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Choloe Green

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.
_____/

Case No. 87300

ANSWER TO PETITION FOR WRIT OF MANDAMUS

I. NRAP 26.1 DISCLOSURE

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

1. Parent Corporations and/or any publically-held company that owns 10% or more of the party's stock:

   NONE

2. Law Firms that have represented Real Party in Interest Choloe Green:

   Law Office of Daniel Marks, Daniel Marks, Esq., and Nicole M. Young, Esq.

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2. Whether the case was filed within the statute of limitations ("SOL").
3. Whether the relation-back doctrine overcomes any issue with the SOL.

V. STATEMENT OF FACTS

A. Factual Background

On July 9, 2016, Defendant Frank Delee, M.D. ("Delee"), performed a cesarean section on Plaintiff Choloe Green ("Choloe") at Defendant Sunrise Hospital and Medical Center ("Sunrise"). Choloe is a black woman, who was 29 years old. She was discharged home on "post-operative day one," even though the standard of care for "a routine cesarean is a 3-4 night stay in the hospital." (SUPP261-66.)

On July 14, 2016, Choloe presented at Sunrise's emergency room because she was in extreme pain. She was admitted into Sunrise's "medical/surgical unit because of the diagnosis of sepsis." She was five days post-partum and experiencing "severe abdominal pain and reports of nausea, vomiting, fever, and

chills." (SUPP261 & 264-65.) She had various conversations with doctors arranged by Sunrise. Petitioner/Defendant Ali Kia, M.D. ("Kia"), was assigned to provide Choloe care. (SUPP279-80 & 285.) She had never met him before and did not know who he was. She was also treated by various nurses and other doctors. (SUPP357.)

During Kia's deposition, he claimed he does not work for Sunrise, but instead works for Defendant Nevada Hospitalist Group, LLP ("NHG"), contrary to his statements to the Medical Board of California that he practices at and works for Sunrise. (SUPP32-34.)

Kia discharged Choloe two days later, on July 16, 2016. Choloe's discharge was discussed between Delee and the doctors treating her at Sunrise. This discharge violated the standard of care because "[1] she was not able to tolerate a regular diet[,] ...[2] her KUB showed multiple dilated loops of bowel, thought to be related to a small bowel obstruction, ...[and] [3] [a]n intraperitoneal abscess was suspected on a CT scan." Despite these issues, both Sunrise (through Kia) and Delee agreed to discharge Choloe home. (SUPP261, 264-65 & 362.)

Dr. Savluk opined Kia violated the standard of care, as follows:

1. Failure to continue appropriate antibiotics during the patients hospitalizations when she was clearly fighting an infection.

2. Failure to continue antibiotics post-discharge in a patient clearly not having recovered from her infection.

3. Failure to follow up the radiographic studies which were clearly suspicious for an intra-abdominal abscess.

4. Discharging a patient with evidence of a small bowel obstruction or illeus without any explanation or resolution.

5. Pre maturely discharging the patient before she had adequately recovered from the septic process.

(SUPP362-63.)

One day later, Choloe was admitted into Centennial Hills Hospital ("Centennial"), in severe pain and with no real bowel movement. The imaging studies at Centennial showed her condition had worsened in the one day since her discharge from Sunrise. (SUPP262, 265 & 362.) Choloe remained hospitalized at Centennial through September 2, 2016. (APP2.) After Centennial, Choloe required rehabilitation until her discharge on October 26, 2016. (SUPP388.)

Dr. Savluk opined that due to Kia's breach of the standard of care Choloe "went on to develop an acute abdomen requiring surgery, intra-abdominal abscess requiring percutaneous drainage and sepsis related ARDS (severe) which required 6 plus weeks in the ICU and resulted in severe physical deconditioning and prolonged sub-acute care." (SUPP363.)

As a result, Choloe was damaged.

B. Procedural History

Choloe filed her initial complaint against Delee and Sunrise on June 30, 2017. (APP1-7.) The reason Kia was not originally named is because the medical records were unclear regarding who made all the medical decisions that fell below the standard of care. Kia admitted he discharged Choloe, but he never billed for his medical care. (SUPP292-93, 461-62 &477-84.) While Sunrise did disclose Kia as a potential witness in October 2017, the explanation of his testimony is extremely vague because it provides no specific information that Kia should be a party. (APP660.)

To gain more information, Choloe properly served and put Kia on notice his deposition would be taken on September 21, 2018. (SUPP6-10.) Kia did not appear for that deposition or request it be rescheduled. (SUPP15-16.) Choloe had to file a motion for an order to show cause to force his November 2018 deposition appearance. (SUPP1-21 &268.) Kia's instant petition is silent regarding his non-appearance.

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1. *After Kia's deposition, Sunrise wanted to distance itself from Kia's negligent conduct.*

On January 15, 2019, Sunrise filed a motion for partial summary judgment on the issue of ostensible agency. (APP904.) The motion was denied because there was a genuine issue of material fact regarding the relationship between Sunrise and Kia. (APP96.) Other than Delee, Choloe did not choose the doctors that provided care at Sunrise. She believed they all worked for Sunrise. (SUPP357.) After Judge Smith denied partial summary judgment, he retired from the bench. This case was assigned to Judge Silva on April 29, 2019. (APP904.)

Sunrise then sought leave to file a third-party complaint against Kia and NHG (Kia's "employer") for contribution and indemnity, which was granted by Judge Silva. (APP62-65.) Sunrise's third-party complaint was filed on June 14, 2019. (APP56-61.) Kia filed his answer to that complaint on August 2, 2019. (APP66-80.) NHG did not file its answer until December 27, 2019. (APP86-92.)

NHG then filed a motion for judgment on the pleadings on March 19, 2020, which Kia joined. (APP905.) When Judge Silva granted that motion, she invited reconsideration of the ostensible agency issue, even though that issue was not

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before her. (APP116-17.) Sunrise then renewed its motion for partial summary judgment regarding ostensible agency on May 20, 2020, which Choloe opposed. (APP905.)

2. *The SOL and relation-back issues have been on the court's radar since 2020.*

Judge Silva granted Sunrise partial summary judgment on the issue of ostensible agency in July 2020. (APP180-82.)

Choloe sought reconsideration of that order on October 12, 2020, and filed a motion for leave to amend her complaint to add Kia and NHG back into the case on October 16, 2020, after incurring the expense of Dr. Savluk's expert affidavit and update to Dr. Karamardian's affidavit. (APP906-7.) Judge Silva denied reconsideration[1] but granted leave to add Kia and NHG back into the case. (APP254-55 & 267-68.) Judge Silva denied Kia's motion for attorneys fees and costs relating to the dismissal of Sunrise's third-party complaint because she knew

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[1]Choloe filed a writ petition in January 2021 because Judge Silva made improper factual determinations in Sunrise's favor when it granted partial summary judgment on ostensible agency before discovery closed and all the evidence could be obtained. That writ petition was denied on March 9, 2021. (*See Green v. Dist. Ct. (Delee, M.D.)*, Case No. 83357.)

he was a proper defendant. (APP248-49.) Her order adding Kia and NHG back into the case supports their inclusion with findings that the amendment relates back to Choloe's original complaint. (APP267-68.)

After Choloe filed her amended complaint, the case was reassigned to Judge Lilly-Spells on January 4, 2021. (APP907.)

Kia filed a motion to dismiss Choloe's amended complaint on January 21, 2021. That motion raised the same SOL and relation-back issues presently before this Court. (APP304-438.) Judge Lilly-Spells denied Kia's motion, finding Choloe's amended complaint related back to the original complaint. (APP479-80.) Kia then filed a motion for reconsideration, which was denied. (APP908.)

On August 12, 2021, Kia filed his first writ petition regarding the SOL and relation-back issues. (APP518-58.) The case was stayed for approximately nine (9) months during the Supreme Court's consideration of Kia's petition. (APP559-68 & 588-89.) The Supreme Court ordered the parties to file their respective Answer and ultimately denied Kia's petition on May 13, 2022, after all briefing was completed and without oral argument. (APP586-87.)

The stay on the case was lifted on June 28, 2022. (APP588-89.) The case was reassigned to Judge Eller on January 27, 2023. (APP910.)

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3. *Kia used the reassignment to Judge Eller as a new opportunity for motion practice, despite no new evidence.*

On March 3, 2023, Kia filed his motion for summary judgment ("MSJ"). (APP617-738.) Judge Eller denied it because she found the amended complaint relates back to support Kia's inclusion in the case. That order specifically finds that Kia "has been provided timely notice and [] is not prejudiced by his inclusion in this case based on how this case has progressed." (APP872.) That order was entered on May 25, 2023. (APP869.)

Kia's instant petition ignores the fact that all evidence attached to his MSJ was produced prior to filing his motion to dismiss. Kia admitted to Judge Eller that all the evidence contained in his MSJ was available to him at the time he filed the motion to dismiss in front of Judge Lilly-Spells. Judge Eller took issue with Kia's motion because it was substantially similar to his prior motion practice before Judge Lilly-Spells. It was at that time Judge Eller notified Kia she was considering sanctions for filing a frivolous motion. Kia's counsel could have opposed or asked to be heard regarding this issue. Instead, Kia's counsel chose to remain silent. Judge Eller then stated she would take the matter under advisement to compare Kia's motions in chambers. (APP809-10.)

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4. *Kia engaged in judge-shopping.*

On April 25, 2023, Judge Eller issued her minute order admonishing Kia's litigation conduct because it was clear he attempted to take advantage of the reassignment when he filed a substantially similar motion to one previously denied. Judge Eller notes that Choloe already defended against this matter twice. In her minute order, Choloe was directed to submit a Memorandum of Fees and Costs, which she did. (APP832 & 876-83.)

On June 20, 2023, Kia filed his motion to retax the fees and costs incurred by Choloe. (APP884-89.) Kia's motion to retax gave him a second chance to oppose and be heard on the sanctions issue. His motion argued for a reduction of fees based on *Brunzell*. (APP886-87.) The Order of Admonishment awards Choloe $7,817.75 in attorneys fees and costs. Choloe originally requested $9,284.75, but Judge Eller reduced that amount based on her consideration of the *Brunzell* factors. Under *Brunzell*, she found that an award of $7,817,75 was reasonable. (APP893-94.) The award of fees and costs in the Order of Admonishment has not been reduced to judgment. Kia never filed a motion to reconsider the Order of Admonishment. Choloe has not filed a motion to reduce the award to judgment.

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5. *Kia ignores his intentional delays and obstructive discovery tactics when he claims prejudice.*

Kia began concealing his identity from Choloe when he first met her. He should have told her he was not affiliated with Sunrise. He did not tell her he was an independent contractor associated with a private medical practice. (SUPP357.) He never billed for his medical care, so no bill or Explanation of Benefits could ever be sent to Choloe on his behalf to put her on notice that he was not an agent of Sunrise. (SUPP461-62 & 477-84.) The contracts between hospitals, doctors, medical groups, and insurance companies are not public records, so the legal relationships between such entities and individuals is unknown until a plaintiff gets into discovery.

Kia's intentional delays speak volumes in connection to the instant petition. Kia's custodian of records submitted a "Certificate of No Records" on or about February 26, 2018, explaining under penalty of perjury, "Subject was never a patient/client/employee of ours." (SUPP477.) It is unknown when Kia first received the records request from Sunrise. After claiming Choloe was not his patient, Kia no-showed his properly noticed deposition. (SUPP15-16.) Choloe

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deposed Kia on November 14, 2018, and discovered he caused her legal injury. (SUPP268-341.) Kia has been a party to this case since June 14, 2019. (APP56-61.)

This case was stayed (causing further delay) for approximately nine months while Kia's original writ petition was pending on the same SOL and relation-back issues. (APP559-68 & 588-89.)

During the hearing on Kia's MSJ, he claimed he is prejudiced by this case because "[h]e's had to report it to the Nevada Board of Examiners" ("the Board"). (APP807.) However, Kia has already been in trouble with the Board relative to his medical treatment of Choloe. On December 16, 2021, the Board filed a complaint against him, alleging (1) malpractice, and (2) violating the standard of care by failing to obtain a consult. On March 4, 2022, Kia stipulated to be disciplined based on his medical treatment of Choloe. (SUPP234-42.) Kia was not candid with Judge Eller when he claimed he was prejudiced by this case in relation to the Board.

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Discovery has been ongoing in an attempt to locate Kia's billing records relating to his medical treatment of Choloe. Kia adamantly claims he has no records and has refused to explain why, sending Choloe on a wild goose chase for something that is typically a no-brainer in medical malpractice discovery. (SUPP461-62 & 477-84.)

Choloe believes Kia and/or NHG allowed the destruction of these records. NHG's NRCP 30(b)(6) witness recently admitted its records were destroyed in 2020 or 2022, which is after Kia and NHG were brought into this case. (SUPP517-18.) It is believed this is why Kia filed the instant petition, simply to delay discovery.

These recent discoveries have occurred during the six months since Judge Eller heard Kia's MSJ. Since that motion was heard, it has become apparent that Kia has not complied with his duties under NRCP 16.1.

The multiple judicial reassignments this case has endured is the reason it has such a unique procedural journey. Despite the reassignments and the conflicting rulings between Judge Smith and Judge Silva, Judge Lilly-Spells' denial of Kia's motion to dismiss, and Judge Eller's denial of his substantially similar MSJ are both well-within their discretion and not subject to writ relief.

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(APP476-89, 496-506 & 869-75.) This Court previously declined to grant such extraordinary relief when Kia sought a writ of mandamus regarding Judge Lilly-Spell's denial of his motion to dismiss. (APP586-87.)

VI. LEGAL ARGUMENT

The original jurisdiction to issue a writ of mandamus lies with this Court. *Segovia v. Eighth Jud. Dist. Ct.*, 133 Nev. 910, 911, 407 P.3d 783, 785 (2017). Writ relief is not available when issues of fact exist. *Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (Nev. 1997).

If there is a "plain, speedy and adequate remedy in the ordinary course of law," then extraordinary writ relief is not available. *Id.*

Here, Kia seeks extraordinary relief on two issues for which a "plain, speedy, and adequate remedy [exists] in the ordinary course of law." Both the sanctions issue and denied MSJ were well-within the court's discretion and not subject to extraordinary relief. Both issues are discussed below.

A. The Order of Admonishment was meant to deter the abusive litigation practices employed by Kia.

The standard of review regarding a district court's award of sanctions, including attorney's fees and costs, is abuse of discretion. *Valley Health Sys. v. Estate of Doe*, 134 Nev. 634, 638, 427 P.3d 1021, 1026-27 (Nev. 2018);

Gunderson v. D.R. Horton, 130 Nev. 67, 80, 319 P.3d 606, 615 (Nev. 2014). "Noncase-concluding sanctions will be upheld if the district court's sanctions order is supported by substantial evidence." *Valley Health*, 134 Nev. at 639.

Kia seeks extraordinary relief from an award of $7,817.75 in attorney's fees and costs. (APP894.) Kia relies on *Black v. Eighth Jud. Dist. Ct.,* 531 P.3d 1267 (Nev. 2023), claiming it is "virtually identical to this case." (*See* Petition for Writ of Mandamus, filed on September 19, 2023 ("Petition"), at p.1.) In reality, the cases cannot be any more different. In *Black*, the district court cancelled a bench trial two weeks before it was scheduled to begin and sanctioned both the plaintiffs and defendants by ordering them to a private mediation with JAMS. (*See* Petition for Writ of Mandamus, *Black v. Eighth Jud. Dist. Ct.,* filed on June 20, 2023, Case No. 86787, at p.1.) Nothing about *Black* is remotely similar to the instant case.

Kia's judge-shopping, failure to engage in other speedy remedies, and lack of necessity for extraordinary relief are discussed below.

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1. *The instant petition is Kia's fifth bite of the apple regarding the SOL/relation-back issue before initial expert reports could ever be exchanged.*

EDCR 7.60(b)(1 & 3) allows the court to sanction a party "after notice and an opportunity to be heard" when a motion is presented that is "obviously frivolous, unnecessary or unwarranted" or if he "multiplies the proceedings ... to increase costs unreasonably or vexatiously."

Once a motion is "heard and disposed of" it may not be "renewed in the same cause, nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion." EDCR 2.24(a). Reconsideration of a prior ruling must be requested within 14 days of notice of entry of the order. EDCR 2.24(b).

Similarly, EDCR 7.12 prohibits a party from filing a motion that was previously denied by another district court judge. In *Moore v. Las Vegas*, this Court analyzed EDCR 7.12's predecessor (District Court Rule 27), which are substantially similar. 92 Nev. 402, 551 P.2d 244 (Nev. 1976). The intent behind this rule is to "prevent 'judge-shopping' once a motion is granted or denied." *Id.* at 404. The purpose of this rule "is to preclude litigants from attempting to have an unfavorable determination by one district judge overruled by another." *Id.* It is an abuse of discretion to even entertain such a motion. *Id.* at 405.

Kia feigns ignorance when he claims "the concept of forum-shopping does not apply here." (*See* Petition, at p.16.) Kia knows very well Judge Eller took issue with his MSJ because it is substantially similar to the motion to dismiss he filed in front of Judge Lily-Spells, including reconsideration and a writ petition relative to that motion. He filed the MSJ because of the department reassignment.

His argument that the motions are not substantially similar because one is under NRCP 12, while the other is NRCP 56 ignores the fact both motions rely on the same law and the same evidence was available at the time both motions were filed. The motion to dismiss is 135 pages (including exhibits) and the MSJ is 118 pages (including exhibits). (APP304-438 & 617-734.) The evidence that Kia relies on in his MSJ does not provide any clarity regarding the SOL or relation-back issues, discussed *infra*.

Kia attempts to claim his MSJ was filed after the record was more fully developed, but he neglects to state he relied on evidence that was available prior to filing the motion to dismiss before Judge Lilly-Spells. (*See* Petition, at p.20; *compare* APP809.) Choloe attached the same evidence to oppose both motions. (SUPP52-225 & 243-420.)

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Kia should have waited until the close of discovery to file the MSJ. Instead, he is now on his fifth bite of the apple, in violation of EDCR 2.24(a) and EDCR 7.12.

Judge Eller recognized Kia's actions in filing serial motions as frivolous, unnecessary, and unwarranted. He multiplied the proceedings to unreasonably and vexatiously increase the cost for Choloe to litigate. *See* NRS 18.010(2)(b). It is true the Order of Admonishment could have more artfully explained the issue, but that can easily be repaired on remand. *See Gunderson,* 130 Nev. at 82 (remanding an order for attorneys fees and costs for additional findings). Any deficiency can be repaired when Choloe files a motion to reduce the award to judgment by including findings of fact and conclusions of law. *See* NRCP 58.

2. *A motion for reconsideration would have cured any procedural deficiencies in the Order of Admonishment.*

Kia complains he was not provided an opportunity to oppose or be heard regarding the sanctions awarded against him. "A court's inherent power gives it the authority to impose 'a sanction for abuse of the judicial process', or, in other words, for bad faith conduct in litigation." *Sun River Energy v. Nelson*, 800 F.3d 1219, 1227 (10th Cir. 2015); *Bahena v. Goodyear Tire & Rubber*, 126 Nev. 243, 252, 235 P.3d 592, 598 (Nev. 2010). When the sanctions are not case-concluding,

the length and nature of the hearing is left to the discretion of the court. *Bahena*, 126 Nev. at 256. The opportunity to oppose and be heard regarding sanctions only raises issues with procedural due process, which may be waived or cured. *Id.* at 1230-31. Both *Sun River* and *Valley Health*, hold a motion for reconsideration cures such procedural due process deficiency. *Sun River*, 800 F.3d at 1230-31; *Valley Health*, 134 Nev. At 647-48.

Here, Kia had the opportunity to oppose and be heard during the hearing on his MSJ and on his motion to retax. He simply chose not to take the opportunity. (APP810-11 & 884-89; SUPP454-58.) He should have filed a motion for reconsideration, which is a "plain, speedy, and adequate remedy in the ordinary course of law." Instead, he filed the instant petition, which is not as speedy.

Kia claims the district court failed to analyze the *Brunzell* factors. *See Brunzell v. Golden Gate Natl. Bank*, 85 Nev. 345, 455 P.2d 31 (Nev. 1969). Both Kia and Choloe engaged in a *Brunzell* analysis relative to Kia's motion to retax. (APP884-89; SUPP434-58.)

While Judge Eller's examination of those factors is not included in the Order of Admonishment, the reduction of Choloe's initial request of $9,131.35 to $7,814.25 in attorneys fees shows the factors were considered. (APP893-94.) Such reduction could only be achieved through a *Brunzell* examination, including

consideration of "(1) the qualities of the advocate ...; (2) the character of the work to be done ...; (3) the work actually performed by the lawyer ...; [and] (4) the result." *Brunzell*, 85 Nev. at 349 (italics omitted).

The failure of a court to consider the *Brunzell* factors is resolved by remanding the order back to the district court for further findings, not simply vacating the order, as requested by Kia. *See Gunderson*, 130 Nev. at 82.

This Court should deny Kia's petition because a motion for reconsideration was the "plain, speedy and adequate remedy" that was available in the ordinary course of law to resolve any issues with the Order of Admonishment.

B. The district court properly dismissed Kia's MSJ because Kia was added to the case before the SOL and is a proper defendant.

As a general rule, this Court does not consider writ petitions challenging the denial of summary judgment. *Smith*, 113 Nev. at 1344. This Court does not exercise its discretion when issues of fact exist, rendering application of the law impossible to a preponderance of the evidence. *Id.* at 1345; *see Deiss v. So. Pac. Co.*, 56 Nev. 169, 177-78, 53 P.2d 332, 335-36 (Nev. 1936).

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An order granting summary judgment is reviewed *de novo*. *Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. Adv. Op. 33, 465 P.3d 862, 870 (Nev. App. 2020). Under NRCP 56(c), summary judgment may not be granted when there are genuine issues of material fact. *Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 216 P.3d 788, 791 (2009).

A genuine issue of material fact exists when a jury verdict could be rendered in favor of the non-moving party. *Posadas v. City of Reno,* 109 Nev. 448, 452, 851 P.2d 438 (1993). On summary judgment, all evidence and associated inferences are "viewed in the light most favorable to the non-moving party." *Woods v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026 (2005).

Because Kia became a party to this action within the applicable SOL and Choloe's amended complaint properly relates back, extraordinary relief should not be granted in Kia's favor.

1. *Kia was properly brought into this case well-within the SOL.*

Under NRS 41A.097(2), an action for professional negligence must be brought within three years of the date of injury or within one year after the plaintiff discovers the injury. "Injury," includes both physical damage (as used for the three-year statute) and the negligence causing the damage (as used for the one-year statute), referred to as "legal injury." *Massey v. Litton*, 99 Nev. 723, 726, 669

P.2d 248, 250 (1983). The SOL "is tolled for any period during which the provider of health care has concealed any act, error or omission." NRS 41A.097(4); *see Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 248, 277 P.3d 458, 460 (Nev. 2012).

Neither the law nor facts may be strained to aid a SOL defense and no presumptions in favor of the defense may be indulged by the court. *Howard v. Walle-Camplan & Tiberti*, 67 Nev. 304, 312, 217 P.2d 872, 876 (Nev. 1950). The three-year and one-year statutes are discussed below.

a. *Kia was brought into this case less than three years after Choloe presented at Sunrise to deliver her baby.*

The three-year statute begins to run "once there is injury from which appreciable harm manifests." *Libby v. Eighth Jud. Dist. Ct.*, 130 Nev. 359, 364, 325 P.3d 1276, 1279 (Nev. 2014).

Sunrise's third-party complaint was filed on June 14, 2019, less than three years after Choloe first presented at Sunrise to deliver her baby before she suffered any harm. (APP56-61.) Based on that filing date, there should be no question that the three-year statute is satisfied.

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Kia ignores the date he first became a party to this lawsuit. By ignoring the third-party complaint, he incorrectly claims Choloe has not satisfied the three-year statute. Kia's citations to *Libby* and *Garabet v. Sup. Ct.*, 151 Cal.App.4th 1538, 60 Cal.Rptr.3d 800 (Ct.App. 2007), does not change the facts of this case. Those cases are inapposite because the third-party complaint eliminates any question of whether the three-year statute is satisfied.

Because Choloe's case is medically complex, expert testimony would be necessary to determine on what actual date appreciable harm manifested relative to Kia's care. Such testimony is not necessary because Sunrise brought Kia into this case less than three years after Kia's medical treatment in issue.

b. *Choloe discovered Kia caused her legal injury during his November 2018 deposition.*

The existence of a "legal injury" is important in the medical malpractice context because not all injuries suffered give rise to a claim. The *Massey* Court reasoned:

> [W]hen injuries are suffered that have been caused by an unknown act of negligence by an expert, the law ought not to be construed to destroy a right of action before a person even becomes aware of the existence of that right.
>
> Furthermore, to adopt a construction that encourages a person who experiences an injury, dysfunction or ailment, and has no knowledge of its cause, to file a lawsuit against a health care provider to prevent

> a statute of limitations from running is not consistent with the unarguably sound proposition that unfounded claims should be strongly discouraged.

Id. at 727. The one year statute considers the plaintiff's awareness and is based on when the plaintiff discovers who caused legal injury. *Massey*, 99 Nev. at 728. It "ordinarily presents as an issue of fact to be decided by the jury." *Winn,* 128 Nev. at 258.

Choloe discovered she suffered a "legal injury" by Kia during his November 14, 2018, deposition. (SUPP268-341.) She would have discovered that injury earlier if Kia had properly billed for his medical treatment and shown up to his original deposition. (SUPP15-16, 461-62 & 477-84.)

During his deposition, Kia confirmed he made the decision to discharge Choloe. (SUPP327-28.) The deposition focused on why he would discharge her with a small bowel obstruction and high white blood cell count. (SUPP314.)

At the time Dr. Karamaradian executed her initial affidavit in this case, it was not clear who was in charge of Choloe's care during her second stay at Sunrise, which is why the affidavit describes the discharging conduct without reference to the named provider. (SUPP261.) *See* NRS 41.071(3).

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Kia's deposition confirmed he breached the standard of care. That is why Sunrise filed a third-party complaint, adding Kia and NHG into this action less than one year later, after Judge Smith denied Sunrise's partial MSJ on ostensible agency. (APP56-61 & 93-97.) NHG then delayed this lawsuit by waiting until December 27, 2019, to answer that complaint. (APP86-92.)

When Judge Silva dismissed Kia and NHG from this case, Choloe immediately sought to rectify the situation, as can be seen through the motion practice that has occurred since. (APP905-11.)

Kia argues Choloe was on inquiry notice to include Kia as a party to her original complaint because he signed her discharge from Sunrise on July 16, 2016. (*See* Petition, at p. 25.) His inclusion on medical records is not sufficient to put her on inquiry notice, however, because many doctors are referenced in those same records. There are notes in the medical records regarding conversations Kia had with other doctors, including Delee and others of unknown affiliation. Those notes made it difficult to ascertain who actually made the decision to discharge.

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This Court should remember Choloe did not choose Kia. Choloe chose Delee and Sunrise to provide her medical care in July 2016. Choloe believed Kia was an agent of Sunrise because no one told her otherwise while she was admitted at Sunrise. (SUPP357.) The medical records are silent regarding Kia's medical group or professional corporation he is affiliated with if not Sunrise.

Kia never billed Choloe's insurance for the medical treatment he provided. He never put her on notice that he was not an agent of Sunrise, neither during the course of his treatment or by sending a bill to her address. (SUPP357, 461-62 & 477-84.) Instead, an unrelated doctor billed Choloe's insurance for Kia's care, so any Explanation of Benefits that Choloe would have received concealed Kia's identity. (SUPP461-62.) Kia ignores this concealment of his identity from Choloe when he claims the one-year statute is not satisfied.

Any inquiry notice that could be imputed to Choloe was clouded by the fact the records available to Choloe did not properly disclose the legal relationships between the actors involved. Such notice was further clouded when Kia's Custodian of Records falsely stated under penalty of perjury (on February 26, 2018) that Choloe was not Kia's patient so no billing records exist. (SUPP477.)

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The consideration of the one-year statute hinges on when the "legal injury" is discovered, not the physical injury. Kia conflates these injuries by ignoring his failure to properly communicate to Choloe his identity/affiliation and bill for his care. Kia made this issue monumentally more difficult by permitting his Custodian of Record to falsely state Choloe was never his patient and forcing Choloe to file a motion for an order to show cause to force Kia's deposition appearance in November 2018. (SUPP1-21 & 477.)

Choloe did not close her eyes to the information available to her. Kia forced her to wade through inconsistent statements, an absence of billing records, and an intentional delay of his deposition to finally get the truth in November 2018 that he made the decision to discharge her on July 16, 2016. Kia's attempts to evade this case should be considered in relation to the one-year statute. Kia's actions prevented Choloe from discovering he caused her legal injury sooner.

The *Massey* Court's interpretation of the applicable SOL confirms Choloe's decision to not sue each and every healthcare provider. A plaintiff should not be encouraged to add every single healthcare provider to the lawsuit to avoid a similar SOL issue. 99 Nev. at 727. That would lead to the absurd result of having 10-20 defendants (or more) in medical malpractice lawsuits. This would defeat the purpose of NRS Chapter 41A, the legislative history reveals it was for the purpose

of keeping doctors in Nevada. *See* Nev. Assem. Comm. on Jud., SB 292, 78th Sess., pp. 40 & 44, May 26, 2015. Kia's arguments, if adopted by this Court, would lead to the reverse result.

Choloe's original complaint was drafted with this purpose in mind based on her chosen healthcare providers. Choloe did not choose Kia (or any other healthcare providers at Sunrise other than Delee) and how Kia was assigned to her is presently the subject of discovery. The contracts between doctors, their professional corporations, hospitals, and insurance companies are not a matter of public record. Healthcare providers heavily guard the production of contracts or claim they simply have informal agreements.

Again, Kia ignores the fact he was added as a party to this case on June 14, 2019, approximately six (6) months after Choloe discovered he caused her legal injury. (APP56-61.) Based on these facts, this Court should find the one-year statute is satisfied.

Because this SOL issue has been reviewed by multiple judges, including a panel of this Court, Kia's requested extraordinary relief should be denied because the SOL is satisfied. At the very least, this Court could find there are genuine issues of material fact regarding when appreciable harm manifested (three-year

statute), when Choloe discovered her legal injury (one-year statute), and if tolling[1] of the SOL is warranted because Kia concealed his identity by failing to advise Choloe he is not an agent of Sunrise and not properly billing for his medical treatment.

2. *NRCP 15(c) alleviates any SOL issue because the addition of Kia relates back to the original complaint.*

Leave of court to amend a complaint is freely given when justice requires. NRCP 15(a)(2). It is in the sound discretion of the court to grant leave to amend a complaint. *Stephens v. S. Nev. Music Co.*, 89 Nev. 104, 105, 507 P.2d 138, 139 (1973). The court must liberally construe NRCP 15(c) "to allow relation-back of the amended pleading where the opposing party will be put to no disadvantage." *Id.* This allows "the court to reach the merits, as opposed to disposition on technical niceties." *Id.*

An amended complaint relates back to the original complaint when it arises out of the same conduct, transaction, or occurrence. NRCP 15(c)(1). *Costello v. Casler* holds that NRCP 15(c)'s relation-back effect applies to the addition of parties. 127 Nev. 436, 440, fn. 4, 254 P.3d 631, 634 (Nev. 2011); *see also Servatius v. United Resort Hotels*, 85 Nev. 371, 372-73, 455 P.2d 621, 622 (Nev.

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[1] This argument was not previously raised before the district court because it is based on recent developments during the discovery process.

1969). The relation-back doctrine overcomes the SOL defense when a proper defendant is added to an amended complaint if he "(1) receives actual notice of the action; (2) knows [or should have known] that it is the proper party; and (3) has not been misled to its prejudice by the amendment." *Id.* (citing *Echols v. Summa Corp.*, 95 Nev. 720, 722, 601 P.2d 716, 717 (1979) (internal quotations omitted); NRCP 15(c)(2).

Notice and knowledge may be imputed based on the relationship between defendants that share an identity of interest, such as Sunrise and Kia's relationship. *Id.* at 441.

Because the Nevada Rules of Civil Procedure are modeled after the federal rules, "cases interpreting the federal rules are strongly persuasive." *FCHI v. Rodriguez,* 130 Nev. 425, 433, 335 P.3d 183, 189 (2014).

Consideration of whether an amended complaint relates back "depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading." *Krupski v. Costa Crociere*, 560 U.S. 538, 541, 130 S.Ct. 2485, 2490 (2010). It is "error to conflate knowledge of a party's existence with the absence of mistake." *Id.* at 548

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Justice Sotomayor goes on to explain:

> That a plaintiff knows of a party's existence does not preclude her from making a mistake with respect to that party's identity. A plaintiff may know that a prospective defendant--call him party A--exists, while erroneously believing him to have the status of party B. Similarly, a plaintiff may know generally what party A does while misunderstanding the roles that party A and party B played in the "conduct, transaction, or occurrence" giving rise to her claim. If the plaintiff sues party B instead of party A under these circumstances, she has made a "mistake concerning the proper party's identity" notwithstanding her knowledge of the existence of both parties. The only question under Rule 15(c)(1)(C)(ii), then, is whether party A knew or should have known that, absent some mistake, the action would have been brought against him.

Id. at 549. The reasonableness of the mistake is not at issue. *Id.* Even the deliberate choice by a plaintiff to sue a defendant based on "a misunderstanding about his status or role" does not prevent a finding that NRCP 15(c)(2) is satisfied. *Id.* The purpose of the doctrine is to balance the policy of resolving cases on their merits against a defendant's interest of repose. *Id.* at 550. Repose is a windfall to a defendant "who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity." *Id.* "Because a plaintiff's knowledge of the existence of a party does not foreclose the possibility that she has made a mistake of identity about which that party should have been aware, such knowledge does not support that party's interest in repose." *Id.*

Finally, "the speed with which a plaintiff moves to amend her complaint ... has no bearing on whether the amended pleading relates back." *Id.* at 553.

There is no dispute that the claim brought against Kia arose out of the same conduct, transaction, and occurrence that Choloe attempted to set out in her original complaint and supporting affidavit. *See* NRCP 15(c)(1).

While the one-year statute is measured from Choloe's perspective, the relation-back doctrine to overcome the SOL is considered from Kia's perspective. *See Massey*, 99 Nev. at 728; *compare Krupski*, 560 U.S. at 541. *Krupski* supports application of the relation-back doctrine to the addition of Kia. Choloe misunderstood the roles and identities between Sunrise and Kia. While she may have been aware of Kia's existence, via the available medical records, she misunderstood the roles played by Sunrise and Kia. *Krupski* allows relation-back in this situation. *Id.* at 549. This is why the relevant factors are considered from Kia's point of view. He has the best information to know if he is a proper defendant to this lawsuit.

a. *Kia knows he is a proper defendant to this case.*

Kia received actual notice of this case prior to the filing of the instant amended complaint. It is unknown when Sunrise first notified Kia of this lawsuit. Kia has privileges at Sunrise, and it would be prudent for Sunrise to notify Kia of

this lawsuit as part of his hospital credentialing. Sunrise also sent a records request to Kia at some point prior to the February 26, 2018, Declaration of Custodian of Records that incorrectly declares Choloe was not his patient. (SUPP477.)

It cannot be disputed that Kia received notice of this case when Choloe served him with a Notice of Deposition on August 24, 2018. (SUPP6-10.) She had to file a motion for an order to show cause to get him to appear for the deposition. (SUPP1-21.) It cannot be disputed Kia received notice as to his actual involvement in the substance of this case during his November 2018 deposition. (SUPP268-341.) He became an actual party to this case on June 14, 2019, via Sunrise's third-party complaint. (APP56-61.)

Kia knows he is a proper defendant of this case, despite the fact his instant petition deflects in response to the first two *Costello/Echols/Servatius* factors. Kia does not advise this Court when he received actual notice of this case. His failure to provide evidence of when he was first notified of this case is fatal to his defense that the amended complaint does not relate back. He further refuses to provide evidence why he is not a proper defendant based on his knowledge of the underlying facts of this case. He intentionally omits this information because he

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knows he breached the standard of care. He entered into a disciplinary settlement with the Board regarding his medical treatment of Choloe! (SUPP234-42.) Kia knows he is a proper defendant to this lawsuit.

b. *Kia has not been misled to his prejudice regarding being a party into this case.*

Judge Silva ensured Kia was not misled to his prejudice by this amendment. She denied his request for costs because she granted Choloe leave to add him back in. (APP244-52.)

Kia has not been disadvantaged by his addition to this case. When he was a third-party defendant, he received a copy of all discovery conducted and even engaged in the discovery process, including attendance at Choloe's deposition. (SUPP412-20.) Kia's actions have actually worked to the disadvantage of Choloe, Delee, and Sunrise. Choloe would have discovered Kia caused her legal injury sooner if he had actually billed for his medical care, shown up to his original deposition, and correctly responded to the billing records request. This unnecessarily delayed the discovery that Kia caused Choloe legal injury. Kia omits these facts because he has not suffered any disadvantage and actually disadvantaged all other parties in this case.

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Kia has failed to provide any evidence he was ever misled to his prejudice by the amendment. Kia claims to suffer extreme prejudice, yet he is unable to articulate the how's and why's in light of his delays of this case. When Judge Eller directly asked how he has suffered, he complained that the case gets disclosed to the Board. (APP807.) By claiming that form of prejudice, Kia was not candid with the court. He neglected to advise the court he agreed to be disciplined by the Board for his medical care of Choloe. (SUPP234-42.) Kia has suffered no prejudice. Choloe has fulfilled her duty under NRCP 15(c) and *Echols*, showing Kia is a proper defendant.

Because Kia cannot reconcile his delays of this case to claim prejudice, the instant petition should be denied. *Echols'* third element regarding whether the amendment mislead Kia to his prejudice is key, and Kia has failed to show how the denial of summary judgment is clearly erroneous based on that element.

As such, this Court should find the amended complaint relates back to the original complaint for purposes of overcoming any SOL issue. At the very least, this Court could find there are issues of fact regarding the *Echols* elements and deny the extraordinary relief requested by Kia.

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VII. CONCLUSION

Based on the foregoing, Kia's instant petition should be denied.

DATED this 13 day of November, 2023.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer 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 WordPerfect 2021 in 14 point font and Times New Roman.

2. I further certify that this answer complies with the page- or type-volume limitations of NRAP 21(d) because, excluding the parts of the answer exempted by NRAP 32 (a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more and contains 6,996 words.

3. Finally, I 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 in the answer 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.

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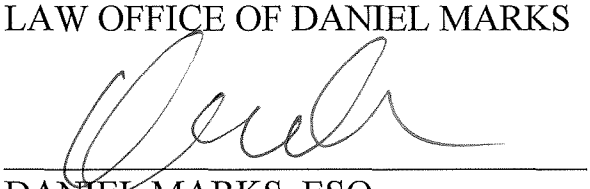
4. I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellant Procedure.

DATED this 13 day of November, 2023.

LAW OFFICE OF DANIEL MARKS



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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the LAW OFFICE OF DANIEL MARKS, and that on the 13 day of November, 2023, I did serve by way of electronic filing, a true and correct copy of the above and foregoing **ANSWER TO PETITION FOR WRIT OF MANDAMUS** on the following:

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I further certify that I did deposit in the U.S. Mail in Las Vegas, Nevada, with first class postage fully prepaid thereon a true and correct copy of the **ANSWER TO PETITION FOR WRIT OF MANDAMUS** to the addresses as follows:

The Honorable Crystal Eller
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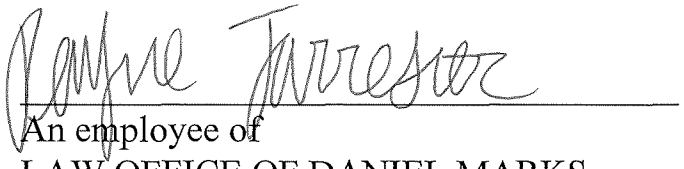

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