IN THE SUPREME COURT OF THE STATE OF NEVADA

JANE NELSON,
Petitioner
vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SUSAN JOHNSON, DISTRICT JUDGE,

Respondents

and
MUHAMMAD SAEED SABIR, M.D.; AND PIONEER HEALTH CARE LLC,
Real Parties in Interest

SUPREME COURT CASE NO. 84006

REAL PARTY IN INTEREST, MUHAMMAD SAEED SABIR, M.D.'S ANSWER TO WRIT OF MANDAMUS

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JANE NELSON, Petitioner vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SUSAN JOHNSON, DISTRICT JUDGE, Respondents and MUHAMMAD SAEED SABIR, M.D.; AND PIONEER HEALTH CARE LLC, Real Parties in Interest	SUPREME COURT CASE NO. 84006

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.l(a) and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly held companies owning 10 percent or more of the party's stock:

None; real party in interest is an individual.

Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

MCBRIDE HALL

2. If litigant is using a pseudonym, the litigant's true name: N/A

DATED this 3rd day of March, 2022.

McBRIDE HALL

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I. ISSUE PRESENTED

Succinctly stated, whether imputed disqualification is required when a firm hires a paralegal from an adverse firm, in mid-litigation, with personal knowledge of confidential information and litigation strategy of the prior firm. Petitioner also asks the Court to apply the holding of *Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc.,* 128 Nev. 289 (2012), requiring a District Court to hold an evidentiary hearing and make specific findings of facts and conclusions of law as to screening efforts of attorneys to avoid imputed disqualification to nonlawyer staff as well.

II. STATEMENT OF FACTS

This is a professional negligence action concerning Petitioner's allegation that the Defendant providers of healthcare failed to diagnose and treat Petitioner's heparin-induced Thrombocytopenia. Petitioner filed her Complaint for medical malpractice on October 19, 2020 against Real Parties in Interest Muhammad Saeed Sabir, M.D., and Pioneer Healthcare. (Petitioner's Appendix ("App."), 1-15). Real Parties In Interest, Dr. Sabir and Pioneer Healthcare, have been represented since the inception of this case by the law firm of McBride Hall.

Shortly following the trial of another matter, *Kimberly Taylor v. Keith Brill, M.D., et al*. (Case No. A-18-773472-C), McBride Hall made an offer of employment

to Kristy Johnson, who was the paralegal for Petitioner's counsel at the time. Specifically, Ms. Johnson worked as a paralegal at the law firm of Breeden & Associates, PLLC from October 2017 until November 5, 2021. Ms. Johnson did not arrange for an interview with the law firm McBride Hall until 8:48 p.m. the evening of October 19, 2021, after the conclusion of trial in the *Kimberly Taylor v. Brill, M.D.*, matter. Prior to that time, counsel from the law firm of McBride Hall did not have any conversations with Ms. Johnson regarding an employment opportunity. *See* Affidavit of Kristy Johnson (Real Parties In Interest's Appendix, 1-2).

Ms. Johnson interviewed for a paralegal position with the McBride Hall law firm on October 21, 2021. During her interview, it was discussed that she would need to be screened off of any active files between the law firms of Breeden & Associates, PLLC and McBride Hall and could not discuss the litigation between the two law firms, including the cases *Jane Nelson v. Muhammad Saeed Sabir, M.D., et al.* (Case No. A-20-823285-C) and *Kimberly Taylor v. Keith Brill, M.D, et al.* (Case No. A-18-773472-C). Thereafter, Ms. Johnson accepted employment with the law firm of McBride Hall as a paralegal with the express condition that a conflict check would be conducted, she would be screened off of any mutual matters between the McBride Hall and Breeden & Associates, PLLC law firms, and she would be prohibited from disclosing any confidential and/or privileged information she may

possess about any potentially conflicting, mutual litigation between the two law firms. *Id.*

When Ms. Johnson left the Breeden & Associates law firm to accept employment with the McBride Hall law firm, a conflict check was conducted to determine whether any potential conflicts were presented by Ms. Johnson accepting employment with the McBride Hall law firm. *Id.* The two firms had some mutual litigation. One of the cases was this case. *Nelson v. Dr. Sabir, et al.*, (Case No. A-20-823285-C). The Breeden & Associates law firm was representing Plaintiff. As previously stated, the McBride Hall law firm was representing and defending Dr. Sabir and Pioneer Health Care, LLC. *Id.*

Prior to beginning her employment with the McBride Hall law firm, Ms. Johnson was informed by Ms. Heather Hall that she could not discuss either matter with anyone who is employed with McBride Hall. *Id.* Ms. Johnson agreed that she would not discuss either the Jane Nelson or Kimberly Taylor matters with anyone employed with the McBride Hall law firm. To date (and into the future), at no time has Ms. Johnson communicated, stated, disclosed or divulged any confidential and/or privileged information she may possess regarding the Jane Nelson or Kimberly Taylor matters to anyone at the McBride Hall law firm. *Id.* Since beginning her employment at the McBride Hall law firm, two Memoranda have been circulated to all members of the McBride Hall law firm advising all of Ms. Johnson's

screening off the Kimberly Taylor and Jane Nelson matters and all firm members have been instructed not to discuss the Kimberly Taylor or Jane Nelson matter with Ms. Johnson. Additionally, Ms. Johnson's computer access to these files has been blocked. The hard files for these cases have been locked in a filing cabinet, which only Mr. Sean Kelly has a key to open. *Id.*

Ms. Johnson is not the paralegal assigned to work on either the Jane Nelson or Kimberly Taylor matters, as the McBride Hall law firm employs two other paralegals, one of whom is assigned to this case. As Ms. Johnson has not discussed either the Kimberly Taylor or Jane Nelson case with any member of the McBride Hall law firm, no member of the McBride Hall law firm knows what confidential and/or privileged information Ms. Johnson may possess about either case. Furthermore, all of these measures were taken prior to Ms. Johnson's start date with her employment at McBride Hall.

Based upon these undisputed facts, Petitioner filed a Motion to Disqualify McBride Hall from representing Dr. Sabir and Pioneer Health Care, LLC. (App., 30-47). Real Parties In Interest opposed the motion on the grounds that McBride Hall has adequately and sufficiently screened Ms. Johnson from both conflicted files. (App., 48-73). The Honorable Susan Johnson heard argument on this matter on November 23, 2021 and correctly ruled that McBride Hall has screened off Ms. Johnson from this matter and that she did not find any prejudice on the part of

Petitioner. (App., 74-85). The Order Denying Petitioner's Motion to Disqualify McBride Hall was clear in stating that the Court found no prejudice in permitting McBride Hall to continue to represent Dr. Sabir and Pioneer Health Care, LLC, and reiterated the screening measures that have been taken the entire time Ms. Johnson has been an employee with said firm, and will continue throughout the course of this litigation. (App., 86-97).

III. ARGUMENT

A. Writ Relief is Not Appropriate Here; The District Court Did Not Manifestly Abuse Its Discretion And The Decision Was Not Clearly Erroneous.

"Mandamus is an extraordinary remedy, and the decision as to whether a petition will be entertained lies with the sound discretion of this court." *Borger v. Dist. Ct.,* 102 Nev. 1021, 1025, 102 P.3d 600 (2004). While Petitioner claims that the District Court must hold an evidentiary hearing on the screening methods and make specific findings of fact and conclusions of law, such is incorrect as applied to this matter. Here, the District Court made a factual determination applying the correct law, based upon the facts presented and the affidavit of Kristy Johnson.

B. An Evidentiary Hearing Is Only Required For Attorneys, Not Nonlawyer Employees.

First, Petitioner cites to *Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc.*, 128 Nev. 289, to support her contention that the District Court must hold an

evidentiary hearing on the screening methods and make specific findings of fact and conclusions of law. (Page 8). However, *Ryan's* is distinguishable from this case because the facts involved disqualifying a firm because one of their attorneys served as a settlement judge in the case. *Id.* at 292. So, not only did the *Ryan's* case involve an actual attorney, but it was an attorney who was the settlement judge on the case. This case is wholly different in that the facts are about a nonlawyer attorney who has been screened off prior to joining McBride Hall's firm.

Moreover, this Court held in *Ryan's* the following:

> "Under RPC 1.12(c), the law firm the disqualified lawyer is associated with will not be disqualified if (1) The disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) Written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule." *Id.* at 296.

Again, in this case, Ms. Johnson is a paralegal, not an attorney. Even so, she was timely screened as the screening measures were in place prior to joining the McBride Hall law firm. Additionally, Petitioner and her counsel were well aware that Ms. Johnson was joining the McBride Hall law firm as Ms. Johnson continued to work for Petitioner's counsel for two weeks after notifying counsel of her new employment.

[Real Parties In Interest offer for the Court's information that the *Kimberly Taylor v. Keith Brill, M.D., et al.* (Case No. A-18-773472-C) actually did proceed with an evidentiary hearing on January 7, 2022 at the District Court level in Department III (The Honorable Judge Monica Trujillo presiding). It should be noted that Petitioner's Motion to Disqualify McBride Hall is the *Taylor* case was denied following the evidentiary hearing. A copy of the Order is attached for this Court's review.] (Real Parties In Interests Appendix, 3-12).

C. Screening of Nonlawyer Employees is Permitted.

Petitioner also cites to *Brown v. Eighth Judicial Dist. Court*, 116 Nev. 1200, 14 P.3d 1266 (2000). However, in conjunction with the facts of this case, *Brown* is actually supportive of Real Parties in Interests' position. Specifically, the *Brown* Court stated:

> "When considering whether to disqualify counsel, the district court must balance the prejudices that will inure to the parties as a result of its decision. To prevail on a motion to disqualify opposing counsel, the moving party must first establish "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur," and then must also establish that "the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." *Id.* at 1205. Citing to Cronin v. District Court, 105 Nev. 635 at 641 P.2d at 1153 (1989) (quoting Shelton v. Hess, 599 F. Supp. 905, 909 (S.D. Tex. 1984).

Moreover, the Court concluded that "requiring proof of a reasonable probability that counsel actually acquired privileged, confidential information

strikes the appropriate balance in disqualification cases such as this." *Id.* at 1206. Here, the District Court correctly concluded that Ms. Johnson was properly screened off and McBride Hall had not acquired privileged and confidential information.

Petitioner also cites to *Ciaffone v. Eighth Judicial Dist. Court*, 113 Nev. 1165, 945 P.2d 950 (1997) to support her contention that nonlawyer staff should be held to the same confidentiality and loyalty standards as lawyers as well as the same imputed disqualification standards. (Page 7). However, the Nevada Supreme Court in *Leibowitz v. Eighth Jud. Dist. Court*, 119 Nev. 523, 530, 78 P.3d 515, 519-520 (Nev. 2003) clarified in part and overruled in part the *Ciaffone* decision. In fact, in *Leibowitz*, this Court determined that screening is permissible for nonlawyer employees. *Id.* at 526 .

Specifically, the *Leibowitz* Court clarified the *Ciaffone* decision by agreeing that "mere access to the adverse party's file during the former employment is insufficient to warrant disqualification." *Id* at 530. The Court went on to say that the imputed disqualification rule only applies when the nonlawyer employee acquires privileged, confidential information. *Id.*

However, the *Liebowitz* Court, in continuing with its decision, overruled the portion of *Ciaffone* to permit nonlawyer screening. *Id.* at 531. As part of its reasoning, the Court stated the following:

> "Imputed disqualification is considered a harsh remedy that 'should be invoked if, and only if, the court is satisfied that real harm is likely to result from failing to invoke it.' This stringent standard is based on a client's right to counsel of the client's choosing and the likelihood of prejudice and economic harm to the client when severance of the attorney-client relationship is ordered. It is for this reason that the ABA opined in 1988 that screening is permitted for nonlawyer employees, while conversely concluding, through the Model Rules of Professional Conduct, that screening is not permitted for lawyers. The ABA explained that 'additional considerations' exist justifying application of screening to nonlawyer employees (i.e., mobility in employment opportunities which function to serve both legal clients and the legal profession) versus the Model Rule's proscription against screening where lawyers move from private firm to private firm. In essence, a lawyer may always practice his or her profession regardless of an affiliation to a law firm. Paralegals, legal secretaries, and other employees of attorneys do not have that option. We are persuaded that *Ciaffone* misapprehended the state of the law regarding nonlawyer imputed disqualification. We therefore overrule *Ciaffone* to the extend that it prohibits screening of nonlawyer employees." *Id.* at 532 .

Therefore, pursuant to *Liebowitz*, McBride Hall had a duty to screen Ms. Johnson (a paralegal/nonlawyer employee) from this case (as well as the *Taylor* case). To determine if such screening mechanisms are appropriate, the Nevada Supreme Court evaluates several factors including: (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 measure taken to reduce the danger of disclosure; and (7) whether the old firm and new firm represent adverse parties in the same proceeding rather than in different proceedings. *Id.* at 534.

Moreover, the Nevada Supreme Court has set forth a non-exhaustive list of screening requirements, which are as follows:

> (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." See *Leibowitz v. Eighth Jud. Dist. Court*, 119 Nev. 523, 532 - 533 (Nev. 2003).

As demonstrated above, McBride Hall has properly screened Ms. Johnson from this case (as well as the *Taylor* case). Attached as Exhibit "A" to Real Parties in Interest's Opposition to Petitioner's Motion to Disqualify McBride Hall was the affidavit of Ms. Johnson supporting these screening measures. (App., 59-60). Additionally, also attached to the Opposition as "Exhibit B" were copies of the two memoranda, which were circulated to all members of the McBride Hall law firm regarding the screening of Ms. Johnson from the Kimberly Taylor and Jane Nelson matters. (App., 62-65). Moreover, attached as "Exhibit C" was an email confirming that Ms. Johnson was electronically blocked from the Jane Nelson and Kimberly Taylor files. (App., 67). Furthermore, "Exhibit D" was the Declaration of Sean M. Kelly, Esq. confirming that appropriate screening measures were immediately put

into place before Ms. Johnson was hired and that they have not been disclosed confidential information from Ms. Johnson. (App., 69-70).

Again, as noted above, there is no case law in Nevada stating that an evidentiary hearing is required for a nonlawyer employee who is being screened under these circumstances. Petitioner cites to *Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc.*, 128 Nev. 289, which involved an attorney who was being screened as he was a settlement judge for the underlying case. Here, we have a nonlawyer paralegal, not an attorney, and McBride Hall timely taken the measures to screen Ms. Johnson from this case (as well as the aforementioned *Taylor* case).

Moreover, Real Parties In Interest will suffer undue prejudice if McBride Hall is disqualified. In determining "to disqualify" counsel, the district court must balance the prejudices that will ensue to the parties as a result of its decision. See *Brown v. Eighth Judicial Dist. Court*, 116 Nev. 1200, 14 P.3d 1266 (Nev. 2000). Real Parties In Interest have a right to choose the counsel they want to represent them, and imputed disqualification is a harsh remedy that has been properly rebutted due to the screening measures undertaken by McBride Hall. The District Court properly determined that Petitioner has not been prejudiced by McBride Hall's continued representation despite employing Ms. Johnson as a paralegal (given that the firm has two additional paralegals and she will not be involved in any matter with this case).

IV. CONCLUSION

Real Parties In Interest respectfully requests this Court decline to entertain the Petition as McBride Hall has properly screened Ms. Johnson from this case. Additionally, Real Parties In Interest requests the Court deny Petitioner's request for an evidentiary hearing as it is not required for a nonlawyer employee and enough evidence has been presented to satisfy same.

DATED this 3rd day of March, 2022.

McBRIDE HALL

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CERTIFICATE OF COMPLIANCE

I hereby certify that this answer complies with the formatting requirements of NRAP 32(a), including the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because this answer has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type style.

I hereby certify that this answer complies with NRAP 21(d), because it contains 3775 words.

I also 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 regarding matters in the record to be supported by appropriate references to 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 answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 3rd day of March, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of March 2022 a true and correct copy of the foregoing **REAL PARTY IN INTEREST, MUHAMMAD SAEED SABIR, M.D.'S ANSWER TO WRIT OF MANDAMUS** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service and/or U.S. First Class Mail was made in accordance with the master service list as follows:

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