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

Electronically Filed
Mar 16 2022 02:35 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT CASE NO. 84006

PETITIONER'S REPLY TO RESPONSE

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Petitioner JANE NELSON hereby submits her Reply to the Response of Real Party in Interest DR. MUHAMMAD SABIR:

REPLY POINTS AND AUTHORITIES

I. Issues not Contested by the Real Party in Interest

It is often helpful in a Reply Brief to summarize the factual and legal points that do not appear to be contested by the respondent, in this case the real party in interest, Dr. Sabir.

First, Dr. Sabir does not dispute that the paralegal his lawyers hired from the Nelson's lawyer: (1) worked directly on Nelson's case and (2) had actual knowledge of all privileged, confidential attorney-client communications and advice between Nelson and her counsel.

Second, Dr. Sabir does not appear to contest that there is a presumption of imputed disqualification based on these facts. *Leibowitz v. Eighth Judicial Dist. Court of Nev.*, 119 Nev. 523, 533-534 (2003).

Third, Dr. Sabir does not appear to contest that he (or his law firm) if they wish to use screening mechanisms to overcome that presumption of imputed disqualification, bears the burden of proof. *Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 298-299, 279 P.3d 166, 170 (2012) ("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"). Nelson

need establish nothing to prevail.

Fourth, there are certain cases where the legal professional changing sides has so much confidential information that screening is not even permitted to cure the disqualification. *Leibowitz*, 119 Nev. at 533 (explaining that in some cases "even if the new employer uses a screening process, disqualification will always be required…").

Fifth, Dr. Sabir does not appear to contest that 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).

Sixth, Dr. Sabir does not appear to contest that imputed disqualification arises not solely when confidences have actually been leaked or shared by the legal professional now working for the other side. Instead, imputed disqualification works to ensure that confidences will not be leaked or shared in the future, to maintain the public's trust in the legal system and, to preserve the freedom with which attorneys feel they can frankly discuss legal issues with clients in front of legal staff.

With this background, Petitioner Nelson will now turn to the points which do seem to be contested by the Real Party in Interest.

II. An Evidentiary Hearing should be Required

Dr. Sabir's first argument is that an evidentiary hearing should not be required for the District Court to resolve these issues. Dr. Sabir acknowledges, however, that

the Nevada Supreme Court plainly held in *Ryan's Express* that for attorneys in imputed disqualification/screening cases, an evidentiary hearing with specific findings of fact and conclusions of law must be held by the District Court. Dr. Sabir argues that *Ryan's Express* should *not* apply to non-lawyer professionals such as paralegals and other legal staff.

While Dr. Sabir is correct insofar as stating *Ryan's Express* concerned an actual attorney instead of an attorney's staff, this is a distinction without a difference. In *Ciaffone v. Eighth Judicial Dist. Court*, 113 Nev. 1165, 945 P.2d 950 (1997), the Nevada Supreme Court held that the same rules of confidentiality and imputed disqualification that apply to lawyers must also apply to non-lawyer staff, otherwise confidentiality cannot be maintained and could be easily circumvented. The Court's leading case on imputed disqualification of non-lawyer employees, *Leibowitz*, clearly appears to have been decided after an evidentiary hearing to flush out all facts, so that legal issue (the requirement of an evidentiary hearing) did not arise in that case. However, Nelson's case squarely presents that procedural question. While it appears to be well-decided that an evidentiary hearing is required on all issues of screening to avoid imputed disqualification, the Court should make clear in this Writ Petition that the rule announced in *Ryan's Express* applies to non-lawyer imputed disqualification cases as well.

III. Proper Screening has not Occurred

Dr. Sabir next argues his lawyer's screening methods (which were never subjected to cross-examination at an evidentiary hearing) are sufficient by themselves and support the District Court's ruling. Nelson disagrees.

Dr. Sabir's attorneys stress that they have made certain that their file on this matter is in a locked cabinet and that the paralegal, Ms. Johnson, has been locked out of the file on computer. But these measures are to protect *Dr. Sabir*, not Nelson. Thus, these assertions are meaningless to protect actual or inadvertent disclosure or the risk of the same, or the public's perception of a fair, adversarial process. These are not screening methods at all to protect Nelson's information. However, it is telling that when it came to protecting *Dr. Sabir's* confidential information, opposing counsel went the extra mile. However, arguing that Dr. Sabir's confidential information is safe incorrectly conflates that issue with actual issue in this case which is screening and protection of *Nelson's* confidential information. Locking up Dr. Sabir's file does nothing to protect Nelson's confidential information.

So what has actually been done to protect *Nelson's* confidential information? The only "screening" done to that end is to tell Ms. Johnson and other firm employees that they are not to discuss the Nelson case. That's the only screening of any kind performed. Even if we assume for a moment that all actors are honest and

would never intentionally or inadvertently not follow this instruction, that is insufficient screening. Ms. Johnson, on information and belief, continues to work in the same small office and daily encounters the attorney assigned to Dr. Sabir's case and works with that attorney on other matters. There is virtually no screening in place to preserve Nelson's confidential information other than a request that the paralegal not discuss the case with anyone at her new firm. If this is sufficient screening, the Nevada Supreme Court should just abandon all of its prior jurisprudence and say that screening is always accepted if you tell the employee not to speak about the case and his/her new firm. Every case that arises will involve at least a bare allegation that the affected attorney or legal staff was told not to speak about the case—so if this is sufficient the Nevada Supreme Court should say so and stop the lip service about the sanctity of privileged communications and just write an opinion that says "we trust people will always do as they are told and that there are no bad actors ever, so a mere statement that the affected employee was told not to share any confidential information is screening enough to stop imputed disqualification." Many found find such a rule problematic or placing form over substance, but this is the argument the District Court seems to have been convinced by.

Nelson finds the asserted screening insufficient to preserve her privileged confidential information now held by a paralegal whose employer is the opposing

attorney. This is a recipe for disaster and should not have been accepted by the District Court as sufficient screening.[1]

IV. No Screening should have been Allowed on these Facts

Section D of the Writ Petition beginning on page 18 cites dozens of legal authorities holding that certain cases (such as this one) are ineligible for screening due to the extreme nature of the privileged, confidential information now held by the opposing side's employee. Indeed, even *Leibowitz* discusses that there are certain classes of cases where even screening will not overcome imputed disqualification. Unfortunately, Dr. Sabir and his counsel do not appear to directly respond to this mountain of authority in Section D. However, Section D of the Writ Petition is likely the most important section and Nelson urges this Court to examine it carefully.

It is often said that bad facts create bad law. In *Ciaffone* and *Leibowitz* cases, there were facts very sympathetic against imputed disqualification since the affected legal staff had little to no privileged, confidential information. So now the District Court is citing *Leibowitz* as if screening is a cure all and imputed disqualification is

[1] Dr. Sabir notes that in the other matter where the parties disputed imputed disqualification, the Taylor matter, an evidentiary hearing *was* held and the District Court still did not apply imputed disqualification. This result is, of course, not binding on the Supreme Court. In any event, the Taylor hearing was specific to the facts of that case. Taylor had already gone to trial and the District Court stated because of that fact the Nelson case seemed the "stronger" of the two cases for imputed disqualification. Moreover, Taylor intends to appeal the decision in her case as well and raise the same issues as are in this Writ Petition.

now essentially abandoned. For 50+ years there was a per se disqualification rule as exemplified by *Ciaffone*. Now the pendulum has swung to the exact opposite and we seem to have a per se acceptance of even bare minimum "screening" efforts per *Leibowitz*. This is wrong approach and the correct approach lies in middle where employees with little to no privilege or confidential information are permitted for screening while employees with vast confidential information trigger imputed disqualification with little opportunity for screening if at all.

This case squarely falls into the latter of those two categories, but the District Courts have no example of such a case yet from the Supreme Court so they are blindly accepting any proffered screening based on *Leibowtiz*. Nelson urges this Court to use this writ petition to clarify the line between these two categories of cases.

V. CONCLUSION

In closing, Nelson seeks her evidentiary hearing on the issue of imputed disqualification and screening but also asks this Court to clarify its prior decisions and how they should be applied to the facts of this case, where the affected employee has the most extreme level of privileged, confidential communications.

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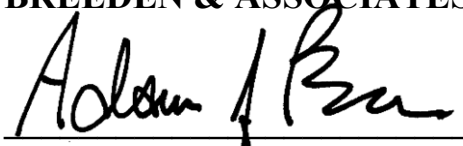
Respectfully submitted this 16th day of March, 2022.

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:

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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 16th day of March, 2022.

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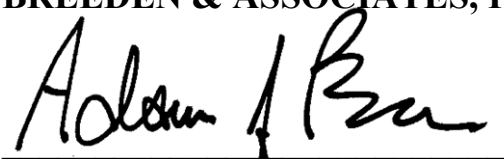

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. 25, I hereby certify that on the 16th day of March, 2022, a copy of the foregoing **PETITIONER'S REPLY TO RESPONSE** was served via U.S. First Class Mail on all registered users as follows:

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