial strategy and settlement negotiation strategy, including possible offers and demands. Ms. Johnson had a similar knowledge of the Nelson case as if Breeden & Associates copied its entire file and sent it to defense counsel. (Appx. 33-35) However, the situation is even worse than that since Ms. Johnson is privy to unwritten, verbal confidential information as well. All of this was attested by Nelson's attorney Mr. Breeden (Appx. 33-35) and the degree of confidential

information Ms. Johnson had was never disputed by McBride Hall. (Appx. at 48-73)

Based on this development, Nelson filed a motion for imputed disqualification of the entire McBride Hall law firm. (Appx. at 30-47) In response, the McBride Hall law firm did not dispute the level of confidential information Ms. Johnson had, but instead opposed the motion on the grounds that it believed it had/could adequately screen Ms. Johnson off the Nelson file to avoid imputed disqualification. (Appx. at 48-73) A brief motion hearing was held on November 23, 2021. (Appx. at 74-85) There was no opportunity to testify, call witnesses or present evidence at the motion hearing. During the hearing, the District Court, Hon. Susan Johnson, presiding, erred both procedurally and substantively. Substantively, the District Court stated that Nelson would have to show actual prejudice to win her motion. (Appx. at 83, ln. 1-11) In other words, Nelson would have to show that confidential information had actually been wrongly disclosed to the opposing law firm. This is the incorrect legal standard. Under the Nevada Supreme Court's applicable case law the sharing of confidences and imputed disqualification is *presumed*, meaning that Nelson need not affirmatively establish anything other than that the nonlawyer actually has confidential information, which was conceded. Secondly, the case presented the issue of screening the paralegal as a method to attempt to cure imputed disqualification. Although the Nevada Supreme Court's case law plainly requires an evidentiary hearing where the District Court must make detailed findings of fact

and conclusions of law when screening is attempted to avoid imputed disqualification, the District Court held no such evidentiary hearing and made no such findings of fact and conclusions of law. (Appx. at 74-85) A brief Order denying the disqualification was entered on December 1, 2021, reiterating a requirement of actual prejudice, disregarding the presumption of imputed disqualification, and denying an evidentiary hearing. (Appx. at 89-90) The written Order contained the screening methods the District Court wanted, but no formal findings of fact and conclusions of law. The written order simply states that the District Court found "no prejudice in permitting McBride Hall to continue to represent [their clients]" because they have "properly screened" Ms. Johnson from the Nelson file at their law firm. (Appx. at 90, ln. 3-7) This writ petition followed.

III. LEGAL STANDARD FOR WRIT RELIEF

It is well-established that Writ relief is an extraordinary remedy, and it is within the Court's discretion whether to entertain a petition seeking that relief. *Renown Reg'l Med. Ctr. v. Second Judicial Dist, Court*, 130 Nev. 824, 827, 335 P.3d 199, 201 (2014). However, the Court may exercise its discretion to consider a petition regarding a motion to dismiss when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Id*. at 197-98, 179 P.3d at 559, *City of Mesquite v. Eighth Judicial Dist. Court of Nev.*, 445 P.3d 1244, 1248 (Nev. 2019).

This Court has repeatedly recognized that for issues of disqualification of a law firm an appeal is an inadequate remedy at law because the affected law firm is allowed to continue the case to conclusion before an appeal may be taken. Nelson's case is ongoing so she has no final, appealable order disposing of all claims yet to appeal from. Thus, writ petitions as to disqualification and imputed disqualification have been repeatedly entertained by this Court as no adequate remedy at law exists. *E.g., Ciaffone v. Eighth Judicial Dist. Court*, 113 Nev. 1165, 945 P.2d 950 (1997); *Leibowitz v. Eighth Judicial Dist. Court of Nev.*, 119 Nev. 523 (2003) (both raising imputed disqualification of a law firm based on the hiring on nonlawyer staff by writ petition). The Court should also entertain this writ petition because of the unique imputed disqualification issues raised therein.

IV. ARGUMENT

A. The Law of Imputed Disqualification and Screening has been Previously Set forth by the Nevada Supreme Court

Several prior cases from this Court have discussed the concept of imputed disqualification when a lawyer or nonlawyer from one law firm is hired by the opposing law firm. These cases often hinge on their particular facts, but a few universally applied principles exist. The District Courts have broad discretion in determining whether disqualification is required in a particular case. *See Robbins v. Gillock*, 109 Nev. 1015, 1018, 862 P.2d 1195, 1197 (1993); *Cronin v. District Court*, 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989). However, doubts or close cases in

this field "should generally be resolved in favor of disqualification." *Brown v. Eighth Judicial Dist. Court*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269-70 (2000). Because of concerns over preservation of confidential information of a client and public trust in the legal adversarial system, nonlawyer staff (legal assistants, paralegals, etc.) are held to the same confidentiality and loyalty standards as lawyers as well as the same imputed disqualification standards. *Ciaffone v. Eighth Judicial Dist. Court*, 113 Nev. 1165, 1169, 945 P.2d 950 (1997).

When a lawyer or nonlawyer is hired by the opposing law firm, is a there is a "presumption of shared confidence" among the legal professionals at the second law firm. *Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 295 n.2, 279 P.3d 166, 170 (2012). No showing of actual leaking or disclosure of confidential information is required. Instead, a two-step analysis is performed.

First, the District Court must determine the *level* of confidential information the nonlawyer staff has about the client's case. Mere access to the confidential information at the prior law firm alone is insufficient to warrant imputed disqualification, instead actual knowledge of the confidential information by the employee must be shown. *Leibowitz v. Eighth Judicial Dist. Court of Nev.*, 119 Nev. 523, 530 (2003). Where the nonlawyer has knowledge of highly confidential information, there is a presumption that the hiring law firm is disqualified. *Leibowitz*, 119 Nev. at 533-534 ("Once a district court determines that a nonlawyer employee

acquired confidential information about a former client, the district court should grant a motion for disqualification unless the district court determines that the screening is sufficient…"). In ruling on the motion to disqualify the District Court should carefully consider several factors as set forth in *Leibowitz*, 119 Nev. at 533-534

Second, although there is a presumption of imputed disqualification upon a showing that the nonlawyer employee possesses confidential information regarding the client's case, the presumption is rebuttable. In some (but not all) circumstances, the presumptively disqualified law firm can overcome the presumption by establishing screening. *Leibowitz*, 119 Nev. at 533. However, if the presumptively disqualified law firm chooses to try to cure the imputed disqualification by screening, the District Court must hold an evidentiary hearing on the screening methods and make specific findings of fact and conclusions of law. *Ryan's Express*, 128 Nev. at 298-299 ("the district court must justify its determination as to the adequacy of the screening in a written order with specific findings of fact and conclusions of law"). At this hearing, the law firm seeking to use screening bears the burden of proof, not the party seeking disqualification, because the party seeking disqualification has already established that imputed disqualification is presumed given the nonlawyer employee's knowledge of confidential client information. *Ryan's Express*, 128 Nev. at 298-299 ("The burden of proof is upon the party seeking

to cure an imputed disqualification with screening to demonstrate that the use of screening is appropriate for the situation"). *Ryan's Express* sets forth certain factors for the District Court to consider as to screening measures, but acknowledges that in some cases screening will never be allowed. *Leibowitz*, 119 Nev. at 533 (explaining that in some cases "even if the new employer uses a screening process, disqualification will always be required…"). This is because imputed disqualification exists not only because of a fear of actual leaks or sharing of confidential information but also because of the "uncertainty regarding the effectiveness of the screen, the monetary incentive involved in breaching the screen, the fear of disclosing privileged information in the course of proving an effective screen, and the possibility of accidental disclosures" combined with the need to maintain public trust in a fair adversarial system where clients can be assured that their confidences and their attorney's strategy and advice remains confidential. *Leibowitz*, 119 Nev. at 536 (Leavitt, dissenting). Thus, the Nevada Supreme Court has *never* wholly adopted screening as a cure-all and found it to be effective to avoid imputed disqualification in 100% of cases.

While the aforementioned is a summary of the law, if the Court requires a deeper history of the rules of imputed disqualification and screening in this case Nelson will more fully explain now. The Nevada Supreme Court first addressed imputed disqualification of a law firm due to hiring nonlawyer legal staff from

opposing counsel in the case of *Ciaffone v. Eighth Judicial Dist. Court*, 113 Nev. 1165, 945 P.2d 950 (1997). That case concerned a nonlawyer, temporary typist for one firm who was later hired by opposing counsel. Under that case, the Court found that nonlawyers must be held to the same standards as lawyers. Imputed disqualification of the second law firm was found because "[a]ttorney disqualification of counsel is part of a court's duty to safeguard the sacrosanct privacy of the attorney-client relationship which is necessary to maintain public confidences in the legal profession and to protect the integrity of the judicial process" *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1576 (D.C. Cir. 1984), and that "a client must be secure in the knowledge that any information he reveals to counsel will remain confidential." *United States v. Schell*, 775 F.2d 559, 565 (4th Cir. 1985). The Court rejected the argument that screening to cure the imputed disqualification could be used. *Ciaffone* set forth a bright-line rule of imputed disqualification without inquiry into the level of confidential information the nonlawyer staff had and rejected the legal concept of screening.

Six years later, the Nevada Supreme Court revisited *Ciaffone* and the issue of screening of nonlawyer legal staff in *Leibowitz v. Eighth Judicial Dist. Court of Nev.*, 119 Nev. 523 (2003). That case concerned a divorce case where two nonlawyer assistants were later hired and used by the other party's law firm. One of the assistants had no confidential information about the case and the other had some

disputed confidential information but not a great deal of confidential information. In *Leibowitz* the Court found that imputed disqualification will apply only if the nonlawyer staff actually had confidential information about the case, mere access to the information was insufficient for imputed disqualification. However, *Leibowitz* found that the affected law firm could try to cure imputed disqualification through a screening process. The Court then stated that in some (but not all) cases, the screening of nonlawyer employees at a new firm to cure imputed disqualification was acceptable, explaining as follows:

> When a law firm hires a nonlawyer employee, the firm has an affirmative duty to determine whether the employee previously had access to adversarial client files. If the hiring law firm determines that the employee had such access, the hiring law firm has an absolute duty to screen the nonlawyer employee from the adversarial cases irrespective of the nonlawyer employee's actual knowledge of privileged or confidential information.
>
> Although we decline to mandate an exhaustive list of screening requirements, the following provides an instructive minimum:
>
> 1. "The newly hired nonlawyer [employee] must be cautioned not to disclose any information relating to the representation of a client of the former employer."
>
> 2. "The nonlawyer [employee] must be instructed not to work on any matter on which [he or] she worked during the prior employment, or regarding which [he or] she has information relating to the former employer's representation."
>
> 3. "The new firm should take…reasonable steps to ensure that the nonlawyer [employee] does not work in connection with matters on which [he or] she worked during the prior employment, absent client consent [i.e., unconditional waiver] after consultation."
>
> In addition, the hiring law firm must inform the adversarial party, or their counsel, regarding the hiring of the nonlawyer employee and the

> screening mechanisms utilized. The adversarial party may then: (1) make a conditional waiver (i.e., agree to the screening mechanisms); (2) make an unconditional waiver (eliminate the screening mechanisms); or (3) file a motion to disqualify counsel.
>
> However, even if the new employer uses a screening process, disqualification will always be required-absent unconditional waiver by the affected client-under the following circumstances:
>
> 1. "When information relating to the representation of an adverse client has in fact been disclosed [to the new employer]"; or, in the absence of disclosure to the new employer,
>
> 2. "When screening would be ineffective or the nonlawyer [employee] necessarily would be required to work on the other side of a matter that is the same as or substantially related to a matter on which the nonlawyer [employee] has previously worked."

Id. at 533. The Supreme Court continued to explain how the district court should weigh all factors, stating the following:

> Once a district court determines that a nonlawyer employee acquired confidential information about a former client, the district court should grant a motion for disqualification unless the district court determines that the screening is sufficient to safeguard the former client from disclosure of the confidential information. The district court is faced with the delicate task of balancing competing interests, including: (1) "the individual right to be represented by counsel of one's choice," (2) "each party's right to be free from the risk of even inadvertent disclosure of confidential information," (3) "the public's interest in the scrupulous administration of justice," and (4) "the prejudices that will inure to the parties as a result of the [district court's] decision."
>
> To determine whether screening has been or may be effective, the district court should consider: (1) "the substantiality of the relationship between the former and current matters," (2) "the time elapsed between the matters," (3) "the size of the firm," (4) "the number of individuals presumed to have confidential information," (5) "the nature of their involvement in the former matter," (6) "the timing and features of any measures taken to reduce the danger of disclosure," and (7) whether the "old firm and the new firm represent adverse

> parties in the same proceeding, rather than in different proceedings" because inadvertent disclosure by the nonlawyer employee is more likely in the former situation.

Subsequent case law regarding the application of *Leibowitz* has been sparse. However, in *Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 298-99, 279 P.3d 166, 172 (2012) the Supreme Court further explained that when faced with a screening and disqualification issue for a lawyer[1] changing employment, the District Court **must** set an evidentiary hearing and consider the following:

> When presented with a dispute over whether a lawyer has been properly screened, Nevada courts should conduct an evidentiary hearing to determine the adequacy and timeliness of the screening measures on a case-by-case basis. The burden of proof is upon the party seeking to cure an imputed disqualification with screening to demonstrate that the use of screening is appropriate for the situation and that the disqualified attorney is timely and properly screened.
>
> When considering whether the screening measures implemented are adequate, courts are to be guided by the following nonexhaustive list of factors:
>
> (1) instructions given to ban the exchange of information between the disqualified attorney and other members of the firm;
>
> (2) restricted access to files and other information about the case;
>
> (3) the size of the law firm and its structural divisions;
>
> (4) the likelihood of contact between the quarantined lawyer and other members of the firm; and
>
> (5) the timing of the screening.
>
> As with motions to disqualify, the consideration of the adequacy of

[1] Presumably, since this is the rule required for screening lawyers, it would also apply to the screening of non-lawyers who possess confidential client information.

> screening is within the sound discretion of the district court, *LaSalle*, 703 F.2d at 256; however, the district court must justify its determination as to the adequacy of the screening in a written order with specific findings of fact and conclusions of law.

B. The District Court Substantively Erred by Holding that Nelson must Establish Actual Prejudice in Order to Bring a Successful Motion for Imputed Disqualification

In general, the McBride Hall law firm's response to the motion to disqualify was always that Nelson had not established that any confidential information had actually been leaked or exchanged from Ms. Johnson to their firm. (Appx. at 50-51) The District Court agreed that this was the deciding factor and stated that because Nelson had established "no prejudice" to her through the actual sharing of confidential information, imputed disqualification of the McBride Hall law firm could not be found. (Appx. at 90, ln. 3-7) However, this is the exact *opposite* of the law the Nevada Supreme Court has previously declared.

The principle of imputed disqualification is that one bad apple spoils the bunch and that if one agent of an organization has confidential information about the opposing party's case (in this case the agent is a paralegal, Ms. Johnson), *the entire organization* is held to have that knowledge. The rule of imputed disqualification relies not only on an actual exchange of confidential information but, more importantly, (a) a desire to avoid accidental or inadvertent disclosure, (b) a desire to eliminate the risk of bad actors who might secretly share or access the information and not advise the opposing party, and (c) the belief that trust in the integrity of the

legal system suffers where one law firm has an employee that has all the confidential information regarding the other law firm's case. The legal system is honorable, but must concern itself with realities that even the appearance of impropriety must be avoided to maintain the public's confidence. *Dewey v. R. J. Reynolds Tobacco Co.*, 109 N.J. 201, 210, 536 A.2d 243, 247 (1988) (explaining the "appearance of impropriety" doctrine of disqualification that "an actual conflict of interest or ethical violation is not always necessary to disqualify.") The legal system must also concern itself with both intentional and inadvertent disclosures. Lastly, the legal system must recognize that there are bad actors in the industry and when the nonlawyer employee has the most sensitive of confidential information one cannot merely trust one's adversary and hope no "shenanigans" are going on. Incredibly [sarcastic], not all attorneys are ethical and would not seek to use the information of its new employee to their client's advantage. The Nevada Supreme Court has plainly recognized that there is a "*presumption* of shared confidence" among the legal professionals. *Ryan's Express*, 128 Nev. at 295 n.2. Thus, once Nelson established the paralegal has confidential information that would compromise her case (which was not even disputed by McBride Hall), there is a rebuttable presumption that imputed disqualification of the entire law firm applies. *Leibowitz*, 119 Nev. at 533-534 ("Once a district court determines that a nonlawyer employee acquired confidential information about a former client, the district court should grant a motion for

disqualification unless the district court determines that the screening is sufficient…").

In this matter, the District Court got it backwards. The District Court presumed no confidential information was shared and that it was Nelson's burden of proof to show that information had been improperly shared. This is plainly incorrect and is the *opposite* of the Nevada Supreme Court's prior jurisprudence. The frustration of Nelson's counsel with the District Court's ruling on this issue is best shown in the closing remarks of the District Court advising Mr. Breeden that if he learned confidential information had been shared he should notify the Court with Mr. Breeden lamenting that it would be impossible for him to know if such a leak occurs, thus the reason for the presumption in favor of disqualification. (Appx. at 84). It is doubtful that one's adversary would ever contact the opposing side to alert them their own misuse of the confidential information, thus the reason for the presumption and imputed disqualification in the first instance.

Respectfully, the District Court erred and should have—consistent with existing law—presumed that imputed disqualification applied given Ms. Johnson's undisputed, severe level of confidential information regarding Nelson's file as well as the strategy and mental impressions of her counsel. This would then place the burden on McBride Hall to establish that screening was possible and/or allowed under the circumstances.

C. The District Court Procedurally Erred by not Holding the Required Evidentiary Hearing and Making Detailed Findings of Fact and Conclusions of Law as to Screening

After incorrectly presuming that imputed disqualification does not apply when the presumption is actually that it does apply, the District Court then erred by denying an evidentiary hearing as to screening. McBride Hall did not even contest that Ms. Johnson had vast, highly sensitive and confidential information from Nelson's attorney about her case. McBride Hall's sole defense to imputed disqualification was that they had implemented a screening process. However, the Nevada Supreme Court made clear in *Ryan's Express* that (1) screening is not proper in all cases and (2) in cases where screening is asserted to cure imputed that disqualification "Nevada courts should conduct an evidentiary hearing to determine the adequacy and timeliness of the screening measures on a case-by-case basis." At that evidentiary hearing, "[t]he burden of proof is upon the party seeking to cure an imputed disqualification with screening to demonstrate that the use of screening is appropriate for the situation and that the disqualified attorney is timely and properly screened." Moreover, the District Court "must justify its determination as to the adequacy of the screening in a written order with specific findings of fact and conclusions of law." *Ryan's Express*, 128 Nev. at 298-299.

None of this clear law from the Nevada Supreme Court was followed by the District Court. No evidentiary hearing was held. The burden of proof was not placed

on McBride Hall, it was placed on Nelson. No specific findings of fact and conclusions of law were made based on the *Leibowitz* and *Ryan's Express* factors. Nothing.

This is plain error by the District Court. Respectfully, at a bare minimum writ relief should be granted directing the District Court to hold the required evidentiary hearing and issue the required findings of fact and conclusions of law.

D. The Supreme Court should use this Writ Petition to Clarify its Jurisprudence on Imputed Disqualification

Thus far, this Court's prior decisions on imputed disqualification of a law firm due to the hiring of nonlawyer staff have factually been sympathetic *against* disqualification. The employee in *Ciaffone* was a temporary employee typist with no established confidential information (only mere hypothetical access to the confidential information). In the next case chronologically, of the two legal assistants in *Leibowitz*, one had no actual confidential information and the other had only minimal confidential information but apparently nothing of a highly sensitive nature. *Ciaffone* and *Leibowitz* thus did not present facts that seemingly had great public policy reasons to disqualify the opposing law firm. The facts of these cases seem to have left the District Court with the belief that acceptance of screening is automatic in all cases and must be accepted. Respectfully, this swings the pendulum too far to the other side on the screening issue.

The facts of Nelson's case, unlike the facts of *Ciaffone* and *Leibowitz*, present

the most severe case possible *in favor of* imputed disqualification. The Supreme Court must now decide whether screening really is a cure-all where the affected client has to blindly trust that her adversary will not access or use confidential information or whether this case falls into the already-recognized category where screening cannot be utilized. The facts of this case require the Supreme Court to indicate whether, even absent a showing of actual shared confidences, that the risk of bad actors, risk of inadvertent disclosure and the need for public trust of the adversarial system outweigh the ability to screen in at least some cases such as this one.

This case presents the most severe facts possible toward imputed disqualification, i.e. a paralegal actually working on the file at plaintiff's law firm with the absolute highest level of confidential, sensitive information being hired away mid-litigation to work for defense counsel. When former Justices Leavitt and Agosti dissented from the *Leibowitz* opinion and argued that screening should not be adopted at all, surely they had nightmare cases such as Nelson's case in mind. Respectfully, the "uncertainty regarding the effectiveness of the screen, the monetary incentive involved in breaching the screen, the fear of disclosing privileged information in the course of proving an effective screen, and the possibility of accidental disclosures" combined with the need to maintain public trust in a fair adversarial system where clients can be assured that their confidences and

their attorney's strategy and advice remains confidential are too strong to allow screening under the facts of Nelson's case.

Indeed, the concept that some cases present facts so severe that screening is never acceptable to avoid imputed disqualification is well-supported. The *Restatement 3d of the Law Governing Lawyers*, § 124 cmt. d1 refers to several degrees of confidential information the legal professional can have, including the degree to which "involvement and the nature and relevance of confidential information in the lawyer's possession might be such that screening ***will not remove imputation***" and suggests at cmt. d that screening is best used in situations where "confidential client information was not seriously at risk." The practice of screening itself was meant to address situations where the confidential information held by the legal professional was minimal or the conflict concerned a former client or an inactive case, and strict adherence to the ruled of imputed disqualification would work unfairly or appear silly. However, on the opposite end of the spectrum, screening was never intended as a remedy where the legal professional had vast confidential, sensitive strategy information about the client's ongoing case and jumped ship to the opposing law firm in mid-litigation. This case involves the *same client* in the *same matter*. Screening should rarely if ever apply to such a case. *Klein v. Superior Court*, 198 Cal. App. 3d 894, 912, 244 Cal. Rptr. 226, 237 (1988) (rejecting screening where the legal professional "performed work for the opposing

party in the same lawsuit" because "[t]hose facts mandate vicarious disqualification.")

In fact, the general rule is that "the smaller the firm, the less likely such screening measures will be effective." *Steel v. GMC*, 912 F. Supp. 724, 744 n.16 (D.N.J. 1995); *Yaretsky v. Blum*, 525 F. Supp. 24 (S.D.N.Y. 1981) (less than thirty lawyers in the firm); *Re Asbestos Cases*, 514 F. Supp. 914 (E.D. Va. 1981) (five lawyers in the firm). McBride Hall has only one known office location and six known attorneys. By necessity the attorney at McBride Hall assigned to defend Nelson's matter will see Ms. Johnson likely every day and may directly work with her on other assigned matters. ***Screening should not be allowed at all on those facts***.

Numerous courts have found that when a legal professional's confidential knowledge of the case is as vast as Ms. Johnson's knowledge, ***screening is properly rejected entirely***. *Lennartson v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 662 N.W.2d 125, 131 (Minn. 2003) (acknowledging that there are some cases where "no screening can cure the conflict and disqualification is imputed to the new firm" and screening measures are "irrelevant" where the confidential information is likely to be significant); *Henriksen v. Great American Savings & Loan*, 14 Cal.Rptr.2d 184 (Cal.Ct. App. 1992) (despite measures to screen, new firm disqualified where newly arriving associate had worked extensively on objecting client's matter at former firm,

imputed disqualification is "especially true where the attorney's disqualification is due to his prior representation of the opposing side during the same lawsuit."); *Klein v. Superior Court*, 198 Cal. App. 3d 894, 912, 244 Cal. Rptr. 226, 237 (1988) (rejecting screening where the legal professional "performed work for the opposing party in the same lawsuit" because "[t]hose facts mandate vicarious disqualification."); *Lansing-Delaware Water Distr. v. Oak Lane Park, Inc.*, 808 P.2d 1369 (Kan. 1991) (reaffirming *Parker v. Volkswagenwerk A.S.*, 781 P.2d 1099 (Kan.1989), new firm's lawyers disqualified where newly arriving lawyer had actually acquired confidential knowledge of objecting client at old firm); *State ex rel. Freezer Services, Inc. v. Mullen*, 458 N.W.2d 245 (Neb. 1990) (disqualification required where lawyer intimately involved in representation left old firm and joined new firm representing adversary in same litigation); *Dewey v. R. J. Reynolds Tobacco Co.,* 109 N.J. 201, 220, 536 A.2d 243, 253 (1988) ("We cannot conceive of any situation in which the side-switching attorney or his new firm would be permitted to continue representation if, unlike the situation before us, the attorney had in fact actually represented the former client or had acquired confidential information concerning that client's affairs."); *Cardona v. GMC*, 942 F. Supp. 968 (D. N.J. 1996) (lawyer extensively involved in representing opposing party); *Jack Eckerd Corp. v. Dart Group Corp.*, 621 F.Supp. 725 (D. Del. 1985) (screening not permitted where lawyers had substantial confidential information from defendant).

The paralegal in this case has the highest, most concerning level of confidential information and knowledge of the mental impressions and case strategy of Nelson's attorney. Screening must be rejected altogether in this case so as to preserve the integrity of the legal profession and preserve trust in the adversarial system.

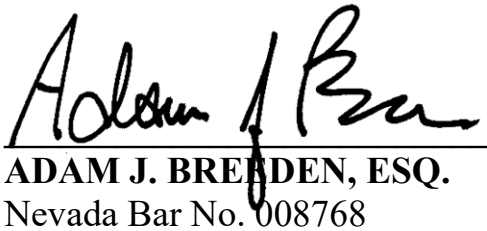
Incredibly, only 20 years ago the law clearly required imputed disqualification of the McBride Hall law firm on these facts without any further inquiry. In a mere generation, has a complete 180° reversal been made such that imputed disqualification now *never* exists if screening is claimed? Nelson asks the Supreme Court to recognize that on the unique facts of this case screening cannot be permitted and to direct the District Court to grant the Motion for Disqualification.

V. CONCLUSION

In closing, Petitioner Nelson requests that a writ of mandamus be issued directing the District Court to grant her motion for disqualification. Screening is simply not an effective method to avoid imputed disqualification on the facts of this case. However, at the very least the Supreme Court should instruct the District Court to vacate its Order and hold the required evidentiary hearing, if the Supreme Court finds that screening might cure the imputed disqualification.

Respectfully submitted this 3rd day of January, 2022.

BREEDEN & ASSOCIATES, PLLC



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CERTIFICATION PURSUANT TO NRAP 28.2 and NRAP 32(a)(9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word, 2020 edition in 14-point Times New Roman font; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains approximately 6,288 words; or

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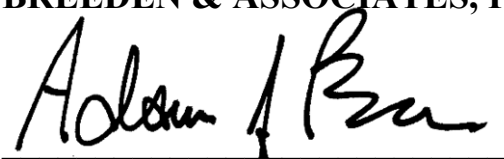
[ ] Does not exceed 15 pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules

of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 3rd day of January, 2022.

BREEDEN & ASSOCIATES, PLLC



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VERIFICATION OF PETITIONERS' COUNSEL UNDER NRAP 21(a)(5)

1. I am Adam J. Breeden, Esq., counsel for the Petitioner Jane Nelson in this Writ Petition and in the underlying District Court case.

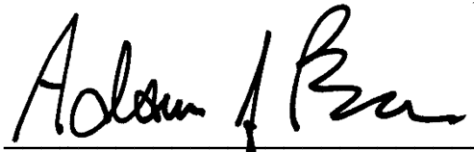
2. I hereby verify under oath that the facts set forth herein are true to my knowledge and supported with citations to the Appendix of this Petition.

3. I make this verification for my client pursuant to NRAP 21(a)(5).

I declare under penalty of perjury that the foregoing is true under the laws of the State of Nevada.

Dated this 3rd day of January, 2022.

BREEDEN & ASSOCIATES, PLLC



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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. 25, I hereby certify that on the 3rd day of January, 2022, a copy of the foregoing **ORIGINAL PETITION FOR WRIT OF MANDAMUS** was served via U.S. First Class Mail on all registered users as follows, with a copy of the Appendix:

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