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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PETITIONER'S REPLY BRIEF

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ARGUMENT

A. Contrary to Ms. Green's Argument, the Ruling in *Black* Is Applicable Here

Ms. Green's argument regarding *Black v. Eight Judicial Dist. Court*, ___ Nev. ___, 531 P.3d 1267, 2023 WL 4539644 (Nev. S. Ct. Case No. 86787, July 13, 2023) (unpublished disposition), is misplaced. (Answering Brief, p. 14). Ms. Green failed to address the central point in *Black*: "the district court manifestly abused its discretion in issuing sanctions without first affording the parties adequate notice and an opportunity to be heard." *Id*. at *1. That holding makes the case applicable because that is exactly what happened here. The District Court sanctioned Dr. Kia without affording him an opportunity to be heard. Therefore, the due process considerations in *Black* firmly apply to this case.

B. Dr. Kia Did Not Engage in Judge Shopping

Ms. Green's reliance on EDCR 7.12 to support her allegation of judge shopping is misplaced. (Answering Brief, pp. 15 – 16). She bases her allegation solely on the fact that the case had been reassigned several times after Dr. Kia had filed his motion to dismiss pursuant to NRCP 12(b)(5). (*Id*.). That is insufficient to run afoul of EDCR 7.12. The rule's plain language states that parties may not bring "the **same** application, petition or motion" before another judge without the written consent of the first. EDCR 7.12. Dr. Kia did not bring his NRCP 12(b)(5) motion twice; he brought two different motions requiring an analysis under two completely

different standards. For this same reason, EDCR 2.24(a) does not apply as Ms. Green asserts. (Answering Brief, p. 15).

Ms. Green's reliance on *Moore v. Las Vegas*, 92 Nev. 402, 551 P.2d 244 (1976), is equally misplaced. *Moore* recognized that the purpose of then District Court Rule 72 (the predecessor of EDCR 7.12) was to prevent judge shopping. 92 Nev. at 405 – 406, 55 P.2d at 246. *Moore* also recognized that the rule's purpose was "not offended where, as here, the case becomes assigned to another judge by reason of some fortuitous event such as death or the elective process and **not by reason of any action initiated by or within the control of the parties**." *Id.* (emphasis added). By the time Dr. Kia filed his motion for summary judgment, the Clerk had administratively reassigned the case twice, and another defendant and Ms. Green had each filed their own, separate peremptory challenges. (Writ Petition, p. 10). Dr. Kia had no role in any of those changes. Therefore, bringing an entirely different motion several years after the original motion to dismiss does not violate either the language or intent of EDCR 7.12.

Ms. Green also makes an inconsistent argument. She asserts that Dr. Kia "should have waited until the close of discovery to file his MSJ," implying that Dr. Kia would not run afoul of EDCR 7.12 if he had just waited. (Answering Brief, p. 16). That makes no sense because the timing would not have had any impact on a potential EDCR 7.12 violation. Similarly, Ms. Green argues that she opposed the

motion for summary judgment with the same evidence that she used to oppose the motion to dismiss. (Answering Brief, p. 16 ("Choloe attached the same evidence to oppose both motions." (emphasis in original)). Her argument actually highlights the difference between the motions as a Rule 12(b)(5) motion focuses on the pleadings and a motion for summary judgment is all about the evidence. As Ms. Green knows, the District Court never converted the Rule 12(b)(5) motion to dismiss into a motion for summary judgment. Her evidence would have had no role in consideration of the motion to dismiss while it would have been considered when analyzing the motion for summary judgment. (*See* Petition, pp. 17 – 20).

C. The Rules Did Not Require Dr. Kia to Bing a Motion for Reconsideration

Ms. Green does not dispute that a due process violation occurred, and instead argues that it could have been cured. (Answering Brief, p. 16). Nothing required Dr. Kia to bring a motion for reconsideration to cure the due process violations of the sanctions order. Ms. Green failed to cite any authority requiring Dr. Kia to bring a potentially curative motion for reconsideration before seeking writ relief. Indeed, *Black* did not involve a motion for reconsideration. *Black* specifically points out that a motion for reconsideration did not follow the sanctions order. *Black* at *1. *Black* did not state that the sanctioned party was required to or could have cured that due process violation with a motion for reconsideration. *Id.*

Ms. Green's reliance on *Valley Health System, LLC v. Doe,* 134 Nev. 634, 427 P.3d 1021 (2018), and *Sun River Energy v. Nelson*, 800 F.3d 1219 (10th Cir. 2015), is misplaced. (Answering Brief, p. 18). Both recognized the due process requirement, and both found that a motion for reconsideration cured the problem. *Sun River Energy,* 800 F.3d at 1230 – 31; *Valley Health System,* 134 Nev. at 647 – 48, 427 P. 3d at 1032. Neither stands for the proposition that the sanction party **had** to bring a motion for reconsideration to cure the due process violation. *Id*.

D. The District Court Failed to Conduct the *Brunzell* Analysis

On one hand, Ms. Green appears to acknowledge that the District Court failed to consider the *Brunzell* factors. (Answering Brief, p. 19 ("The failure of the court to consider the Brunzell factors . . . ."). Alternatively, she argues that the District Court's reduction of her requested fees proves that it conducted the required analysis under *Brunzell v. Golden Gate National Bank,* 85 Nev. 345, 455 P.2d 31 (1969). (Answering Brief, p. 18). This argument is incorrect. The District Court's order does not state that it considered the *Brunzell* factors. (APP000893 – 894). The order does not even mention the *Brunzell* case. (*Id*.). That omission of *Brunzell* alone is fatal and renders the decision an abuse of discretion. *See Edgeworth Family Trust v. Simon*, 136 Nev. 804, 477 P.3d 1129 (2020), 2020 WL7828800 (Nev. S. Ct. Case Nos. 77678 and 78176, December 30, 2020) at *4 (unpublished disposition) (a district court does not need to write about each factor in an order but must at least

mention that it considered them), citing *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015)).

E. Dr. Kia's Presence in The Case Did Not Satisfy the Requirements of the Statute of Limitations Because Ms. Green Failed to Timely Assert Claims Against Him

By any measure, Ms. Green's claims against Dr. Kia are untimely. NRS 41A.097(2) provides that a medical malpractice claim must be brought within "3 years after the date of injury or 1 year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first . . . ." Ms. Green wants the limitations period to commence on the day of Dr. Kia's deposition, when she ostensibly learned for the first time that he had allegedly injured her. (Answering Brief, p. 23 ("Choloe discovered she suffered a "legal injury" by Kia during his November 14, 2018, deposition.")). Even if one accepted this argument, Ms. Green still missed the one-year statute of limitations. She waited nearly two years after the deposition to file her motion to amend the complaint to add Dr. Kia. (APPENDIX000267). Therefore, she missed the one-year limitation period and was out of time. *Winn v. Sunrise Hospital and Medical Center*, 128 Nev. 246, 251, 277 P.3d 458, 461 (2012) (A plaintiff must satisfy both the one-year discovery period and the three-year injury period.).

/ / /

F. Dr. Kias's Status as A Dismissed Party Does Not Meet the Statute of Limitations Requirement

Ms. Green incorrectly relies on Sunrise's amended complaint to get around her statute of limitations problem. She points to the fact that Sunrise, but not her, asserted claims against Dr. Kia via a third-party complaint six months after his deposition. (Answering Brief, p. 27). This argument misses the mark because only Sunrise asserted a claim against Dr. Kia, and those claims were dismissed along with him from the lawsuit. (APPENDIX000417, lines 4 – 7).

The statute of limitations requires the assertion of a **claim** prior to the expiration of the time period relating to that claim. Ms. Green offers no legal authority supporting her proposition that the assertion of a crossclaim against Dr. Kia by a co-defendant satisfies the statute of limitations requirements for her claims. On the other hand, NRS 41A.097(2) plainly sates that an "**action** for injury or death against a provider of health care" must be brought within the proscribed period (emphasis added). In this context, an action is a judicial proceeding. NRS 17.440. Sunrise did not assert a claim for injury or death against Dr. Kia but rather for indemnification and contribution under NRS 17.225 and NRS 17.825. (APPENDIX000057 – 59; ¶ 25). Ms. Green waited over a year to file a motion to amend her complaint to assert her medical malpractice claim against Dr. Kia. (APPENDIX000267). She was out of time for her claim.

The cases analyzing NRS 41A.07(2) focus on when a claim was brought as opposed to when a party was joined in a lawsuit. *See, e.g., Estate of Curtis v. South Las Vegas Medical Investors, LLC*, 136 Nev. 806, 474 P.3d 355, 2020 WL6271201 at *1(Nev. S.Ct. Case No. 79396, October 23, 2020) (unpublished disposition). In *Curtis*, the Supreme Court dismissed professional negligence claims as being time barred while letting other claims that were subject to a different statute of limitations stand. *Id.* Under the Court's analysis, a defendant's status as a party was immaterial, and the Court focused on when each claim was actually brought. *Id.* Similarly, in *Estate of Curtis v. Socaoco,* 136 Nev. 806, 472 P.3d 683, 2020 WL5837196 (Nev. S.Ct. Case No. 79116, September 30, 2020) (unpublished disposition) the Court did not say that a party had to be joined in some capacity to meet the requirements of NRS 41A.097(2), but rather held that "NRS 41A.097(2) provides that a **cause of action** for professional negligence against a health care provider" must be brought within the limitations period. *Id*. at *2 (emphasis added). Therefore, Ms. Green's claim fails because it is too late.

G. Ms. Green's Claim Against Dr. Kia Does Not Relate Back Under NRCP 15(c) and *Krupski* Does Not Apply

Ms. Green's reliance on NRCP 15(c) and *Krupski v. Costa Crociere* p. A., 560 U.S. 538 (2010), is misplaced. In particular, NRCP 15(c) relates to when a plaintiff makes a **mistake** in naming a party, as noted in NRCP(c)(2):

> (2) the amendment **changes** a party or the naming of a party against whom a claim is asserted, if Rule 15(c)(1) is satisfied and if, within the period provided by Rule 4(e) for serving the summons and complaint, the party to be brought in by amendment:
>
> (A) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (B) knew or should have known that the action would have been brought against it, **but for a mistake concerning the proper party's identity.**

(Emphasis added). What Ms. Green failed to consider is the requirement under NRCP 15(c)(2)(B) that the failure to name Dr. Kia be the result of a mistake and that the wrong party was named. As *Krupski* points out, "The only question under Rule 15(c)(1)(C)(ii) [the comparable federal rule], then, is whether party A [i.e., Dr. Kia in this case] knew or should have known that, **absent some mistake**, the action would have been brought against him." 560 U.S. at 549 (emphasis added). Ms. Green does not claim in her Answering Brief that she mistakenly named another party instead of Dr. Kia, and that Dr. Kia is in fact to correct defendant. (Answering Brief, at pp. 30 – 34). Instead, she claims that Dr. Kia is an **additional** party. Thus, Dr. Kia was omitted through Ms. Green's own lack of diligence, not due to a mistaken belief as to his role, and therefore NRCP 15(c) does not apply.

The Nevada cases that Ms. Green cites are in accord. In *Echoles v. Summa Corporation*, 95 Nev. 720, 601 P.2d 716 (1979), a plaintiff sued a corporation for a personal injury claim involving an exploding bottle of ketchup at a casino restaurant.

95 Nev. at 721, 601 P.2d at 717. Unbeknownst to the plaintiff, the corporate entity had split, and the restaurant had been transferred to a new, affiliated corporate entity. *Id.* Plaintiff agreed to dismiss the original corporate entity and amended his complaint to bring a claim against the new corporate entity. *Id.* The new corporate entity moved to dismiss because the statute of limitations had passed by that point in time. *Id.* The Nevada Supreme Court reversed the trial court's granting of the motion to dismiss because the new corporate entity knew within the limitations period that plaintiff had sued the wrong entity and that it was the correct entity. *Id.* Here, rather than make a mistake, Ms. Green had simply failed to exercise appropriate diligence when investigating her claims in the face of the hospital records which plainly identified Dr. Kia. (Petition, p. 3 (Ms. Green had the discharge summary that Dr. Kia authored and signed at the initial stages of the case)).

The result is the same in *Costello v. Casler*, 127 Nev. 436, 254 P.3d 631 (2011). There, the plaintiff was in an auto accident and filed a claim with the other driver's insurance carrier. 127 Nev. at 438, 254 P.3d at 631 – 632. Unbeknownst to the plaintiff, the other driver had died of causes unrelated to the accident. *Id.* Plaintiff filed a claim with the defendant's carrier, but those settlement discussions were unsuccessful. *Id.* The plaintiff, still not knowing the defendant had died, sued the defendant prior to the expiration of the statute of limitations. *Id.* Afte the statute of limitations had expired, the plaintiff attempted to name the decedent defendant's

estate. *Id.* On appeal, the Nevada Supreme Court reversed the district court's ruling that the amendment did not relate back under NRCP 15(c). *Id.* The Supreme Court focused on the plaintiff's mistake in naming the wrong party and the finding that the insurance carrier's defense of the case was not prejudiced because the claim and defenses were the same regardless of whether the decedent or the decedent's estate was name. 127 Nev. at 441 – 442, 254 P.3d at 631 – 635.

Ms. Green does not claim that she made a mistake by suing another person instead of Dr. Kia, and indeed she is still maintaining her original claims against her originally named defendants. She is attempting to bring Dr. Kia in as a new defendant and allege new claims against him. The fact that the original medical records she had in her possession at the beginning of the case named him and that she waited over a year after his deposition to seek to amend her complaint all points to a measured decision to not pursue him as opposed to a mistake.

Finally, Dr. Kia is entitled to rely on her initial decision. While the purpose behind Rule 15(c) is to promote a policy of hearing claims on their merits, "[a] plaintiff's right to have his or her claim heard on its merits despite technical difficulties, however, must be balanced against a defendant's right to be protected from stale claims and the attendant uncertainty they cause." *Costello*, 127 Nev. at 441, 254 P.3d at 635, citing *Pargman v. Vickers,* 208 Ariz. 573, 96 P.3d 571, 576 (App.2004) (internal quotations omitted)). In *Krupski*, the U.S. Supreme Court also

recognized that a potential defendant as "a strong interest in repost," i.e., an interest in the protections that a statute of limitations affords. 560 U.S. at 550. In this instance, the protections of the statute of limitations outweigh Ms. Green's lack of diligence.

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 20th day of December 2023.

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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 2,722 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 20th day of December 2023.

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I HEREBY CERTIFY that I am an employee of NAYLOR & BRASTER, that service of the foregoing **PETITIONER'S REPLY BRIEF** was made on December 20, 2023, via mandatory electronic service via the Court's e-filing system to:

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