IN THE SUPREME COURT
OF THE STATE OF NEVADA

ALI KIA, M.D.,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, THE HONORABLE CRYSTAL ELLER, PRESIDING,

Respondent,

and

CHOLOE GREEN, FRANK J. DELEE, M.D., FRANK J. DELEE, MD, PC, SUNRISE HOSPITAL AND MEDICAL CENTER, LLC, AND NEVADA HOSPITALIST GROUP, LLP,

The Real Parties in Interest.

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Clerk of Supreme Court

Supreme Court Case No.

Dist. Court Case No.: A-15-714654-B

PETITION FOR WRIT OF MANDAMUS

NAYLOR & BRASTER
John M. Naylor (NBN 5435)
Jennifer L. Braster (NBN 9982)
1050 Indigo Drive, Suite 200
Las Vegas, NV 89145
(702) 420-7000

COLLINSON, DAEHNKE, INLOW & GRECO
Patricia Egan Daehnke (NBN 4976)
Linda Rurangirwa (NBN 8843)
2110 E. Flamingo Road, Suite 212
Las Vegas, NV 89119
(702) 979-2132

ATTORNEYS FOR PETITIONER

NRCP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Petitioner is Ali Kia, M.D., an individual. There are no related corporate entities.

Date: September 19, 2023

NAYLOR & BRASTER

By: */s/ John M. Naylor*

John M. Naylor, NBN 5435
NAYLOR & BRASTER
1050 Indigo Drive, Suite 200
Las Vegas, NV 89145
Attorneys for Petitioner

DECLARATION OF JOHN M. NAYLOR, ESQ.

County of Clark)
) ss.
State of Nevada)

1. I am John M. Naylor, and I am an attorney for Ali Kia, M.D. in this matter. I am providing this declaration to satisfy the requirements of NRS 34.170; NRS 34.330; and NRAP 21.

2. I certify that I have read this writ petition and to the best of my knowledge and belief, this petition complies with the form requirements of NRAP 21(d), it is not frivolous, and it is not made for any improper purpose such as to delay these proceedings or a needless increase in the cost of litigation.

3. On information and belief, the facts stated in the foregoing petition for extraordinarily writ relief are true and correct of my own knowledge based on the papers and proceedings in the underlying case of *Green v. Frank J. DeLee, M.D., Frank J. DeLee, MD, PC, Sunrise Hospital and Medical Center, LLC, Ali Kia, M.D., and Nevada Hospitalist Group, LLC*, Case No. A-17-757722-C, Eighth Judicial District Court, Clark County, Nevada.

4. I certify that this petition complies with the Nevada Rules of Appellate procedure including the requirements of NRAP 28(e), requiring all statements of fact be supported by references to the record.

5. Contained in the appendix are true and correct copies of the papers filed in the underlying action that are relevant to the issues raised and relief and comply with the requirements of NRAP 21(a)(4).

6. I declare under penalty of perjury that the foregoing is true and correct.

Date: September 19, 2023

Las Vegas, Nevada

/s/ John M. Naylor

John M. Naylor, Esq.
NBN 5435

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ROUTING STATEMENT

This petition stems from the denial of Petitioner Ali Kia, M.D.'s ("Dr. Kia") motion for summary judgment and the District Court's sua sponte imposition of sanctions against Dr. Kia for bringing that motion. This matter is not presumptively one that is assigned to the Court of Appeals pursuant to NRAP 17(b).

This matter is virtually identical to *Black v. Eight Judicial District Court*, ___ Nev. ___, 531 P.3d 1267, 2023 WL 4539644 (Nev. S. Ct. Case No. 86787, July 13, 2023) (unpublished disposition), which the Supreme Court retained rather than assigned the matter to the Court of Appeals. *Black*, like this case, involved the review of sanctions imposed sua sponte against a party without briefing, a hearing, or other opportunity to be heard on the issue. In *Black*, the Supreme Court retained the case, and issued a writ of mandamus ordering the district court to vacate the sanctions order. *Id.* at *1.

This petition involves both the imposition of sanctions and denial of the motion for summary judgment as the District Court sanctioned Dr. Kia for filing the motion for summary judgment. This Court should retain jurisdiction over this case because the motion for summary judgment involves an important issue of public policy, i.e., the application of the statute of limitations under NRS 41A.097(2). The District Court erroneously interpreted NRCP 15 and the cases of *Servatius vs. United Resort Hotels,* 85 Nev. 371, 455 P.2d 621 (1969) and *Echols vs. Summa Corp.*, 95

Nev. 720, 601 P.2d 716 (1979) when finding that Dr. Kia would not be prejudiced even though he did not learn of the lawsuit until after the statute of limitations had run. The District Court further failed to take into account the deliberate decision by Respondent to not add Dr. Kia until after the limitation period had run. The District Court's finding creates unjust and illogical results which essentially nullify the purpose of the statute of limitations and unfairly prejudices and burdens unnamed parties in the State of Nevada who would otherwise be protected by the statute of limitations.

RELIEF SOUGHT

Dr. Kia seeks a writ of mandamus directing the District Court to vacate the sua sponte sanctions order entered on August 8, 2023, and to grant summary judgment in favor of Dr. Kia and against Real Party in Interest Chloe Green ("Ms. Green").

ISSUES PRESENTED

1. Did the District Court violate Dr. Kia's substantive due process rights when it sua sponte sanctioned him for filing a motion for summary judgment without an opportunity to oppose those sanctions or otherwise be heard?

2. Did the District Court err when it determined that Ms. Green's amended complaint related back to her original complaint pursuant to NRCP 15?

3. Did the District Court abuse its discretion by awarding attorney fees to Ms. Green without explaining its analysis under *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969)?

FACTS

A. Ms. Green's Underlying Malpractice Claim Stems from a Hospital Stay in 2016

Ms. Green's medical malpractice claim stems from the caesarian section that Frank J. DeLee, M.D. ("Dr. DeLee") performed on her at Sunrise Hospital on July 9, 2016. (APPENDIX000002, ¶2). The hospital discharged her the following day. (*Id*.). Ms. Green had a follow-up appointment with Dr. DeLee on July 13, 2016, when she told him that she had not had a bowel movement since the procedure. (*Id*., ¶7). Ms. Green alleges that during that office visit, Dr. DeLee did not provide any care addressing her lack of a bowel movement. (*Id*.).

Still not having had a bowel movement, Ms. Green went to the emergency room at Sunrise Hospital on July 14, 2016. (*Id.*, ¶8). That day, Sunrise Hospital admitted her, and she was discharged two days later, on July 16, 2016. (*Id*.). Dr. Kia was her attending physician during her stay. (APPENDIX000652).

Sunrise Hospital discharged Ms. Green on July 16, 2016, and Dr. Kia authored and signed the discharge summary. (APPX000002, ¶8). That summary signed by Dr. Kia was part of Sunrise Hospital's records. (APPENDIX000652).

On July 17, 2016, Ms. Green went to the emergency room at Centennial Hills Hospital, and the hospital admitted her with a diagnosis of small bowel obstruction. (APPENDIX000002, ¶9). Ms. Green experienced additional complications, and Centennial Hills Hospital discharged her on September 2, 2016. (*Id*.). Ms. Green's claim is that Sunrise Hospital should not have discharged her on July 16, 2016, and her subsequent hospitalization and complications were the result. (*Id*., ¶10).

B. Ms. Green Filed Her Lawsuit Against Sunrise Hospital and Dr. DeLee on June 30, 2017

Ms. Green filed her medical malpractice claim on June 30, 2017, against Frank J. DeLee, M.D., Frank J. DeLee, MD, PC, and Sunrise Hospital and Medical Center (the "Complaint"). (APPENDIX000001). The case started in Department 8 of the Eighth Judicial District Court. (*Id*.). Notably, the complaint did not allege any DOE or ROE defendants pursuant to NRCP 10(d) either in its caption or in its body. (APPENDIX000001 – 3). Specifically, Ms. Green failed to name Dr. Kia as a defendant even though he had discharged her, and she had the medical records showing his involvement. (*Id*.).

The Complaint included the merit affidavit of Lisa Karamardian, M.D. ("Dr. Karamardian"), who opined on the standard of care exercised by Dr. DeLee and Sunrise Hospital. (APPENDIX000006 – 7). Dr. Karamardian specifically stated that she reviewed the medical records relating to Ms. Green's July 14 – 16, 2016 stay at Sunrise Hospital, and she opined that Ms. Green's care by Sunrise Hospital

and Dr. DeLee and discharge relating to that stay fell below the standard of care. (*Id*., ¶3 – 7). Dr. Karamardian said nothing about Dr. Kia. (*Id*.). The District Court recognized that Dr. Karamardian had reviewed Sunrise Hospital's records, and that those records included the discharge report identifying Dr. Kia. (*Id*.). Dr. Karamardian faulted Dr. DeLee, and she said nothing about Dr. Kia. (*Id.*).

C. Sunrise Hospital Identified Dr. Kia as a Witness on October 10, 2017

Further bringing Dr. Kia to the attention of Ms. Green, Sunrise Hospital disclosed him as a witness in its second supplemental NRCP 16.1 disclosures served on October 10, 2017. (APPENDIX000660). Sunrise Hospital disclosed that "Dr. Kia is expected to testify regarding the care and treatment rendered, as well as to the facts and circumstances of this case and alleged damages." (*Id*.). Ms. Green, however, took no action to bring Dr. Kia into the lawsuit at that time.

D. Ms. Green Took Dr. Kia's Deposition Over a Year Later on November 14, 2018, Yet Still Did Not Act to Bring Him into The Lawsuit

Ms. Green took Dr. Kia's deposition on November 14, 2018, about 17 months after filing the Complaint. (APPENDIX000681). Ms. Green focused her questions on the time frame of the alleged malpractice, the July 14 – 16, 2016, emergency room visit. (APPENDIX000688 – 000691). Ms. Green extensively questioned Dr. Kia and her counsel reviewed Sunrise Hospital's discharge records with him. (*Id*.). Ms. Green, however, did not do anything immediately following the deposition to bring Dr. Kia into the case.

E. On June 14, 2019, About Eight Months After Dr. Kia's Deposition, Sunrise Hospital Attempted to Assert Indemnity and Contribution Claims Against Dr. Kia, However the District Court Granted a Motion for Judgment on the Pleadings in Favor of Dr. Kia

On June 14, 2019, Sunrise Hospital filed an amended answer and third-party claims against Dr. Kia and Nevada Hospitalist Group ("NHG") (for whom Dr. Kia covered) for indemnity and contribution. (APPENDIX000056). By that point in time, the case had been administratively reassigned to Department 9. (*Id*.; APPENDIX0000890 (entry for April 29, 2019)). The basis for the claims was that Dr. Kia was the discharging physician for the June 14 – 16, 2016 visit. (APPENDIX000057 – 59; ¶¶1- 17).

NHG subsequently filed a motion for judgment on the pleadings premised on the fact Sunrise Hospital failed to attach a merit affidavit substantiating the claims that NHG and Dr. Kia failed to meet the standard of care. (APPENDIX000116, lines 13 – 27). Dr. Kia joined the motion. (APPENDIX000114, line 28; APPENDIX000115, line 1). The District Court granted the motion in an order entered on June 2, 2020. (APPENDIX000117lines 4 – 7). The District Court specifically rejected Sunrise Hospital's attempt to incorporate by reference Ms. Green's supporting merit affidavit from Dr. Karamardian, which was originally attached to the Complaint. (APPENDIX000116, lines 13 – 27). The District Court noted that Dr. Karamardian's affidavit did not mention Dr. Kia or NHG, and Ms.

Green's complaint did not plead DOE or ROE defendants that could potentially be Dr. Kia or NHG. (*Id.*).

F. On June 3, 2020, Ms. Green Filed A Motion to Amend Her Complaint to Include DOE Defendants, and She waited Until October 16, 2020 to Bring Claims Against Dr. Kia by Filing a Motion to Amend Her Complaint to Add Dr. Kia as a Defendant, and Dr. Kia Files His Motion to Dismiss

On June 3, 2020, Ms. Green filed a motion to amend her complaint to add unidentified DOE defendants. (APPENDIX000183 – 186, ¶¶15 – 28). The Court denied the motion, noting that "Plaintiff did not seek to add Ali Kia, M.D. as an additional party Defendant in her Proposed Amended Complaint provided with her Motion to Amend." (APPENDIX000183, ¶18).

On October 16, 2020, about four years after the emergency room visit and more than three years after filing the Complaint, Ms. Green filed another motion to amend the complaint to add claims against Dr. Kia. (APPENDIX000267). Dr. Kia did not oppose the motion given that he was not part of the case. (*Id.*).

The District Court heard argument on the issue of whether the proposed amended complaint related back to the original Complaint but made no specific findings that it did. (APPENDIX000231, lines 12 – 14). At oral argument, the District Court specifically noted that a question regarding the statute of limitations existed. (*Id*. ("[THE COURT]: "But you still have to address statute of limitation issues . . . ")). Granting the motion to amend with respect to claims against Dr. Kia, the District Court noted that it expected additional motion practice on that issue:

> I am going to grant the Motion to Amend as to -- to the extent that plaintiff can add in Dr. Kia. I anticipate that this will then be subject of additional litigation. But we'll cross that bridge when we get there.

(APPENDIX000237, lines 13 – 17). The District Court relied on the liberal standard for amending complaints under NRCP 15 when deciding to grant the motion. (APPENDIX000268, lines 8 – 14). In its written order entered on December 15, 2020, the District Court discussed the issue of relating claims back to the original Complaint but did not specifically find that the amended complaint related back to the original Complaint and was silent on the issue. (APPENDIX000267, lines 26 – 28; APPENDIX000268, lines 1 – 7).

G. Dr. Kia Filed a Motion to Dismiss Pursuant to NRCP 12(b)(5) Based on the Statute of Limitations

Ms. Green filed her amended complaint on December 16, 2020 (the "Amended Complaint"). (APPENDX000274). Dr. Kia filed a motion to dismiss pursuant to NRCP 12(b)(5) on January 21, 2021 (the "Motion to Dismiss"). (APPENDIX000340). Dr. Kia based his motion on the fact that the Amended Complaint on its face gave rise to a statute of limitations defense. (APPENDIX000310 – 311). The Amended Complaint contained the naked allegation that Dr. Kia had committed malpractice between July 14 and 16, 2016:

> 10. On July 14, 2016, after still not having a bowel movement post C-section, Chloe went to the emergency room at Sunrise Hospital, with severe abdominal pain and reports of nausea, vomiting, fever, and chills. She was admitted to the medical/surgical unit because of the

> diagnosis of sepsis. Sunrise Hospital, through Ali Kia, M.D., discharged Chloe on July 16, 2016, despite having a small bowel obstruction. The discharge was discussed and confirmed by Dr. DeLee.
>
> * * *
>
> 14. That Defendant Dr. DeLee, Sunrise Hospital, Dr. Kia, and Nevada Hospitalist Group, LLP, breached the standard of care in their treatment of Chloe and as a direct and proximate result of that breach, Chloe has been damaged.

(APPENDIX000275 – 276). The Amended Complaint did not plead any allegations asserting that these claims against Dr. Kia related back to the original Complaint. (*Id*.).

The District Court denied the Motion to Dismiss finding that the Amended Complaint related back to the original Complaint, however, it left open the possibility of further motion practice, stating at the hearing on the motion:

> [THE COURT:] And, additionally, you're always entitled to bring additional motions outside of a motion to -- for reconsideration if supported by case law. The Court will definitely considerate it at that time. So I don't think that anything about this ruling precludes NHG or Dr. Kia, for that matter, for bringing additional motions and continuing to litigate the case.

(APPENDIX000461, lines 12 – 16; APPENDIX000478 – 479). Dr. Kia brought a Motion for Reconsideration, which the District Court denied, finding that Dr. Kia has not demonstrated the ruling on the Motion to Dismiss was clearly erroneous. (APPENDIX000499, lines 15 – 16). The Court specifically noted that its prior ruling

as "based upon the pleadings, argument at the time of the hearing and the procedural history of the case." (*Id*., lines 11 – 12).

Dr. Kia filed a writ petition, and the Supreme Court ordered a response (*Kia v. Eighth Judicial District Court*, Nev. S.Ct. Case No. 83357 (August 12, 2021)). (APPENDIX000518). The Supreme Court determined that its intervention was not warranted without making any comments on the merits of the underlying arguments by Dr. Kia. (APPENDIX000586 – 587).

H. Two Years Later, Dr. Kia Filed a Motion for Summary Judgment on the Issue of the Statute of Limitations

Dr. Kia filed his motion for summary judgment on March 3, 2023, which the subject of this writ ("Motion for Summary Judgment"). (APPENDIX000517). By that point, the Clerk had reassigned the case four times since Dr. Kia had originally filed his Motion to Dismiss. The Clerk had administratively reassigned the case twice, and Ms. Green and another defendant had each exercised a peremptory challenge. (APPENDIX000893 (entry for January 4, 2021); APPENDIX000895 (entry for January 3, 2023; APPENDIX000603; APPENDIX000607 – 610). Department 19 heard and decided the Motion for Summary Judgement, and the case is currently in Department 19. (APPENDIX000610; APPENDIX000767).

The Motion for Summary Judgment focused on the statute of limitations issue and the issue of whether the Amended Complaint related back to the original Complaint. (APPENDIX000627 – 630). Unlike the Motion to Dismiss which was

based on the pleadings then before the District Court, Dr. Kia included several exhibits as evidence supporting his motion: (i) Ms. Green's initial NRCP 16.1 Disclosures, (ii) the Sunrise Hospital Discharge report authored and signed by Dr. Kia, (iii) Sunrise Hospital's supplemental NRCP 16.1 disclosures, (iv) Dr. Kia's entire deposition transcript from November 14, 2018, and (v) Dr. Kia's responses to Ms. Green's first set of requests for admission. (APPENDIX000645 – 733).

The District Court denied the motion, finding that the claims against Dr. Kia related back to the filing of the original Complaint pursuant to NRCP 15(c). (APPENDIX000872, lines 4 – 14). The Court went on to sua sponte say that it was considering sanctions against Dr. Kia because his Motion for Summary Judgment was similar to his prior Motion to Dismiss, stating at the April 12, 2023 hearing:

> [THE COURT]: Now, I am considering ordering sanctions against Dr. Kia for even bringing this motion based on the fact that it is incredibly consistent, if not, exactly the same as the motion that the plaintiff already has had to defend and go up to the Supreme Court and defend. So what I'm going to do is I'm going to pull the initial motion that was filed earlier, and I'm going to compare them. And if it's as consistent as Mr. Marks was saying, I am going to order sanctions, and those will be to cover any costs and attorney's fees that Mr. Marks' office had to expend preparing to defend this motion.
>
> But that, I'm going to wait until I read the original motion and see how consistent it is.

(APPENDIX000810, lines 17 – 25; APPENDIX000811ines 1 – 2). After making that statement, the District Court immediately moved on to another motion. (*Id*.). The District Court did not invite further briefing or hear oral argument on its sua

sponte consideration of sanctions. (*Id.*). On April 25, 2023, the District entered a minute order sanctioning Dr. Kia for what it called "forum shopping":

> After the hearing on this matter, the Court reviewed the previous Motion filed by Defendant Kia, which was heard on March 16, 2021, and denied, before the Honorable Jasmin Lilly-Spells, Department 23. The Court FINDS that the instant Motion before this Court, the Honorable Crystal Eller, Department 19, is identical to the previously filed Motion to Dismiss. This conduct amounts to forum shopping.
>
> Accordingly, the Court finds it appropriate to award Plaintiff any reasonable attorney's fees and costs that Plaintiff's counsel's office had to expend in preparing and defending the instant Motion, provided that Plaintiff files an appropriate Application for fees and costs for the Court to consider.

(APPENDIX000832). The District Court included this in the written order it entered denying the Motion for Summary Judgment:

> IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court is considering sanctions against Defendant Ali Kia, M.D., based on how similar this motion is to prior motions filed by Defendant Ali Kia, M.D., before the prior judge's in this case.

(APPENDIX000872, lines 18 – 20).

I. The District Court Awarded Attorney Fees Without Undertaking a *Brunzell* Analysis

In response to the District Court's written order, Ms. Green filed a Memorandum of Fees and Costs, requesting a total of $9,131.25 in attorney fees and $3.50 in costs. (APPENDIX000876). In response, Dr. Kia filed a Motion to Retax, and Ms. Green filed a reply. (APPENDIX000884).

On August 8, 2023, the District Court entered an order awarding Ms. Green $7,814.25 in attorney fees and $3.50 in costs. The order did not contain any analysis pursuant to *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969). (APPENDIX000892 – 895).

WHY THE WRIT SHOULD ISSUE

A. A Writ of Mandamus Is Appropriate Because the Sanctions Order Is Not Directly Appealable, An Eventual Appeal Would Not Adequately Address the Harm to Dr. Kia, and Dr. Kia Is Entitled to Summary Judgment As A Matter of Law Due To the Statute of Limitations

The Supreme Court has original jurisdiction to issue writs of mandamus, and the decision to entertain a petition for such relief is solely within the Court's discretion. *See* Nev. Const. art. 6, § 4; *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 474 – 75, 168 P.3d 731, 736 – 37 (2007). Dr. Kia must show that extraordinary relief is warranted, and such relief is proper only when there is no plain, speedy, and adequate remedy at law. *See Pan v. Eighth Judicial Dist. Court,* 120 Nev. 222, 224, 228, 88 P.3d 840, 841, 844 (2004).

This case is almost identical to *Black*, in which the Supreme Court granted writ relief, ordering the district court to vacate a sanctions order entered sua sponte without allowing the sanctioned party an opportunity to be heard. *Black* at *1. In *Black*, the Supreme Court held that the decision to entertain the writ petition was appropriate because the sanctions order was not directly appealable, and not hearing the petition might result in the aggrieved party incurring attorney fees and costs that

might not be recoverable after an appeal. *Id.*; *see also Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court,* 128 Nev. 635, 639 – 40, 289 P.3d 201, 204 (2012) (explaining that writ relief may be appropriate when a later appeal would be ineffective).

This petition also requests relief from the closely related order denying Dr. Kia's Motion for Summary Judgment. While the Supreme Court does not ordinarily grant writ relief with respect to the denial of summary judgment motions, exceptions to the rule exist. These exceptions include judicial economy and when no factual disputes exist, and clear statutory authority warrants intervention. *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344, 95 P.2d 280, 281 (1997). This Court previously required an answer when Dr. Kia filed a writ petition regarding his denied Motion to Dismiss and later decided that intervention was not warranted at that time. (Nev. S.Ct. Case No. 83357). The case for extraordinary relief is more compelling here because as with any motion for summary judgment, the record is more fully developed, and there are no genuine issues of material fact. The statute of limitations bars Ms. Green's claims against Dr. Kia. Granting writ relief would serve the interests of judicial economy and prevent Dr. Kia from having to expend more on involvement in this case, amounts which may not be recoverable on appeal.

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B. The District Court Abused Its Discretion When Sanctioning Dr. Kia Because the Court Did Not Afford Him an Opportunity To Be Heard and the Sanction Was Not Supported By Substantial Evidence

1. The Court Reviews Sanctions Decisions for Abuse of Discretion

The Court reviews a sanctions order for an abuse of discretion. *Capriati Construction Corporation, Inc. v. Yahyavi*, 137 Nev. 675, 676 – 677, 498 P.3d 226, 229 (2021). The Court will uphold noncase-ending sanctions if substantial evidence supports the district court's order. 137 Nev. at 677, 498 P.3d at 229. "Substantial evidence is that which a reasonable mind could find adequate to support a conclusion." *Id*. (citation omitted).

2. The District Court Abused Its Discretion When It Violated Dr. Kia's Due Process Rights by Sua Sponte Entering a Sanctions Order Without Giving Dr. Kia an Opportunity to Be Heard

The District Court violated Dr. Kia's due process rights by sanctioning him without affording him an opportunity to at least file an opposing brief. *Sun River Energy, Inc. v. Nelson*, 800 F.3d 1219, 1230 (10th Cir. 2015) (noting that notice and an opportunity to be heard and oppose sanctions is essential to meet due process requirements), cited with approval by *Valley Health System, LLC v. Estate of Doe*, 134 Nev. 634, 647, 427 P.3d 1021, 1032 (2018). This Court has long held that fundamental fairness and due process require that sanctions be just and relate to specific misconduct. *MDB Trucking, LLC v. Versa Products Co., Inc.*, 136 Nev.

626, 631, 475 P.3d 397, 403 (2020); *GNLV Corp. v. Serv. Control Corp*., 111 Nev. 866, 870, 900 P.2d 323, 325 (1995).

This Court's analysis in *Black* is instructive. This Court, issuing a writ of mandamus, held that consideration of sanctions required notice an opportunity to be heard. *Black* at *1. In *Black*, as here, the district court did not issue an order to show cause as to why sanctions should not issue and did not hold a separate hearing. *Id.* This Court found the district court's actions were an abuse of discretion because they did not meet fundamental due process requirements. *Id.* This Court granted the writ of mandamus and ordered the district court to vacate the sanctions. *Id*. The Court should take the same action here.

3. The District Court Abused Its Discretion by Finding That Dr. Kia Was "Forum Shopping"

The District Court's sanctions order hinges on the concept that Dr. Kia was "forum shopping." (APPENDIX000893, lines 3 – 5). The concept of forum shopping does not apply here, and therefore substantial evidence does not support that conclusion. Forum shopping is the "[p]ractice of choosing the most favorable jurisdiction or court in which the claim might be heard." *Black's Law Dictionary* 681 (8th ed.2004), cited by *Uber Technologies, Inc. v. Second Judicial Dist. Court*, 130 Nev. 1256, 2014 WL 6680785 (Nev. S.C.t Case No. 66875, Nov. 24, 2014)

(unpublished disposition).[1] The concept of forum shopping arises in the context of a defendant objecting to the forum selected by a plaintiff and typically refers to whether a plaintiff should have brought an action in a state or jurisdiction other than Nevada. *See, e.g., Provincial Government of Marinduque v. Place Dome, Inc.*, 131 Nev. 296, 250 P.3d 392 (2015) (analyzing a forum non-convenient motion in a lawsuit brought in Nevada where the acts at issue primarily occurred in the Philippines and Canada). When analyzing such a challenge, the courts give great deference to a plaintiff's decision as to where to bring their lawsuit. 131 Nev. at 300-01, 250 P.3d at 396.

Here, Ms. Green brought her claim in the district courts of Nevada, and in fact that is the only place where she could have brought her claim. Dr. Kia has never objected to this forum, and as such, is not forum shopping. Therefore, the District Court's notion that he was forum shopping is entirely misplaced.

4. The District Court Abused Its Discretion Because Dr. Kia Did Nothing Wrong by Filing the Motion for Summary Judgment

The District Court abused its discretion because filing the Motion for Summary Judgment was entirely appropriate. An NRCP 12(b)(5) motion and a summary judgment motion are two completely different types of motions that address two completely different situations and are evaluated using two completely

[1] Dr. Kia recognizes the restrictions of NRAP 36(c)(2), and only cited *Uber Technologies* for its reference to *Black's Law Dictionary*.

different standards. A motion to dismiss under NRCP 12(b)(5) is correct and appropriate when, as here, a complaint gives rise to defense of the statute of limitations. *Keller v. Snowdon*, 87 Nev. 488, 491, 489 P.2d 90, 92 (1971) ("When the defense of the statute of limitations appears from the complaint itself, a motion to dismiss is proper."), *citing Manville v. Manville*, 79 Nev. 487, 387 P.2d 661 (1963), *abrogated by rule amendment, NC-CSH, Inc. v. Garner*, 125 Nev. 647, 651 – 652, 218 P.3d 853, 857 (2009). The point of an NRCP 12(b)(5) motion is to test the sufficiency of the pleadings to determine whether they in fact state a cause of action. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 227 – 228, 181 P.3d 670, 672 (2008).

As the parties are well aware, motions to dismiss are strictly scrutinized, and a court is to consider all the allegations in the complaint as true and draw all inferences in favor of a plaintiff. 124 Nev. at 227 – 228, 181 P.3d at 672. Dismissal is appropriate only if it appears beyond a doubt that a plaintiff could prove no set of facts, if true, that would entitle her to relief. *Id*. A district court may not consider any matters outside the pleadings. NRCP 12(d); *Breliant v. Preferred Equities Corp.,* 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

A motion for summary judgment, such as Dr. Kia's, has an entirely different purpose and an entirely different standard. In contrast to a motion to dismiss, a motion for summary judgment looks at the substantive issues in the case on their

merits. Unlike a motion for summary judgment, a motion to dismiss has no evidentiary requirements as it is meant merely to test the sufficiency of the pleadings. *Buzz Stew,* 124 Nev. at 228, 181 P.3d at 672; *see also Blackjack Bonding v. City of Las Vegas Mun. Ct.,* 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000); *Montesano v. Donrey Media Group,* 99 Nev. 644, 648, 668 P.2d 1081, 1084 (1983) (if a district court considers matters outside the pleadings the motion is considered a motion for summary judgment). A motion for summary judgment, however, is all about the evidence. NRCP 56(c)(1).

NRCP 41(a), which allows a plaintiff to voluntarily dismiss a complaint, illustrates the difference between a motion to dismiss and a motion for summary judgment. Under NRCP 41(a), a plaintiff may voluntarily dismiss their case without leave of the court prior to the filing of an answer or filing of a motion for summary judgment. NRCP 41(a)(1)(A). Filing a motion to dismiss pursuant to NRCP 12(b)(5) does not prevent a plaintiff from exercising its right under NRCP 41(a). *Gallen v. Eighth Judicial Dist. Court*, 112 Nev. 209, 212, 911 P.2d 858, 859 – 860 (1996). This is because NRCP 41(a) is designed to be exercised in the early stages of the proceedings, well before the litigation progressed and the parties become fully engaged. *Willick v. Eight Judicial Dist. Court*, 138 Nev. 158, 162, 508 P.3d 1059, 1063 (2022). Similarly, an NRCP 12(b)(5) motion is meant for the initial stages of the proceedings as it must be made prior to the filing of an answer. NRCP 12(b). In

contrast, a motion for summary judgment takes place later in the proceedings when the record is more fully developed, as it must be supported by evidence, which is typically gathered through discovery. In other words, a motion to dismiss is an early, preliminary assessment before a record has been developed, while a motion for summary judgment is later in the proceedings, after a record has been developed. NRCP 56.

The District Court abused its discretion because Dr. Kia did nothing wrong when filing his motion for summary judgment. At that point, the case was two years past the preliminary review of the Amended Complaint under his NRCP 12(b)(5) motion that tested the sufficiency of the pleadings. Unlike his Motion to Dismiss, the Motion for Summary Judgment included a number of matters outside the pleading, including his deposition transcript, discovery responses, and medical records. Ultimately, Dr. Kia's actions were not wrongful and therefore did not warrant sanctions.

5. The District Court Abused Its Discretion by Failing to Analyze Ms. Green's Attorney Fees Under the *Burnzell* Factors

The District Court awarded attorney fees to Ms. Green without analyzing each of the *Brunzell* factors. This is an abuse of discretion. *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 730 (2005) ("while it is within the trial court's discretion to determine the reasonable amount of attorney fees under a statute or rule, in exercising that discretion, the court must evaluate the factors set forth in *Brunzell v.*

Golden Gate National Bank."); *Gunderson v. D.R. Horton, Inc*., 130 Nev. 67, 82 319 P.3d 606, 616 (2014) (in the context of analyzing an offer of judgment, failure to consider each *Brunzell* factor is an abuse of discretion). Vacating the award as an abuse of discretion is warranted.

C. Summary Judgment Is Appropriate Because No Issues Of Material Fact Exist, and The Statute of Limitations Bars Ms. Green's Claims Against Dr. Kia As a Matter of Law

1. Ms. Green Missed the One and Three-Year Statute of Limitations in NRS 41A.097(2)

NRS 41A.097(2) provides that a malpractice/professional negligence claim must be brought within three years of the date of injury or one year after discovery through reasonable diligence, whichever occurs first. A plaintiff must satisfy both the one-year discovery period and the three-year injury period. *Winn v. Sunrise Hospital and Medical Center*, 128 Nev. 246, 251, 277 P.3d 458, 461 (2012).

(a) Ms. Green Cannot Satisfy The Three-Year Limitations Period

Ms. Green cannot meet either time period limitations period. The statute's three-year limitation period "begins to run once there is an appreciable manifestation of the plaintiff's injury. We further conclude that a plaintiff need not be aware of the cause of his or her injury in order for the three-year limitations period to begin to run." *Libby v. Eighth Judicial Dist. Ct.*, 130 Nev. 359, 365, 325 P.3d 1276, 1280 (2014). Put another way, the "three-year limitation period to bring actions for injury or death against health care providers begins to run once there is injury from which

appreciable harm manifests." 130 Nev. at 368, 325 P.3d at 1281. The three-year limitation period does not require that Ms. Green be aware of the cause of her injury because imposing such a requirement would render the three-year period "irrelevant." 130 Nev. at 365, 277 P.3d at 1279 – 1280. In *Libby*, the Nevada Supreme Court looked to California authority for guidance on application of the three-year limitation period. 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." *Id*. (citations omitted). The *Libby* Court cited *Garabet v. Superior Court*, 151 Cal.App.4th 1538, 60 Cal.Rptr.3d 800 (Ct.App. 2007), in which that plaintiff 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 that the limitations period started running when the plaintiff began to experience adverse symptoms after the surgery. *Id.* at 809. Here, Ms. Green suffered an appreciable manifestation of her alleged injury when she was admitted to Centennial Hills Hospital on July 17, 2016, as her symptoms allegedly persisted after discharge by Dr. Kia on July 16, 2016, and then worsened and she subsequently underwent exploratory surgery on July 18, 2016. There is no

requirement pursuant to NRS 41A.097(2) that Ms. Green discover the cause of the injury, but simply that she suffered an appreciable harm. As Ms. Green suffered an appreciable harm as late as July 18, 2016, the three-year statute of limitations expired on July 18, 2019. Ms. Green's Amended Complaint naming Dr. Kia as a defendant was filed 4 years and slightly less than 5 months after Ms. Green suffered an appreciable injury. This was 1 year and almost 5 months after the expiration of the three-year statute of limitations. As such, Ms. Green's Amended Complaint as to Dr. Kia is time-barred and summary judgment should be granted in his favor and against Ms. Green.

(b) Ms. Green Cannot Satisfy the One-Year Limitations Period

Nor does Ms. Green meet the one-year statute of limitations. Strictly speaking, the Court does not need to reach this issue because Ms. Green failed to meet the three-year limitations period. *Winn,* 128 Nev. at 251, 277 P.3d at 461 (2012). (both the one-year and three-year requirements must be met). Nevertheless, the one-year statute of limitations for a medical malpractice action begins to run when a plaintiff "knows or should have known of the facts that would put a reasonable person on inquiry notice of his cause of action," whether or not it has occurred to the patient to seek further medical advice. *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983). The focus is on the patient's knowledge of, or access to, facts rather than on his discovery of legal theories. *See* 99 Nev. at 726 –

728, 669 P.2d at250 – 52. A person is put on "inquiry notice" when he or she should have known of facts that "lead an ordinarily prudent person to investigate the matter further." *Winn*, 128 Nev. at 252, 277 P.3d at 462 (quoting Black's Law Dictionary 1165 (9th ed. 2009)) (internal quotations omitted). The period begins to run when a plaintiff has a general belief that someone's negligence may have caused his injury. *Id.* A plaintiff cannot "close their eyes" to the information available to them. *See Siragusa v. Brown*, 114 Nev. 1384, 1394, 971 P.2d 801, 807 (1988) ("Plaintiffs may not close their eyes to means of information . . . and must in good faith apply their attention to those particulars within their reach.") (citation omitted). "[S]o long as suspicion [of wrongdoing] exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1111, 751 P.2d 923, 928, 245 Cal. Rptr. 658, 662 (1988). "[T]the Ninth Circuit has consistently found that a plaintiff need not know the identity of the person who caused his injury to trigger the statute of limitations." *Ritchie v. U.S.*, 210 F.Supp.2d 1120, 1128 (N.D. Ca. 2002).

In *Winn,* this Court addressed when the discovery date pursuant to NRS 41A.097(2) can be determined as a matter of law. The Court held that the evidence in that case "Irrefutably demonstrates that Winn discovered Sedona's injury no later than February 14, 2007 – the date when he received the initial 182 pages of medical records. At this point, Winn had not only hired an attorney to pursue a medical

malpractice action, but he also had access to Dr. Ciccolo's postoperative report that referenced air being present in Sedona's heart at inappropriate times during the surgery. By this point at the latest, Winn and his attorney had access to facts that would have led an ordinarily prudent person to investigate further into whether Sedona's injury may have been caused by someone's negligence." Winn, 128 Nev. at 257, 277 P.3d at 462.

Here, Ms. Green discovered her injury as to Dr. Kia more than one-year prior to filing her Amended Complaint. Ms. Green filed her Complaint on June 30, 2017. The Complaint attached the affidavit of Dr. Karamardian who stated she had reviewed the medical records from Sunrise Hospital and specifically discussed what she believed were breaches in the standard of care during the July 14, 2016 hospital stay. Thus, by June 30, 2017, Ms. Green had: 1) retained an attorney; 2) obtained the relevant Sunrise Hospital records; 3) had the Sunrise Hospital records reviewed by a medical expert; and 4) filed a Complaint. By August 9, 2017, Ms. Green had served an initial NRCP 16.1 disclosure providing the records from Sunrise Hospital record that included Dr. Kia's discharge summary from July 16, 2016, and documentation that he was the attending physician during that visit. Ms. Green did not file her Amended Complaint against Dr. Kia until December 16, 2020. This was three years and five months after Ms. Green retained counsel and had all the relevant information. The Amended Complaint was not timely filed within one year of

Plaintiff's discovery of her injury, as a matter of law and thus the Complaint is time barred and summary judgment should be granted as a matter of law.

D. Ms. Green's Amended Complaint Does Not Relate Back To Her Original Complaint Pursuant to NRCP 15

The District Court erred by finding that the Amended Complaint related back to the original Complaint pursuant to NRCP 15. The District Court essentially failed to perform any analysis and relied on its prior, initial rulings based solely on the Amended Complaint in the context of an NRCP 12(b)(6) motion. As a general rule, an amended complaint cannot add a new party once the statute of limitations has run. *Servatius*, 85 Nev. at 372-73, 455 P.2d at 622. An amendment can add a new, proper defendant under limited circumstances in which the new defendant: (1) has actual notice of the institution of the action; (2) knew that it was the proper defendant in the action, and (3) was not in any way misled to its prejudice. *Id.*, 85 Nev. at 373, 455 P.2d at 622-23; *see also*, *Echols v. Summa Corp.*, 95 Nev. 720, 722, 601 P.2d 716, 717 (1979).

1. Dr. Kia Is Not a Proper Defendant For Purposes of *Servatius* and *Echols* as He Was Not Brought in to Correct an Already Named Improper Defendant

The issue of whether a defendant should know they are the proper defendant after receiving actual notice for purposes of NRCP 15(c) has only been applied in the limited situations where there is a mistake in nomenclature, or there was an identity of interests between an improper and proper defendant such that there was

fair and adequate notice of the lawsuit. That is not the case here. There is no defendant that was improperly named that had an identity of interest with Dr. Kia. Specifically, Dr. Kia was not employed by Sunrise Hospital, nor did he have malpractice insurance with Sunrise Hospital. There is no evidence that there was any mistake in nomenclature of a party before the District Court. In *Servatius*, the Court found the factors to be present as the amended complaint corrected a mistake in the name of a party already before the court. *Id.*, 85 Nev. at 372, 455 P.2d at 622. The amendment of Dr. Kia to the Complaint was not substituting a proper party for an improper party; correcting his nomenclature; done to substitute him for a party with an identity of interest. The amendment brought him in as a new party Defendant, and therefore NRCP 15 (c)(2) does not apply.

2. Dr. Kia Has Been and Will Continue to Be Prejudiced as a Result of Defending the Case on the Merits

A plaintiff's right to have his or her claim heard on its merits despite technical difficulties must be balanced against "a defendant's right to be protected from stale claims and the attendant uncertainty they cause." *Costello v. Casler*, 127 Nev. 436, 441, 254 P.3d 631, 635 (2011). Here, Dr. Kia did not have actual notice of the claim prior to expiration of the statute of limitations; there was no identity of interest such that he would have been required to defend against the case in any event. As a result, Dr. Kia is incurring costs that he otherwise would not have done and would not have

anticipated given that his first knowledge of this matter occurred after the expiration of the statute of limitations.

CONCLUSION

A writ of mandamus is appropriate because the District Court abused its discretion by sanctioning Dr. Kia without affording him an opportunity to be heard. A writ of mandamus requiring the District Court to enter an order granting summary judgment in favor of Dr. Kia is appropriate because Ms. Green cannot meet the statute of limitations as a matter of law.

Dated this 19th day of September 2023.

NAYLOR & BRASTER

By: */s/ John M. Naylor*
John M. Naylor
NAYLOR & BRASTER
1050 Indigo Drive, Suite 200
Las Vegas, NV 89145

Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

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.

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) and the declaration required by NRS 34.170, NRS 34.330, and NRAP 21, it is proportionately spaced, has a typeface of 14 points or more, and contains 6,964 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. 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 19th day of September 2023.

NAYLOR & BRASTER

By: */s/ John M. Naylor*
John M. Naylor
NAYLOR & BRASTER
1050 Indigo Drive, Suite 200
Las Vegas, NV 89145

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of NAYLOR & BRASTER, that service of the foregoing **PEITION FOR WRIT OF MANDAMUS** was made on September 19, 2023, 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. Pursuant to agreement of Real Parties in Interest, proof of which is attached, mail service of the foregoing is waived.

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
(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
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 CRYSTAL ELLER
The Eighth Judicial District Court
Department 19
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155
Dept19lc@clarkcountycourts.us
Respondent

/s/ Amy Reams
An Employee of Naylor & Braster

John Naylor

From: Tyson Dobbs <tdobbs@HPSLAW.COM>
Sent: Monday, September 18, 2023 4:18 PM
To: John Naylor; DMarks@danielmarks.net; NYoung@danielmarks.net; Eric.stryker@wilsonelser.com; Brigette.Foley@wilsonelser.com; Mike Prangle; Brent.Vogel@lewisbrisbois.com; Erin.Jordan@lewisbrisbois.com
Cc: Patricia Daehnke; Linda K. Rurangirwa; Amy Reams
Subject: RE: Green v. DeLee, Case No. A-17-757722-C

Sunrise consents.

HALL PRANGLE+ SCHOONVELD LLC
WHERE TRIAL LAWYERS ARE THE NORM

1140 North Town Center Dr.
Suite 350
Las Vegas, NV 89144
F: 702.384.6025

Tyson Dobbs
Partner
O: 702.212.1457
Email: tdobbs@HPSLAW.COM

Legal Assistant: Nicole Etienne
O: 702.212.1446
Email: netienne@hpslaw.com

From: John Naylor <jnaylor@nblawnv.com>
Sent: Monday, September 18, 2023 12:59 PM
To: DMarks@danielmarks.net; NYoung@danielmarks.net; Eric.stryker@wilsonelser.com; Brigette.Foley@wilsonelser.com; Mike Prangle <mprangle@HPSLAW.COM>; Tyson Dobbs <tdobbs@HPSLAW.COM>; Brent.Vogel@lewisbrisbois.com; Erin.Jordan@lewisbrisbois.com
Cc: Patricia Daehnke <Patricia.Daehnke@cdiglaw.com>; Linda K. Rurangirwa <Linda.Rurangirwa@cdiglaw.com>; Amy Reams <areams@nblawnv.com>
Subject: Green v. DeLee, Case No. A-17-757722-C

[External Email] CAUTION!.

Good afternoon,

We are filing a writ petition regarding Dr. Kia's motion for summary judgment and the related sanctions order this afternoon.

John Naylor

From: Nicole Young <NYoung@danielmarks.net>
Sent: Monday, September 18, 2023 5:09 PM
To: Vogel, Brent; Stryker, Eric K.; John Naylor; Daniel Marks; mprangle@HPSLAW.COM; tdobbs@HPSLAW.COM; Thomas, Melanie
Cc: Patricia Daehnke; Linda K. Rurangirwa; Amy Reams
Subject: RE: Green v. DeLee, Case No. A-17-757722-C

Plaintiff consents to electronic service.

Nicole M. Young, Esq.
Associate Attorney
Law Office of Daniel Marks
610 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 386-0536
Facsimile: (702) 386-6812

From: Vogel, Brent <Brent.Vogel@lewisbrisbois.com>
Sent: Monday, September 18, 2023 4:53 PM
To: Stryker, Eric K. <Eric.Stryker@wilsonelser.com>; John Naylor <jnaylor@nblawnv.com>; Daniel Marks <DMarks@danielmarks.net>; Nicole Young <NYoung@danielmarks.net>; mprangle@HPSLAW.COM; tdobbs@HPSLAW.COM; Thomas, Melanie <Melanie.Thomas@lewisbrisbois.com>
Cc: Patricia Daehnke <Patricia.Daehnke@cdiglaw.com>; Linda K. Rurangirwa <Linda.Rurangirwa@cdiglaw.com>; Amy Reams <areams@nblawnv.com>
Subject: RE: Green v. DeLee, Case No. A-17-757722-C

Nevada Hospitalist Group consents.

LEWIS BRISBOIS

Brent Vogel ABOTA
Partner
Brent.Vogel@lewisbrisbois.com

T: 702.693.4320 F: 702.893.3789

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV 89118 | **LewisBrisbois.com**

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From: Stryker, Eric K. <Eric.Stryker@wilsonelser.com>
Sent: Monday, September 18, 2023 4:44 PM
To: John Naylor <jnaylor@nblawnv.com>; DMarks@danielmarks.net; NYoung@danielmarks.net; Foley, Brigette E.

<Brigette.Foley@wilsonelser.com>; mprangle@HPSLAW.COM; tdobbs@HPSLAW.COM; Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Erin.Jordan@lewisbrisbois.com
Cc: Patricia Daehnke <Patricia.Daehnke@cdiglaw.com>; Linda K. Rurangirwa <Linda.Rurangirwa@cdiglaw.com>; Amy Reams <areams@nblawnv.com>
Subject: [EXT] RE: Green v. DeLee, Case No. A-17-757722-C

Dr. DeLee consents, thx

Eric K. Stryker
Attorney at Law
Wilson Elser Moskowitz Edelman & Dicker LLP
6689 Las Vegas Blvd. South, Suite 200
Las Vegas, NV 89119
702.727.1242 (Direct)
702.727.1400 (Main)
702.727.1401 (Fax)
eric.stryker@wilsonelser.com

From: John Naylor [mailto:jnaylor@nblawnv.com]
Sent: Monday, September 18, 2023 12:59 PM
To: DMarks@danielmarks.net; NYoung@danielmarks.net; Stryker, Eric K. <Eric.Stryker@wilsonelser.com>; Foley, Brigette E. <Brigette.Foley@wilsonelser.com>; mprangle@HPSLAW.COM; tdobbs@HPSLAW.COM; Brent.Vogel@lewisbrisbois.com; Erin.Jordan@lewisbrisbois.com
Cc: Patricia Daehnke <Patricia.Daehnke@cdiglaw.com>; Linda K. Rurangirwa <Linda.Rurangirwa@cdiglaw.com>; Amy Reams <areams@nblawnv.com>
Subject: Green v. DeLee, Case No. A-17-757722-C

Good afternoon,

We are filing a writ petition regarding Dr. Kia's motion for summary judgment and the related sanctions order this afternoon.

Please let me know whether you will consent to receiving your service copy electronically. In your response, please indicate the party that you represent.

Best regards,

-John

John M. Naylor
NAYLOR & BRASTER
1050 Indigo Drive, Suite 200
Las Vegas, NV 89145
(t) (702) 420-7000
(d) (702) 420-7998

(f) (702) 420-7001
jnaylor@naylorandbrasterlaw.com
www.naylorandbrasterlaw.com