

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTINA KUSHNIR, MD, and
WOMEN'S CARE CENTER OF NEVADA

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK, AND
THE HONORABLE TIERRA JONES,
DISTRICT JUDGE,

Respondents,

and

THE ESTATE OF CAROL A. GAETANO,
DECEASED, VINCENT GARBITELLI,
ADMINISTRATOR

Real Parties in Interest.

Supreme Court No. _____
District Court No. A-17-764111-C
Electronically Filed
Sep 26 2018 04:04 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

PETITIONERS' APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2018, I served the foregoing **PETITIONERS' APPENDIX** upon the following parties by:

 X VIA ELECTRONIC SERVICE: by mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or

 X VIA U.S. MAIL: By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the service list below in the United States mail at Las Vegas, Nevada

Adam Laxalt, Esq. Attorney General Nevada Department of Justice 100 North Carson Street Carson City, Nevada 89701 <i>Counsel for Respondent The Honorable Tierra Jones</i>	Zoe Terry, Esq. Terry Law Group, PC 1980 Festival Plaza Dr., Ste 300 Las Vegas, NV 89135 <i>Attorneys for Real Parties in Interest</i>
Honorable Tierra Jones Eighth Judicial District Court Department X Regional Justice Center 200 Lewis Avenue Las Vegas, Nevada 89101 <i>Respondent</i>	


An employee of CARROLL, KELLY, TROTTER, FRANZEN,
McBRIDE & PEABODY

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Steven D. Grierson
CLERK OF THE COURT

Albert S. Johnson

DISTRICT COURT
CLARK COUNTY, NEVADA

A-17-764111-C

Department 24

ESTATE OF CAROL A. GAETANO, DECEASED,
VINCENT GARBITELLI, ADMINISTRATOR

V.

CHRISTINA KUSHNIR, MD, AND WOMEN'S CARE
CENTER OF NEVADA, INC.

CASE NO.
DEPT. NO

COMPLAINT

I, Vincent Garbitelli, am an Administrator for the Estate of Carol A. Gaetano.

On or about July 1st, 2016 I was appointed Administrator through Probate Court in Clark County, Nevada.

Carol Gaetano died on January 17th, 2016 at Valley Hospital Medical Center in Las Vegas,
Nevada.

The actions and omissions of Christina Kushnir, MD and Women's Care Center of Nevada failed to provide appropriate medical care to Carol Gaetano, a patient referred to the medical practice of Dr. Kushnir. Dr. Kushnir and her office failed to meet the standard of care for medical practitioners in the Las Vegas community.

As outlined below, Dr. Kushnir and the Women's Care Center of Nevada committed medical malpractice as defined in the Nevada Statutes, specifically NRS 41A.015.

CAUSE of ACTION:

Carol Gaetano was referred to a gynecologist, Defendant physician Christina Kushnir of Women's Cancer Center of Nevada and saw that physician in her office on November 24th, 2015.

Dr. Kushnir without any input from Carol's Internist elected to schedule the patient for a **diagnostic** laparoscopy and "abdominal" biopsies. The procedure was scheduled for December 9th, 2015. The patient did not give consent for "tumor debulking" and Dr. Kushnir noted on her patient record that she "will obtain a **diagnosis** and go from there."

On December 9th, 2015, Dr. Kushnir performed an unnecessary and contraindicated diagnostic laparoscopy that resulted in a perforated colon and acute peritonitis requiring hospitalization.

Defendant physician held herself out as a gynecologist and gynecological cancer specialist. Dr. Kushnir acknowledged that Carol did not desire "tumor debulking" at the time of the November 24th office visit. There was no diagnosis verified at that time.

On November 25th, 2015, Carol had a Positron Emission Tomography with CT scan. The scan revealed multiple areas of abnormal uptake of radio-active glucose in the abdominal peritoneal region consistent with cancer lesions. On the report it was written the following: "upper GI endoscopy and colonoscopy are recommended for further evaluation."

Dr. Kushnir ignored that recommendation from the radiologist and did not consult with Carol's Internist for a gastroenterologist referral to perform the recommended procedures. Instead, Dr. Kushnir performed a **diagnostic** exploratory laparoscopy on December 9th, 2015.

The laparoscopy performed by Dr. Kushnir caused multiple perforations of Carol Gaetano's bowel and caused acute peritonitis with sepsis and respiratory failure.

The gross malpractice of Dr. Kushnir was the proximate cause of Carol Gaetano suffering acute peritonitis, sepsis, respiratory failure, and severe conscious pain and suffering.

AFFIRMED on this day, under penalty of perjury

October 20, 2017

By:

Vincent Garbitelli, Administrator of the Estate of Carol A. Gaetano
Pro Se

Vincent Garbitelli



COMPLAINT
VINCENT GARBITELLI,
ADMINISTRATOR, ESTATE OF
CAROL A GAETANO, DECEASED
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DISTRICT COURT

CLARK COUNTY, NEVADA

A-17-764111-C

Department 24

ESTATE OF CAROL A. GAETANO, DECEASED,
VINCENT GARBITELLI, ADMINISTRATOR

CASE NO.
DEPT. NO

V.

CHRISTINA KUSHNIR, MD, AND WOMEN'S CARE
CENTER OF NEVADA, INC.

AFFIDAVIT

I, Vincent Garbitelli, M.D., FACP., hereby swears out this Affidavit under penalty of perjury

As follows:

I am a physician licensed to practice medicine in the State of New York since 1978. I am a 1977 graduate of Loyola Stritch School of Medicine of Chicago, Illinois. I completed a three year Internal Medicine Residency program at Winthrop University Hospital in Mineola, New York in 1980. I became certified in the specialty of Internal Medicine by the American Board of Internal Medicine in 1980. I have been continuously licensed and Board Certified in Internal Medicine, in private practice, without interruption. I have published several articles and letters, which have appeared in The Archives of Internal Medicine and the Journal of the American Medical Association. I am a Fellow of the American College of Physicians.

In addition, I have been recognized as a Medical Expert in a wide variety of malpractice cases, having testified as said expert in all five counties of New York City and Nassau and Suffolk Counties on Long Island.

All of my expert medical opinions are made within a reasonable degree of medical certainty and are based upon my education, training, 40 years of medical practice, and review of the medical records and facts on this case and the diagnosis and care of thousands of patients over the last 43 years.

The specialty of Internal Medicine involves the **diagnosis and treatment of diseases and conditions of men and women from teenage years to the very elderly**. A diagnosis must first be made after a careful history and physical exam along with the ordering of the appropriate laboratory studies and diagnostic procedures as necessary to make a diagnosis without placing the patient under undue risk.

An Internist is firstly a **Diagnostician** and it is considered the standard of care to make judgments about what is or is not appropriate to make a diagnosis of cancer or other disease process. Although the Internist may not perform the procedure to effect a diagnosis of cancer in a given patient, the Internist is fully qualified to determine what procedure may or may not be necessary and/or appropriate for any given patient based upon the particular history and physical examination of any given patient.

Regardless of the specialty of the physician performing any given diagnostic procedure, because it is a **diagnostic** procedure, it is well within the broad standard of Internal Medicine to make a medical judgment about the appropriateness of a given procedure that a surgeon, gynecologist, or other specialist may want to perform to **make a diagnosis**.

CAUSE of ACTION:

Carol Gaetano was referred to a gynecologist, Defendant physician Christina Kushnir of Women's Cancer Center of Nevada and saw that physician in her office on November 24th, 2015.

Dr. Kushnir without any input from Carol's Internist elected to schedule the patient for a **diagnostic** laparoscopy and "abdominal" biopsies. The procedure was scheduled for December 9th, 2015. The patient did not give consent for "tumor debulking" and Dr. Kushnir noted on her patient record that she "will obtain a **diagnosis** and go from there."

On December 9th, 2015, Dr. Kushnir performed an unnecessary and contraindicated diagnostic laparoscopy that resulted in a perforated colon and acute peritonitis requiring hospitalization.

FACTS of the CASE:

Defendant physician held herself out as a gynecologist and gynecological cancer specialist. Dr. Kushnir acknowledged that Carol did not desire "tumor debulking" at the time of the November 24th office visit. There was no diagnosis verified at that time.

On November 25th, 2015, Carol had a Positron Emission Tomography with Non-Diagnostic CT scan. The scan revealed multiple areas of abnormal uptake of radioactive glucose in the abdominal peritoneal region consistent with cancer lesions. On the report it was written that "upper GI endoscopy and colonoscopy are recommended for further evaluation."

Dr. Kushnir ignored that recommendation from the radiologist and did not consult with Carol's Internist for a gastroenterologist referral to perform the recommended procedures. Instead, Dr. Kushnir performed a **diagnostic** exploratory laparoscopy on December

9th, 2015.

At the start of the laparoscopy, the intra-abdominal pressure was very high at 16. Despite that persistent high pressure and knowing the history of the patient with previous surgeries of an appendectomy, a gallbladder resection, a complete abdominal hysterectomy, and salpingo-oophorectomy; Dr. Kushnir proceeded with the diagnostic laparoscopy.

She took "multiple biopsies" according to her operative report despite the fact that there was "diffuse disease throughout the entire peritoneum (and the) liver was not visible."

After the laparoscopy was completed, Carol complained of significant abdominal pain and was given pain medication without relieving the pain. She also complained of nausea and had bloating and lack of appetite. She was sent home without relief of her symptoms.

Her symptoms of nausea, vomiting, and generalized abdominal pain continued throughout the night of December 9th and the morning of December 10th, 2015.

Although she made a telephone call to Dr. Kushnir's office in the morning of December 10th, she was not advised to go to the emergency room until the afternoon.

She was admitted to Valley Hospital Medical Center on the afternoon of December 10th and it was discovered on abdominal CT scan and X rays that perforated bowel was present.

The laparoscopy **performed** by Dr. Kushnir had resulted in multiple perforations of Carol Gaetano's bowel and acute peritonitis with sepsis and respiratory failure.

EXPERT OPINION

It is my opinion, within a reasonable degree of medical certainty that Dr. Kushnir and Women's Cancer Center of Nevada departed from good and accepted practice of medicine by performing a **contraindicated, unnecessary, and negligently performed diagnostic laparoscopy** which resulted in multiple bowel perforations and peritonitis.

Dr. Kushnir was fully aware of Carol Gaetano's history during the November 24th 2015 office visit and should have been aware of the high risk of complications associated with the presumptive diagnosis of peritoneal cancer in a patient with multiple abdominal surgeries and her plan of doing a diagnostic laparoscopy to get a tissue biopsy.

It is 100% certain that there would be adhesions and significant scar tissue in the abdomen of the patient because of her extensive surgical history.

That history made it contraindicated to attempt a laparoscopy because of the difficulty in visualizing the peritoneal lesions and safely taking biopsies.

The laparoscopy was also unnecessary in making a diagnosis of cancer. It was already known on the day after the November 24th 2015 office visit that cancer was highly likely because of the positive PET/CT scan revealing multiple lesions in the abdomen.

Dr. Kushnir also departed from the good and accepted practice of medicine by ignoring the recommendation of the radiologist who interpreted the PET/CT scan, to get an upper endoscopy and colonoscopy "for further evaluation."

Dr. Kushnir departed from the good and accepted practice of medicine by failing to refer to a radiologist for a "skinny" needle CT guided biopsy of any one of the lesions seen on the PET/CT scan. That was a much less riskier course of diagnostic action than her plan of a contraindicated diagnostic laparoscopy.

Because Dr. Kusnir had already "made up her mind" to proceed with the laparoscopy on the November 24th office visit by stating in her record "will schedule for a **diagnostic**

laparoscopy... risks and benefits were discussed..." she never offered Carol Gaetano alternative diagnostic and investigative measures in making the diagnosis of cancer.

By ignoring the recommendations of the radiologist and not opting for less invasive diagnostic procedures, Dr. Kushnir embarked on a plan that created a substantial and unnecessary risk of life threatening complications.

Dr. Kushnir had the chance to abort the laparoscopy on December 9th when she encountered the very high intra-abdominal pressures and lack of visualization of the organs within the abdomen but she failed to meet the standard of every physician--- to do no harm.

With her laparoscope and biopsy "graspers" she perforated the patient's bowels multiple times in multiple attempts to get tissue for diagnosis when far less dangerous means were available to her.

In addition, Dr. Kushnir departed from good and accepted practice of medicine when she discharged Carol after the laparoscopy even though the patient felt very sick with nausea and abdominal pain. It is my opinion with a reasonable degree of medical certainty that Carol Gaetano was suffering from multiple perforations of her colon secondary to the negligence of Dr. Kushnir's surgery and biopsies.

Dr. Kushnir departed from the good and accepted practice of medicine in failing to diagnose the patient's perforated colon, sending her home with those perforations and developing acute peritonitis and sepsis.

Dr. Kushnir did not properly monitor the patient and did not send her to the hospital until the afternoon of December 10th, 2015.

In conclusion, Dr. Kushnir utilized dangerous and unnecessary means to make a diagnosis of cancer of the peritoneum when there were clearly much safer, medically indicated

cancer of the peritoneum when there were clearly much safer, medically indicated procedures to confirm the diagnosis and her gross negligence violated the cardinal rule in Medicine to "first, do no harm."

The gross malpractice of Dr. Kushnir was the proximate cause of Carol Gaetano suffering acute peritonitis, sepsis, respiratory failure, and severe conscious pain and suffering.

SWORN on this day

OCT Month 20 Day 2017

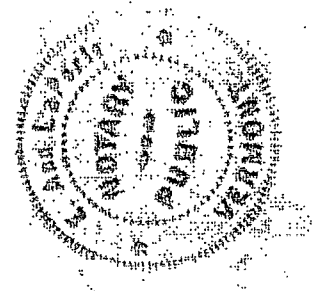
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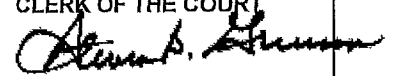
Vincent Garbitelli, MD.

Vincent Garbitelli MD

State of Vermont
Orange County

At Randolph, this 20th day of OCTOBER A.D. 2017
personally appeared VINCENT GARBITELLI
and acknowledged this instrument by HIS sealed and
subscribed to be HIS free act and deed. Before
me E. Dana O'Brien Notary Public
My Commission Expires: 02-10-2019





1 **MDSM**

2 ROBERT C. MCBRIDE, ESQ.

3 Nevada Bar No.: 7082

4 HEATHER S. HALL, ESQ.

5 Nevada Bar No.: 10608

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14 Attorneys for Defendants,

15 *Christina Kushnir, M.D. &*

16 *Women's Cancer Center of Nevada, Inc.*

17 (*erroneously named as Women's Care Center of Nevada*)

18 **DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

20 THE ESTATE OF CAROL A. GAETANO,
21 DECEASED, VINCENT GARBITELLI,
22 ADMINISTRATOR,

23 Plaintiffs,

24 vs.

25 CHRISTINA KUSHNIR, MD, and
26 WOMEN'S CARE CENTER OF NEVADA

27 Defendants.

CASE NO.: A-17-764111-C

DEPT: X

DEFENDANTS CHRISTINA KUSHNIR,
M.D. AND WOMEN'S CANCER CENTER
OF NEVADA, INC.'S MOTION TO
DISMISS PLAINTIFFS' COMPLAINT

DATE OF HEARING: _____

TIME OF HEARING: _____

28 **DEFENDANTS CHRISTINA KUSHNIR, M.D. AND WOMEN'S CANCER CENTER OF
NEVADA, INC.'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

COME NOW, Defendants, CHRISTINA KUSHNIR, M.D. and WOMEN'S CANCER
CENTER OF NEVADA, INC. (erroneously named as Women's Care Center of Nevada), by and
through their counsel of record, ROBERT C. McBRIDE, ESQ. and HEATHER S. HALL, ESQ.
of the law firm of CARROLL, KELLY, TROTTER, FRANZEN, McKENNA & PEABODY,
and hereby submit their Motion to Dismiss Plaintiffs' Complaint.

This Motion is made and based upon the attached Memorandum of Points and

1 Authorities, the papers and pleadings on file herein, and any oral argument made at the time of
2 the hearing of this matter.

3 DATED this 26th day of December, 2017.

4
5 CARROLL, KELLY, TROTTER,
6 FRANZEN, McKENNA & PEABODY

7 /s/ Heather S. Hall

8 ROBERT C. MCBRIDE, ESQ.

9 Nevada Bar No.: 7082

10 HEATHER S. HALL, ESQ.

11 Nevada Bar No.: 10608

12 8329 W. Sunset Road, Suite 260

13 Las Vegas, Nevada 89113

14 Attorneys For Defendants,

15 *Christina Kushnir, M.D. & Women's*

16 *Cancer Center of Nevada, Inc.*

17 **NOTICE OF MOTION**

18 YOU AND EACH OF YOU PLEASE TAKE NOTICE that these Defendants will bring
19 the foregoing motion on for hearing on the **30** day of **Jan.**, 201**8**, in Department X
20 of the above-entitled Court at the hour of **9:30** a.m./~~p.m.~~, or as soon thereafter as counsel may
21 be heard.

22 DATED this 26th day of December, 2017.

23 CARROLL, KELLY, TROTTER,
24 FRANZEN, McKENNA & PEABODY

25 By: /s/ Heather S. Hall

26 ROBERT C. MCBRIDE, ESQ.

27 Nevada Bar No.: 7082

28 HEATHER S. HALL, ESQ.

Nevada Bar No.: 10608

CARROLL, KELLY, TROTTER,

FRANZEN, McKENNA & PEABODY

8329 W. Sunset Road, Suite 260

Las Vegas, NV 89113

Attorneys for Defendants

Christina Kushnir, M.D. & Women's

Cancer Center of Nevada, Inc.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION & STATEMENT OF FACTS**

4 This is a professional negligence action based upon care and treatment provided to
5 decedent Carol Gaetano by Defendants. Plaintiffs are the Estate of Carol Gaetano and Vincent
6 Garbitelli, as the Administrator of the Estate of Carol Gaetano. *See Plfs' Comp.* Plaintiffs'
7 Complaint was filed on November 3, 2017. *Id.* Plaintiffs allege that on December 9, 2015,
8 Defendant Dr. Kushnir performed a diagnostic laparoscopy that resulted in a perforated colon and
9 acute peritonitis, requiring hospitalization. *Id.* at page 2. As alleged in the Complaint, decedent
10 died on January 17, 2016 at Valley Hospital Medical Center. *Id.* at page 1.

11 Plaintiffs' one-year statute of limitations for *inquiry notice* expired before the instant
12 Complaint was filed on November 3, 2017. This action arises out a claim for medical
13 malpractice/wrongful death related to the death of decedent on January 17, 2016. Thus, at the
14 latest, Plaintiffs were required to assert their allegations of wrongful death/medical malpractice
15 by January 17, 2017. They waited until November 3, 2017 to bring their claims, nearly eleven
16 months after the statute of limitations had run. Because Plaintiffs were on inquiry notice of their
17 possible causes of action more than one year before they filed the instant Complaint, Plaintiffs'
18 Complaint should be dismissed. Defendants move for dismissal because Plaintiffs' claims are
19 time-barred pursuant to NRS 41A.097.

20 **II.**

21 **ARGUMENT**

22 **A. STANDARD FOR MOTION TO DISMISS PURSUANT TO NRCP 12(b)(5).**

23 Dismissal for failure to state a claim is appropriate when it appears beyond a doubt that
24 the plaintiff could prove no set of facts which, if true, would entitle him to relief. *Buzz Stew, LLC*
25 *v. City of Las Vegas*, 124 Nev. Adv. Rep. 21, 181 P. 3d. 670, 672 (2008). To survive a motion to
26 dismiss for failure to state a claim, the complaint must set forth factual allegations sufficient to
27 establish each element necessary to recover under some actionable legal theory. *See e.g., Hampe*
28 *v. Foote*, 118 Nev. 405, 408, 47 P.3d 438, 439 (2002) (although factual allegations in the

1 complaint are regarded as true for the purposes of a motion to dismiss, a [d]ismissal is proper
2 where the allegations are insufficient to establish the elements of a claim for relief).

3 “A court can dismiss a complaint for failure to state a claim upon which relief can be
4 granted if the action is barred by the statute of limitations.” *Bemis v. Estate of Bemis*, 114 Nev.
5 1021, 967 P.2d 437 (1998) [Internal citations omitted]. When the defense of statute of
6 limitations appears on the face of the complaint, a motion to dismiss for failure to state a claim is
7 proper. *Kellar v. Snowden*, 87 Nev. 488, 489 P.2d 90 (1971); *see also, Paso Builders, Inc. v.*
8 *Hebard*, 83 Nev. 165, 426 P.2d 731 (1967).

9 **B. PLAINTIFFS’ CLAIMS AGAINST DEFENDANTS ARE BARRED BY THE**
10 **STATUTE OF LIMITATIONS.**

11 Plaintiffs’ claims against Dr. Kushnir and Women’s Care Center are time-barred under
12 NRS 41A.097, which provides in relevant part:

13 Except as otherwise provided in subsection 3, an action for injury or death against a
14 provider of health care may not be commenced more than 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, for:

- 15 (a) Injury to or the wrongful death of a person [...] based upon alleged
16 professional negligence of the provider of health care;
[...]
17 (c) Injury to or the wrongful death of a person [...] from error or omission in
practice by the provider of health care.

18 [Intentionally omitted] [emphasis added]. NRS 41A.097(2)(a), (c).

19 The appropriate accrual date for the statute of limitations is a question of law when the
20 facts are uncontroverted. *Day v. Zubel*, 112 Nev. 972, 922 P.2d 536 (1996), *citing Nevada Power*
21 *Co. v. Monstanto Co.*, 955 F.2d 1304, 1307 (9th Cir.1992). The Nevada Supreme Court has
22 clarified the discovery rule set forth in NRS 41A.097. Specifically, the Court held that “the
23 statute of limitations begins to run when the patient has before him facts which would put a
24 reasonable person on inquiry notice of his possible causes of action, whether or not it has
25 occurred to the particular patient to seek further medical advice.” *Massey v. Litton*, 99 Nev. 723,
26 727-28, 669 P.2d 248, 251-52 (1983). The focus is on the patient’s knowledge or access to facts
27 rather than on his discovery of legal theories. *Id.* at 728, 252; *See also Jolly v. Eli Lilly & Co.*, 44
28 Cal. 3d 1103, 1111, 751 P.2d 923, 928, 245 Cal. Rptr. 658, 662 (1988) (“It is the discovery of

1 facts, not their legal significance, that starts the statute”). Thus, once the patient has “inquiry
2 notice” of her cause of action, the statute of limitations begins to run. *Id.*

3 In a wrongful death case, the injury is the death. *See Pope v. Gray*, 104 Nev. 358, 760
4 P.2d 763 (1988). In *Pope v. Gray*, the Supreme Court of Nevada determined that the discovery
5 rule applied in *Massey* also applies to cases dealing with medical malpractice wrongful death
6 actions by heirs. The Court utilized the *Massey* rule and held that the statute of limitations does
7 not necessarily begin to run from the date of death, but from the date that plaintiff discovers or
8 reasonably should have discovered the legal injury.

9 Actual notice of a definite cause of action is not required to trigger NRS 41A.097’s one
10 year statute of limitations. *Massey*, 99 Nev. at 728, 669 P.2d at 252. The Nevada Supreme Court
11 has further explained that “a patient **discovers** his *legal injury* **when** he knows or, through the
12 use of reasonable diligence, **should have known of facts that would put a reasonable person**
13 **on inquiry notice** of his cause of action.” *Id.* [Emphasis added]. Only inquiry notice of
14 Plaintiffs’ possible legal injury is required to trigger Plaintiffs’ statute of limitations. *Pope*, 104
15 Nev. at 362.

16 “[T]he Ninth Circuit has consistently found that a plaintiff need not know the identity of
17 the person who caused his injury to trigger the statute of limitations.” *Ritchie v. U.S.*, 210
18 F.Supp. 2d 1120, 1128 (N.D. Cal. 2002), *citing Dyniewicz v. U.S.*, 742 F.2d 484, 486 (9th Cir.
19 1984) (“Discovery of the cause of one’s injury, however, does not mean knowing who is
20 responsible for it”).

21 Carol Gaetano passed away on January 17, 2016. *See Plfs’ Comp.*, page 1. The date of
22 death commenced the running of the statute of limitations. As a matter of law, Plaintiffs were on
23 notice of their wrongful death/medical malpractice claim no later than that date. Thus, Plaintiffs
24 arguably had until January 17, 2017 to pursue these claims. Because Plaintiffs waited until
25 November 3, 2017 to file their Complaint, they are now beyond the one year statute of
26 limitations and dismissal is appropriate.

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III.

CONCLUSION

Based on all of the foregoing, Plaintiffs knew or should have known, through the use of reasonable diligence, of their claims against these Defendants more than one year before they sought to bring their claims. Accordingly, Defendants respectfully request this Honorable Court dismiss Plaintiffs' Complaint against them pursuant to NRS 41A.097.

DATED this 26th day of December, 2017.

CARROLL, KELLY, TROTTER,
FRANZEN, McKENNA & PEABODY

/s/ Heather S. Hall

ROBERT C. MCBRIDE, ESQ.

Nevada Bar No.: 7082

HEATHER S. HALL, ESQ.

Nevada Bar No.: 10608

8329 W. Sunset Road, Suite 260

Las Vegas, Nevada 89113

Attorneys For Defendants,

Christina Kushnir, M.D. & Women's

Cancer Center of Nevada, Inc.

1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that on the 26th day of December 2017, I served a true and correct
3 copy of the foregoing **DEFENDANTS CHRISTINA KUSHNIR, M.D. AND WOMEN'S**
4 **CANCER CENTER OF NEVADA, INC.'S MOTION TO DISMISS PLAINTIFFS'**
5 **COMPLAINT** addressed to the following counsel of record at the following address(es):

- 6 ☒ **VIA ELECTRONIC SERVICE:** by mandatory electronic service (e-service), proof
7 of e-service attached to any copy filed with the Court; or
- 8 ☐ **VIA U.S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope with
9 postage thereon fully prepaid, addressed as indicated on the service list below in the
10 United States mail at Las Vegas, Nevada
- 11 ☐ **VIA FACSIMILE:** By causing a true copy thereof to be telecopied to the number
12 indicated on the service list below.

13 Vincent Garbitelli
14 Administrator, Estate of Carol A. Gaetano,
15 Deceased
16 PO Box 267
17 Williston Park, NY 11596
18 drgarbitelli@gmail.com

19
20
21
22 /s/ Heather S. Hall
23 An Employee of *CARROLL, KELLY, TROTTER,*
24 *FRANZEN, McKENNA & PEABODY*
25
26
27
28



OPPOSITON TO MDSM
VINCENT GARBITELLI,
ADMINISTRATOR, ESTATE OF
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DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF CAROL A. GAETANO, DECEASED,
VINCENT GARBITELLI, ADMINISTRATOR

V.

CHRISTINA KUSHNIR, MD, AND WOMEN'S CANCER
CENTER OF NEVADA, INC.

)
) CASE NO.A-17-
764111-C
)
) DEPT. NO 10
)
)

OPPOSITION TO MOTION
TO DISMISS

RESPONSE TO DEFENDANT'S MOTION TO DISMISS ON ARGUMENT THAT STATUTE
OF LIMITATIONS HAS BEEN EXCEEDED

INTRODUCTION:

In the above captioned case, DEFENDANT claims that the statute of limitations as per NRS 41A.097 has been exceeded. Plaintiff strongly disputes that claim. Section 2 of the aforementioned statute states: "...an action for injury or death against a provider of health care may not be commenced more than 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..."

This opposition paper will make the argument that the court should deny defendant's motion on the basis of the law and the facts of the case.

FACTS PERTINENT TO THE MOTION AND ITS OPPOSITION:

As stated in the COMPLAINT and EXPERT AFFIDAVIT IN SUPPORT OF THE COMPLAINT, Carol Gaetano was seen by CHRISTINA KUSHNIR, MD at the WOMEN'S CARE CENTER OF NEVADA on November 24 2015.

Kushnir acknowledged that Carol Gaetano did not consent to "tumor debulking" at that November 24 2015 visit.

On November 25 2015, Carol Gaetano had a Positron Emission CT tomography scan. The scan revealed multiple areas of abnormal uptake consistent with cancer lesions. On the report it was written "...upper GI endoscopy and colonoscopy are recommended for further evaluation."

Dr. Kushnir, of her own volition, elected to ignore that medical advice and schedule Carol Gaetano for a DIAGNOSTIC laparoscopy and "abdominal" biopsies, to be done on December 9 2015. Kushnir noted on the patient record that she "will obtain a diagnosis and go from there."

On December 9 2015, Kushnir did an unnecessary and contraindicated diagnostic laparoscopy that resulted in a perforated colon and acute peritonitis requiring hospitalization.

On or about January 2 2016, Dr. Kushnir responded to the PLAINTIFF'S now ADMINISTRATOR VINCENT GARBITELLI via telephone and advised him that Carol Gaetano had stage 4 cancer and that her cancer had spontaneously perforated her colon in multiple locations. Kushnir stated that she did a right hemicolectomy and left the wound open because of acute peritonitis.

Carol Gaetano died on January 17 2016 at Valley Hospital Medical Center.

PLAINTIFF ADMINISTRATOR received Dr. Kushnir's office medical records in the summer of 2016. He received the 7800 pages of hospital records in the fall of 2016 and was not able to completely read them until shortly before November 24 2016.

ARGUMENTS IN OPPOSITION TO THE MOTION TO DISMISS

As per NRS 41A.097 an action for medical malpractice "...may not be commenced more than 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..."

The malpractice action was filed on November 3 2017 but the malpractice and injury was not discovered by the Plaintiff until the hospital records were read by the Plaintiff Administrator LESS THAN ONE YEAR BEFORE THE FILING OF THIS ACTION.

Furthermore, Plaintiff administrator filed a complaint with the Medical Board of Nevada when he discovered the malpractice. That filing occurred officially on December 4 2016 as it was received via FEDEX on November 28 2016. Plaintiff had up until the last week of November 2017 to meet the nominal statutory requirements after Kushnir's malpractice was discovered. The exhibits are attached to this opposition to the motion to dismiss initiated by the Defendant.

Thus, the requirements of the statute are met.

But there is even a stronger argument against Defendant's motion to dismiss.

On or about January 2 2016, Dr. Kushnir, as previously noted above, spoke with Vincent Garbitelli on the telephone and DELIBERATELY CONCEALED the true nature of Carol Gaetano's perforated colon. She stated that Carol's cancer had spontaneously perforated, knowing, or she should have known that it was her instrumentation that perforated the patient's colon. (See attached Garbitelli Affidavit.)

Furthermore, Kushnir DELIBERATELY CONCEALED the true nature of Carol Gaetano's cancer. That the PLAINTIFF DECEDENT did not have Stage 4 cancer from an unknown

primary but Primary Peritoneal carcinoma that was confined to the abdomen and NOT metastatic to distant organs.

Defendant Kushnir, along with the hospital and medical staff, inappropriately insisted that Carol Gaetano had Terminal Stage 4 cancer when she did not have that.

According to NRS 41A.097 paragraph 3 "... time limitation is tolled for any period during which the provider of health care has concealed any act, error or omission upon which the action{for malpractice} is based and which is known or though the use of reasonable diligence should have been known to the provider of health care."

DEFENDANT KUSHNIR cannot escape from the statute as written because it is precisely written to prevent a doctor from hiding one's malpractice to allow the statute of limitations to run its course.

The deception engaged by Kushnir should not allow her to prevent Carol Gaetano, who walked into Kushnir's office expecting honest and competent medical care, to be denied her day in court on an alleged technicality of Defendant's erroneous interpretation of the law.

CONCLUSION:

Based on the above facts and arguments Plaintiff asks that Defendant's Motion to Dismiss be denied.

DATED on this 2nd day of January, 2018

Submitted by:

Vincent Garbitelli, Administrator, Estate of Carol Gaetano

Vincent Garbitelli 1/2/18

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of January 2018, I served a true and correct copy of the foregoing PLAINTIFF'S MOTION IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT to the following attorney for the Defendant via

Electronic service and by US Mail:

Robert C. McBride, esq.
Heather S. Hall, esq.
CARROLL, KELLY, TROTTER,
FRANZEN, McKENNA, & PEABODY
8329 W. Sunset Road, Suite 260
Las Vegas, Nevada 89113
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Email: hshall@cktfmlaw.com
Attorneys for Defendants
Christina Kushnir, MD &
Women's Cancer Center of Nevada



Vincent Garbitelli, Administrator for Estate of
Carol A. Gaetano, Deceased



1 **RPLY**

2 ROBERT C. MCBRIDE, ESQ.

3 Nevada Bar No.: 7082

4 HEATHER S. HALL, ESQ.

5 Nevada Bar No.: 10608

6 CARROLL, KELLY, TROTTER,
7 FRANZEN, McBRIDE & PEABODY

8 8329 W. Sunset Road, Suite 260

9 Las Vegas, Nevada 89113

10 Telephone No. (702) 792-5855

11 Facsimile No. (702) 796-5855

12 E-mail: rcmcbride@cktfmlaw.com

13 E-mail: hshall@cktfmlaw.com

14 Attorneys for Defendants,

15 *Christina Kushnir, M.D. &*

16 *Women's Cancer Center of Nevada, Inc.*

17 *(erroneously named as Women's Care Center of Nevada)*

18 **DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

20 THE ESTATE OF CAROL A. GAETANO,
21 DECEASED, VINCENT GARBITELLI,
22 ADMINISTRATOR,

23 Plaintiffs,

24 vs.

25 CHRISTINA KUSHNIR, MD, and
26 WOMEN'S CARE CENTER OF NEVADA

27 Defendants,

CASE NO.: A-17-764111-C

DEPT: X

DEFENDANTS CHRISTINA KUSHNIR,
M.D. AND WOMEN'S CANCER CENTER
OF NEVADA, INC.'S REPLY IN
SUPPORT OF MOTION TO DISMISS
PLAINTIFFS' COMPLAINT

DATE OF HEARING: January 30, 2018

TIME OF HEARING: 9:30 a.m.

28 **DEFENDANTS CHRISTINA KUSHNIR, M.D. AND WOMEN'S CANCER CENTER OF
NEVADA, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS'
COMPLAINT**

COME NOW, Defendants, CHRISTINA KUSHNIR, M.D. and WOMEN'S CANCER
CENTER OF NEVADA, INC. (erroneously named as Women's Care Center of Nevada), by and
through their counsel of record, ROBERT C. McBRIDE, ESQ. and HEATHER S. HALL, ESQ.
of the law firm of CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY, and
hereby submit their Reply in Support of Motion to Dismiss Plaintiffs' Complaint.

This Reply is made and based upon the attached Memorandum of Points and Authorities, the papers and pleadings on file herein, and any oral argument made at the time of the hearing of this matter.

DATED this 23rd day of January, 2018.

CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY

/s/ Heather S. Hall

ROBERT C. MCBRIDE, ESQ.

Nevada Bar No.: 7082

HEATHER S. HALL, ESQ.

Nevada Bar No.: 10608

8329 W. Sunset Road, Suite 260

Las Vegas, Nevada 89113

Attorneys For Defendants,

Christina Kushnir, M.D. & Women's

Cancer Center of Nevada, Inc.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION & STATEMENT OF FACTS

4 In response to this Motion to Dismiss, Plaintiffs advocate for actual notice, when the
5 standard in Nevada is inquiry notice. Plaintiffs essentially argue that they needed to know the
6 exact details of the medical care and the actions taken by each provider to be put on actual notice
7 of their potential claims against these Defendants, but the standard in Nevada that serves as the
8 basis of this Motion is *inquiry notice*.

9 Plaintiffs' focus on discovery of legal theories is equally misplaced. As stated in the
10 Motion, for purposes of determining when a plaintiff was on *inquiry notice*, the focus is on
11 knowledge or access to facts rather than on discovery of legal theories. *Massey v. Litton*, 99
12 Nev. 723, 728, 669 P.2d 248, 252 (1983); *See also Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103,
13 1111, 751 P.2d 923, 928, 245 Cal. Rptr. 658, 662 (1988) ("it is the discovery of facts, not their
14 legal significance, that starts the statute"). Plaintiffs' Opposition fails to even address inquiry
15 notice and references matters outside of the pleadings, despite the fact that this is a Motion to
16 Dismiss. In addition to the fact that it is improper to attach matters outside the initial pleadings,
17 substantively, the information from the Nevada State Board of Medical Examiners and the
18 affidavit of Dr. Garbitelli that he became aware decedent, his first cousin, was critically ill on
19 December 30, 2015 only underscore that he had adequate information that would have led a
20 reasonably prudent person to inquire further upon learning of decedent's death on January 17,
21 2016.

22 Plaintiffs also rely upon NRS 41A.097(3), the tolling provision of the statute. First,
23 Plaintiffs claim that the statute of limitations was tolled while they pursued an action with the
24 Nevada State Board of Medical Examiners. No such provision exists in the statute. NRS
25 41A.097 does not provide additional time beyond the one year to allow Plaintiffs to file a
26 Complaint with the Nevada State Board of Medical Examiners before filing a lawsuit.

27 Next, Plaintiffs claim the statute of limitations began to run when the Plaintiff
28 Administrator read the hospital records and that occurred less than one year before the filing of

1 this action. *See Plfs' Opp.*, page 2. The statute of limitations is not tolled until a Plaintiff decides
2 to review medical records and there is no authority for this position.

3 Finally, Plaintiffs claim that NRS 41A.097(3) tolls the statute of limitations because Dr.
4 Kushnir deliberately concealed the true nature of Ms. Gaetano's perforated colon in a
5 conversation with Vincent Garbitelli that allegedly occurred on January 2, 2016. *See Plfs' Opp.*,
6 page 2. Even accepting Plaintiff's claim as true (and it is not), this generic assertion does not toll
7 the statute of limitations. Plaintiffs do not identify any act or omission that Dr. Kushnir allegedly
8 concealed, but make the vague claim that she concealed "the true nature of Carol Gaetano's
9 cancer." *Id.* This is not sufficient to engage the tolling provision in NRS 41A.097. This also
10 ignores that Plaintiffs are represented by Vincent Garbitelli, who is himself a physician and
11 presumably more capable than the average, reasonable person of understanding medical issues.
12 Furthermore, the erroneous claim that Dr. Kushnir concealed any information during a January 2,
13 2016 phone call is belied by the sequence of events that occurred after this purported
14 concealment. After this, Plaintiffs went on to request medical records and pursue an
15 administrative action with the Nevada State Board of Medical Examiners.

16 Plaintiffs were on inquiry notice of their potential claims against these Defendants long
17 before November of 2016. In Nevada, the injury in a wrongful death claim is the death.
18 Plaintiffs acknowledge that Carol Gaetano's date of death was January 17, 2016 and that they
19 obtained the medical records in the summer of 2016. *Plfs' Opp.*, page 2. Plaintiffs had until
20 January 17, 2017 to file their claims and the Complaint that was filed on November 3, 2017 is
21 untimely. Thus, this Motion to Dismiss should be granted.

22 II.

23 ARGUMENT

24 A. PLAINTIFFS' DUTY TO INQUIRE AROSE MORE THAN ONE YEAR BEFORE 25 THIS COMPLAINT WAS FILED.

26 Plaintiffs' Opposition to this Motion focuses on what Plaintiffs did with the facts known
27 or available to them but the proper standard is objective, not subjective. Plaintiffs fail to address
28 inquiry notice. Instead, Plaintiffs discuss several alternative theories as to when they contend
they had actual notice of their claims. This argument is not germane to the date on which

1 Plaintiffs were on inquiry notice. It is of no consequence that an average layperson may not have
2 a specific medical or legal theory as a basis for a malpractice claim. It is enough if the
3 reasonable person has notice sufficient to inquire about a potential claim. "The focus is on the
4 patient's knowledge or access to facts rather than on her discovery of legal theories." *Massey v.*
5 *Litton*, 99 Nev. 723, 727-28, 669 P.2d 248 (Nev. 1983) (citing *Graham v. Hansen*, 180 Cal. Rptr.
6 604, 128 Cal. App. 3d. 965 (1982)).

7 The proper measure is not what Plaintiffs did with the facts known or available to them,
8 but what the "ordinarily prudent person" would have done. *Winn v. Sunrise Hospital and*
9 *Medical Center*, 277 P.3d 458, 462 (Nev. 2012). In this case, the facts known or available to
10 "the ordinarily prudent person," on January 17, 2016 were enough to charge that person with
11 "inquiry notice."

12 Nevada law is well-settled that the focus is on the discovery of facts and "these facts
13 need not pertain to precise legal theories the plaintiff may ultimately pursue, but merely to the
14 plaintiff's general belief that someone's negligence may have caused his or her injury."
15 *Massey*, 99 Nev. at 728, 669 P.2d at 252; *See also Jolly v. Eli Lilly & Co., supra*. ("it is the
16 discovery of facts, not their legal significance, that starts the statute"). A "plaintiff need not
17 know the identity of the person who caused his injury to trigger the statute of limitations."
18 *Ritchie v. U.S.*, 210 F.Supp. 2d 1120, 1128 (N.D. Cal. 2002). Here, the only possible
19 conclusion is that, for an "ordinarily prudent person", the bell commencing the investigation
20 period rang no later than the date Ms. Gaetano. To avoid the limitations bar, suit against these
21 Defendants was required no later than January 17, 2017. Because Plaintiffs waited until
22 November 3, 2017 to file their Complaint, they are now beyond the one year statute of
23 limitations.

24 **B. THE STATUTE OF LIMITATIONS WAS NOT TOLLED FOR ANY PERIOD**
25 **AND THIS COMPLAINT IS UNTIMELY.**

26 The Nevada Supreme Court has determined that the tolling provision of NRS 41A.097(3)
27 only applies when there has been an intentional act that objectively hindered a reasonably
28 diligent plaintiff from timely filing suit. *Libby v. Eighth Judicial Dist. Court*, 325 P.3d 1276
(Nev. 2014), quoting *Winn*, 277 P.3d at 464. In an effort to convince this Court that Plaintiffs

1 should have longer than one year to file their wrongful death claims, Plaintiffs assert that NRS
2 41A.097(3) tolled the statute of limitations but never points to anything specific that Dr. Kushnir
3 allegedly concealed. First, Plaintiffs claim that the statute of limitations was tolled while they
4 pursued an action with the Nevada State Board of Medical Examiners. As is evident, the statute
5 has no such tolling provision to allow pursuit of a Board action before the one year statute of
6 limitations commences for litigation.

7 Next, Plaintiffs claim the statute of limitations began to run when the Plaintiff
8 Administrator read the hospital records and that occurred less than one year before the filing of
9 this action. *See Plfs' Opp.*, page 2. Again, nothing in NRS 41A.097 allows a Plaintiff to delay
10 reviewing medical records in an effort to extend the statute of limitations. This is a completely
11 illogical, unsupported interpretation of the statute. Further, an "ordinarily prudent person"
12 suspecting wrongdoing may not delay suit until after he or she apprehends the full extent of the
13 negligence or injury. *See, e.g., Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1111, 751 P.2d 923,
14 928, 245 Cal. Rptr. 658, 662 (1988) ("[s]o long as suspicion [of wrongdoing] exists, it is clear
15 that the plaintiff must go find the facts; she cannot wait for the facts to find her"). As stated
16 above, "inquiry notice" is the trigger starting the investigation.

17 Finally, Plaintiffs claim that NRS 41A.097(3) tolls the statute of limitations because Dr.
18 Kushnir deliberately concealed the true nature of Ms. Gaetano's perforated colon in a
19 conversation with Vincent Garbitelli that allegedly occurred on January 2, 2016. *See Plfs' Opp.*,
20 page 2. This vague allegation never points to anything specific that was concealed and is
21 inadequate to establish that the tolling provision applies here. Any argument that Plaintiffs did
22 not have sufficient information available to permit them to surmise that Dr. Kushnir had
23 allegedly committed negligence during the care she provided to decedent in December 2015 fails
24 because: (1) the standard is the "ordinarily prudent person" not these particular Plaintiffs; and (2)
25 indeed, there was sufficient information available at the time of decedent's death on January 17,
26 2016 that would have prompted the "ordinarily prudent person" to investigate further.

27 The proper measure is not what Plaintiffs did with facts known or available to them, but
28 what "the ordinarily prudent person" would have done. *Winn v. Sunrise Hospital & Medical*

1 *Center, supra*. An ordinarily prudent person, faced with the death following medical treatment
2 would have inquired further. Plaintiffs' generic statements that Dr. Kushnir concealed the true
3 nature of decedent's cancer should be seen for what they are – a fiction created in an attempt to
4 save this untimely lawsuit. Plaintiffs were on inquiry notice of their claims against these
5 Defendants by January 17, 2016, at the absolute latest, and their claims against these Defendants
6 are untimely.

7 **III.**

8 **CONCLUSION**

9 Based on all of the foregoing, Plaintiffs knew or should have known, through the use of
10 reasonable diligence, of their claims against these Defendants more than one year before they
11 sought to bring their claims. Accordingly, Defendants respectfully request this Honorable Court
12 dismiss Plaintiffs' Complaint against them pursuant to NRS 41A.097.

13 DATED this 23rd day of January, 2018.

14
15 CARROLL, KELLY, TROTTER,
16 FRANZEN, McBRIDE & PEABODY

17 /s/ Heather S. Hall
18 ROBERT C. McBRIDE, ESQ.
19 Nevada Bar No.: 7082
20 HEATHER S. HALL, ESQ.
21 Nevada Bar No.: 10608
22 8329 W. Sunset Road, Suite 260
23 Las Vegas, Nevada 89113
24 Attorneys For Defendants,
25 *Christina Kushnir, M.D. & Women's*
26 *Cancer Center of Nevada, Inc.*
27
28

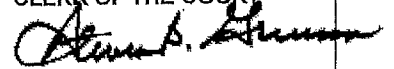
1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that on the 23rd day of January 2018, I served a true and correct
3 copy of the foregoing **DEFENDANTS CHRISTINA KUSHNIR, M.D. AND WOMEN'S**
4 **CANCER CENTER OF NEVADA, INC.'S REPLY IN SUPPORT OF MOTION TO**
5 **DISMISS PLAINTIFFS' COMPLAINT** addressed to the following counsel of record at the
6 following address(es):

- 7 ☒ **VIA ELECTRONIC SERVICE:** by mandatory electronic service (e-service), proof
8 of e-service attached to any copy filed with the Court; or
9 ☐ **VIA U.S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope with
10 postage thereon fully prepaid, addressed as indicated on the service list below in the
11 United States mail at Las Vegas, Nevada
12 ☐ **VIA FACSIMILE:** By causing a true copy thereof to be telecopied to the number
13 indicated on the service list below.

14 Vincent Garbitelli
15 Administrator, Estate of Carol A. Gaetano,
16 Deceased
17 PO Box 267
18 Williston Park, NY 11596
19 drgarbitelli@gmail.com

20
21
22
23
24 An Employee of **CARROLL, KELLY, TROTTER,**
FRANZEN, McBRIDE & PEABODY



1 NOE
2 ROBERT C. McBRIDE, ESQ.
3 Nevada Bar No.: 7082
4 HEATHER S. HALL, ESQ.
5 Nevada Bar No.: 10608
6 CARROLL, KELLY, TROTTER,
7 FRANZEN, McBRIDE & PEABODY
8 8329 W. Sunset Road, Suite 260
9 Las Vegas, Nevada 89113
10 Telephone No. (702) 792-5855
11 Facsimile No. (702) 796-5855
12 E-mail: rcmcbride@cktfmlaw.com
13 E-mail: hshall@cktfmlaw.com
14 Attorneys for Defendants
15 *Christina Kushnir, M.D. &*
16 *Women's Cancer Center of Nevada, Inc.*
17 *(erroneously named as Women's Care Center of Nevada)*

11 DISTRICT COURT

12 CLARK COUNTY, NEVADA

13 THE ESTATE OF CAROL A. GAETANO,
14 DECEASED, VINCENT GARBITELLI,
15 ADMINISTRATOR,

16 Plaintiffs,

17 vs.

18 CHRISTINA KUSHNIR, MD, and
19 WOMEN'S CARE CENTER OF NEVADA

20 Defendants.

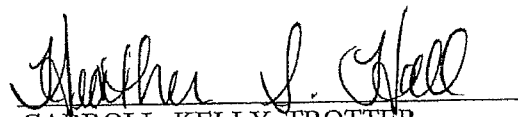
CASE NO.: A-17-764111-C
DEPT: X

NOTICE OF ENTRY OF ORDER
DENYING DEFENDANTS CHRISTINA
KUSHNIR, M.D. AND WOMEN'S CARE
CENTER OF NEVADA'S MOTION TO
DISMISS PLAINTIFFS' COMPLAINT

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PLEASE TAKE NOTICE that an Order Denying Defendants Christina Kushnir, M.D.
And Women's Care Center Of Nevada's Motion To Dismiss Plaintiffs' Complaint was entered
and filed on the 1st day of March, 2018, a copy of which is attached hereto.

Dated this 5th day of March, 2018.


CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY
ROBERT C. McBRIDE, ESQ.
Nevada Bar No.: 7082
HEATHER S. HALL, ESQ.
Nevada Bar No.: 10608
8329 W. Sunset Road, Suite 260
Las Vegas, Nevada 89113
Attorneys For Defendants,
Christina Kushnir, M.D. & Women's
Care Center of Nevada

1
2
3 **CERTIFICATE OF SERVICE**


4 I HEREBY CERTIFY that on the 5th day of March 2018, I served a true and correct copy
5 of the foregoing **ORDER DENYING DEFENDANTS CHRISTINA KUSHNIR, M.D. AND**
6 **WOMEN'S CARE CENTER OF NEVADA'S MOTION TO DISMISS PLAINTIFFS'**
7 **COMPLAINT** addressed to the following counsel of record at the following address(es):

- 8 ☒ **VIA ELECTRONIC SERVICE:** By mandatory electronic service (e-service), proof of
9 e-service attached to any copy filed with the Court; or
10 ☐ **VIA U.S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope with
11 postage thereon fully prepaid, addressed as indicated on the service list below in the
12 United States mail at Las Vegas, Nevada
13 ☐ **VIA FACSIMILE:** By causing a true copy thereof to be telecopied to the number
14 indicated on the service list below.

15 Vincent Garbitelli
16 Administrator, Estate of Carol A. Gaetano,
17 Deceased
18 PO Box 267
19 Williston Park, NY 11596
20 drgarbitelli@gmail.com

21
22
23
24
25
26
27
28

An Employee of CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY



1 **ORDR**

2 ROBERT C. McBRIDE, ESQ.
3 Nevada Bar No.: 7082

4 HEATHER S. HALL, ESQ.
5 Nevada Bar No.: 10608

6 CARROLL, KELLY, TROTTER,
7 FRANZEN, McBRIDE & PEABODY

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10 Telephone No. (702) 792-5855

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12 E-mail: rcmcbride@cktfmlaw.com

13 E-mail: hshall@cktfmlaw.com

14 Attorneys for Defendants

15 *Christina Kushnir, M.D. &*

16 *Women's Cancer Center of Nevada, Inc.*

17 (*erroneously named as Women's Care Center of Nevada*)

18 **DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

20 THE ESTATE OF CAROL A. GAETANO,
21 DECEASED, VINCENT GARBITELLI,
22 ADMINISTRATOR,

23 Plaintiffs,

24 vs.

25 CHRISTINA KUSHNIR, MD, and
26 WOMEN'S CARE CENTER OF NEVADA

27 Defendants.

CASE NO.: A-17-764111-C

DEPT: X

**ORDER DENYING DEFENDANTS
CHRISTINA KUSHNIR, M.D. AND
WOMEN'S CARE CENTER OF
NEVADA'S MOTION TO DISMISS
PLAINTIFFS' COMPLAINT**

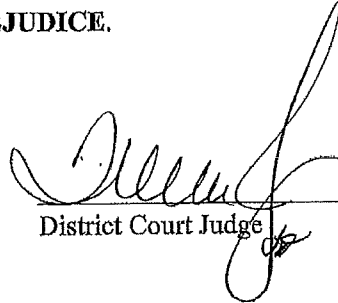
28 Defendants, CHRISTINA KUSHNIR, M.D. and WOMEN'S CARE CENTER OF
NEVADA's Motion to Dismiss Plaintiffs' Complaint came on for hearing on January 30, 2018.
Defendants appeared by and through their counsel of record, ROBERT C. McBRIDE, ESQ. of
the law firm of CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY.
Plaintiff VINCENT GARBITELLI appeared telephonically.

The Court, having considered the Motion, Opposition, Reply and oral argument, and

1 good cause appearing therefore, the Court finds that Defendants' Motion to Dismiss Plaintiffs'
2 Complaint is hereby **DENIED WITHOUT PREJUDICE**.


3 IT IS SO ORDERED.

4 Dated this 26 day of February 2018.


District Court Judge


5
6 Respectfully Submitted By:

7
8 DATED this 14th day of February 2018.

9 
10 ROBERT C. MCBRIDE, ESQ.
Nevada Bar No.: 7082
11 HEATHER S. HALL, ESQ.
Nevada Bar No.: 10608
12 CARROLL KELLY TROTTER
FRANZEN, McBRIDE & PEABODY
13 8329 W. Sunset Road, Suite 260
Las Vegas, Nevada 89113
14 Attorneys for Defendants
Christina Kushnir, M.D. &
15 Women's Cancer Center of Nevada, Inc.
(erroneously named as Women's Care Center of Nevada)
16

17 Approved as to Form and Content:

18 DATED this 9th day of FEBRUARY 2018.

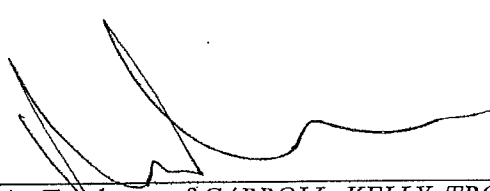
19
20 By: 
VINCENT GARBITELLI
21 In Proper Person
22 On behalf of Plaintiffs
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1 day of March 2018, I served a true and correct copy of the foregoing **ORDER DENYING DEFENDANTS CHRISTINA KUSHNIR, M.D. AND WOMEN'S CARE CENTER OF NEVADA'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT** addressed to the following counsel of record at the following address(es):

- ☒ **VIA ELECTRONIC SERVICE:** By mandatory electronic service (e-service), proof of e-service attached to any copy filed with the Court; or
- ☐ **VIA U.S. MAIL:** By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on the service list below in the United States mail at Las Vegas, Nevada
- ☐ **VIA FACSIMILE:** By causing a true copy thereof to be telecopied to the number indicated on the service list below.

Vincent Garbitelli
Administrator, Estate of Carol A. Gaetano,
Deceased
PO Box 267
Williston Park, NY 11596
drgarbitelli@gmail.com


An Employee of **CARROLL, KELLY, TROTTER,
FRANZEN, McBRIDE & PEABODY**

Steven D. Grierson

RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

VINCENT GARBITELLI,

Plaintiff,

vs.

CHRISTINA KUSHNIR, M.D.,
et al.,

Defendants.

CASE NO. A-17-764111-C

DEPT. NO. X

BEFORE THE HONORABLE TIERRA JONES, DISTRICT COURT JUDGE

TUESDAY, JANUARY 30, 2018

**RECORDER'S TRANSCRIPT OF HEARING:
DEFENDANTS CHRISTINA KUSHNIR, M.D. AND WOMEN'S CANCER CENTER
OF NEVADA, INC.'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT
U.S. BANK'S MOTION FOR SUMMARY JUDGMENT**

APPEARANCES:

FOR THE PLAINTIFF:

VINCENT GARBITELLI
Pro Per
Via Court Call

FOR THE DEFENDANTS:

ROBERT C. McBRIDE, ESQ.

RECORDED BY: VICTORIA BOYD, COURT RECORDER
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1 LAS VEGAS, NEVADA, TUESDAY, JANUARY 30, 2018

2 (Case called at 10:25 A.M.)

3 (Court dialing Court Call)

4 THE COURT: Hello. Hello.

5 MR. GARBITELLI: Hello, good morning. Vincent
6 Garbitelli here.

7 THE COURT: Good morning, Mr. Garbitelli. We are
8 on the record in A-764111, Vincent Garbitelli versus
9 Christina Kushnir. And Mr. Garbitelli, I apologize, we had
10 some other -- counsel had some other places that they needed
11 to appear so we are getting started on this case.

12 And you here via court call respecting yourself.
13 Counsel for the defense, can we have your name?

14 MR. McBRIDE: Sure. Robert McBride on behalf
15 Christina Kushnir and Women's Cancer Center, Your Honor.

16 THE COURT: Okay. This is on for Defendant
17 Kushnir's and Women's Cancer Center's Motion to Dismiss the
18 Plaintiff's Complaint. I have read the Motion. I have also
19 read the Opposition, and I've read the Reply.

20 Does counsel for the Cancer Center or Ms. Kushnir
21 have anything you want to add?

22 MR. McBRIDE: Your Honor, just simply to point out
23 that there was another Reply document that was filed by the
24 plaintiff, and we'd simply submit that was a rogue document.
25 I'm certain that --

1 THE COURT: The Reply in Support?

2 MR. McBRIDE: Right. And so I would say that
3 anything in that document should be disregarded by the Court.
4 But other than to point out, Your Honor, that I think that
5 it's pretty well set in our motion that in this case 41A.097
6 is the statute of limitations with regard to a claim for
7 wrongful death, which is what is alleged in this case. And
8 that it's clear by the facts of this case that the plaintiff
9 was put on inquiry notice, at least at the time of the death
10 of the decedent and had -- at least had one year within which
11 to file a Complaint and failed to do so.

12 And it was not until 11 months later that a
13 Complaint was filed. And the Court is well aware that the
14 statute and the case law on this subject requires only
15 inquiry notice in terms of when an ordinary prudent person
16 would have been put on notice about any alleged facts, and
17 that basically starts when the patient's death occurs.

18 So on that basis, Your Honor, we'd say that there's
19 ample evidence to suggest that the -- that there's no tolling
20 provision that is would apply to this.

21 And just one other minor thing. The representation
22 or the argument that there was a misrepresentation of the
23 nature of the cancer, that is -- really has nothing to do
24 with whether or not the plaintiff would have been put on
25 inquiry notice in this particular case, because that had

1 nothing to do with the specific act of negligence, which was
2 the perforation to the colon.

3 THE COURT: Right. And I actually, I disagree,
4 Counsel, because that allegation is actually the major
5 concern that I have, because if they were told that it was
6 the actual cancer that caused the perforation of the colon
7 and not some acts that were done by Dr. Kushnir, or by
8 anything that was done at the Women's Cancer Care Center,
9 then what reason would they have to believe that there was
10 negligence? Because if someone dies of cancer, I mean, it's
11 very, very unfortunate, but that's something that we deal
12 with on a daily basis at the hospitals and with doctors.

13 So if that's what they were led to believe up and
14 until the medical records had been reviewed, I think that's
15 absolutely relevant to when a reasonable prudent person would
16 have been put on notice that there may have been some
17 negligence on behalf of the doctor.

18 MR. McBRIDE: Well, assuming even that's the case,
19 Your Honor, assuming that's the case, the records were
20 obtained in July of 2016, which would have allowed ample
21 opportunity for the decedent at that point, to make any
22 inquiry notice. So assuming it's even the summer of July
23 2016, when they obtained those medical records, assume you
24 use that as the date when they reviewed those medical
25 records, which I think is actually earlier, but I understand

1 the Court's argument.

2 The fact of the matter is, is that the Complaint
3 was not filed until November of 2017, which is again, another
4 five months after that. So I think that we're talking about
5 -- and in this particular case, the plaintiff involved is
6 actually Mr. Garbitelli, it's my understanding is a
7 physician.

8 So it's not -- that's not a requirement. Doesn't
9 -- in fact, the statute doesn't make a distinction. The
10 caselaw doesn't make a distinction whether or not they have
11 specialized knowledge in the area.

12 THE COURT: Right.

13 MR. McBRIDE: But in this particular area -- in
14 this particular case, assume that to be true, that that's
15 when that inquiry notice would have been in effect, would
16 have been when those records were obtained.

17 THE COURT: Okay.

18 MR. McBRIDE: So I think it's still barred by the
19 statute of limitations.

20 THE COURT: Okay. Thank you Counsel.

21 Mr. Garbitelli, what is your response to that?

22 MR. GARBITELLI: Well, first of all, Your Honor, I
23 appreciate being able to talk over the telephone and also,
24 Mr. McBride is wrong about July 2006. We did not get the
25 records of the hospital until toward the end of October of

1 2016, and they were --

2 THE COURT: Okay, well --

3 MR. GARBITELLI: -- not read until --

4 THE COURT: -- but in your Opposition you say it
5 was the summer of 2016 and they were 7800 pages.

6 MR. GARBITELLI: Well, the summer ones were the
7 ones that came from Dr. Kushnir's office, but they were very
8 sparse, only a few pages. And it wasn't until we read the
9 records in November of 2016, that we found -- and of course,
10 not only did we find evidence of negligence, but then I was
11 in shock being a physician, too, that Dr. Kushnir would have
12 lied or misrepresented to me, in that January 2016 telephone
13 call, where she said that the cancer was widespread, stage
14 four, perforated.

15 She made it sound, you know, completely fatal and
16 terminal. And so to me, I think that in the 097 part of the
17 limitations, I think indeed, it should be tolled, because she
18 did conceal, or even if she didn't deliberately conceal, they
19 should have known that it wasn't the cancer that caused the
20 woman to -- to have all these problems, it was because there
21 was perforation.

22 So we were not, you know, privy to that
23 information. So the facts did not come out until we read the
24 record in November of 2016 and then, of course, we had until
25 the following November of 2016.

1 . So then I did two things to support my responses to
2 the opposition, you know, to dismiss was, the record that we
3 sent to the medical board, because as soon as I found out,
4 not only did I see evidence -- fact evidence of negligence,
5 but I also saw that they was unprofessional, which is
6 different from negligence, as you know, Your Honor.

7 And so I was -- this has never happened to me in 40
8 years of being a doctor, that the doctor would blatantly lie
9 or conceal or misrepresent the condition of a patient, and
10 that's why I filed that first. And that's when the -- I
11 would say, that if it'd be anything you're going to do the
12 one year. That's why we filed within one year.

13 So as you stated earlier, Your Honor, I think that
14 is absolutely the issue is, about this concealment and the
15 misrepresentation of what was cancer that killed her or
16 whether there was some negligence. So I think that the
17 defendants' arguments are not germane to this issue. And of
18 course, they keep going back to being put on notice with the
19 time of her death. But to me, if the legislature wanted to
20 do one year from the time of death, they would have so
21 stated. They said three years or one year from the time that
22 I discovered.

23 Discovered's a big word. It doesn't -- it doesn't
24 say anything at all about having a hunch or being suspicious
25 or anything like that.

1 And then the only other thing I would say in
2 reference to Mr. McBride's statement about me sending in a
3 rogue or fugitive document, I only responded, Your Honor,
4 because when Heather Hall wrote her Reply, she basically
5 accused me, and especially in the final paragraph, of
6 perjury.

7 And here she is saying to defend herself, that she
8 has to say I filed false papers with the court? And as a
9 physician for 40 years, that's why I replied. So I'm sorry
10 that maybe that wasn't proper. Although, I know I could
11 amend my Complaint down the road, but I really appeal to,
12 Your Honor, that this indeed issue, as you pointed out, is in
13 fact, the critical linchpin of our whole opposition regarding
14 that statute of limitations and I feel that the case should
15 go forward and let the evidence come out, and let Dr. Kushnir
16 and the defense actually come up with facts and allow to be
17 deposed to refute the allegations and charges that I've made
18 in two affidavits under oath.

19 THE COURT: Well, and Mr. Garbitelli in regards to
20 the Reply that you filed, Counsel is -- I mean, he is correct
21 that that's not what the rules allow. And I understand like
22 a lot of times you get the moving party, they say something
23 in their Reply that the opposing party doesn't agree with.
24 But that's the whole reason I let you guys come in and have a
25 oral argument in court. That gives you the opportunity to

1 address those things.

2 You don't get to file a Reply so the Court is not
3 considering anything that was in your Reply because it was
4 against the court rules for you to file a Reply. And I
5 understand that you want to refute those things, but that's
6 what the -- I mean, you're allowed to do that today orally.

7 MR. GARBITELLI: Okay, well, thank you, Your Honor,
8 because I felt the charges of perjury were really serious,
9 and I took it very seriously and that's why I replied and I'm
10 sorry about not knowing what the rules were.

11 THE COURT: Well, I mean, that's the thing. I
12 mean, and that's the -- I mean, that's the risk you take, you
13 know, when you're pro per, but you still have to follow the
14 rules as well. So I'm not going to --

15 MR. GARBITELLI: I understand, Your Honor, but I
16 feel my arguments that I stated do apply as far as the
17 tolling of the statute of limitations and the fact that the
18 -- I have made a very clear case in the original affidavits
19 that she withheld and misrepresented and outright lied to me.
20 There's been no refutation of that.

21 THE COURT: Okay. And Counsel, do you have any
22 response to that?

23 MR. McBRIDE: Your Honor, just simply that this is
24 a claim for wrongful death. There's not a claim for fraud or
25 concealment in this -- on this case. And on the facts of the

1 case, based on the allegations that were pled in the
2 Complaint, the statute of limitations would have run and
3 there's no tolling provisions that would have applied in that
4 case.

5 THE COURT: Okay. Well, I mean, in my reading of
6 everything as well as the argument that you guys have made
7 today, I think NRS 41A.097 is clear when it discusses that
8 the time may be tolled if a provider of healthcare has
9 concealed any act, error or omission upon which the act is
10 based.

11 And in this case, I think at this early stage in
12 the proceeding the allegations are out there, and I think
13 without further discovery being done, those are allegations
14 that absolutely apply at this point, as the evidence to the
15 contrary at this point is just basically facts that are
16 alleged in a motion.

17 So for today's purposes, I'm going to deny the
18 Motion to Dismiss, but it's being denied without prejudice.
19 If discovery is conducted in this case and it is determined
20 that there was no representation about the stage four cancer,
21 this motion can be renewed or any appropriate motions as
22 Counsel deems appropriate based on what is brought out in the
23 discovery process but for today's purposes, the motion will
24 be denied, but it is without prejudice.

25 MR. McBRIDE: Thank you, Your Honor.

1 THE COURT: Thank you.

2 MR. McBRIDE: We'll prepare an order.

3 THE COURT: Thank you so much, Counsel, I really
4 appreciate it.

5 MR. McBRIDE: Thank you. And I apologize for --

6 THE COURT: No problem.

7 MR. GARBITELLI: Thank you. Thank you, Your Honor.

8 THE COURT: Thank you, Mr. Garbitelli for being
9 here. Thanks.

10 MR. GARBITELLI: Am I dismissed?

11 THE COURT: Yes.

12 MR. GARBITELLI: Okay, thank you, Your Honor. Take
13 care.

14 [Hearing concluded at 10:36 A.M.]

15 * * * * *

ATTEST: I hereby certify that I have truly and correctly
transcribed the audio/visual proceedings in the above-
entitled case to the best of my ability.

Julie Lord

JULIE LORD, INDEPENDENT TRANSCRIBER
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