

**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. **Electronically Filed**  
Sep 26 2018 04:03 p.m.  
District Court No. **Elizabeth A. Brown**  
**A-17-76411-C**  
Clerk of Supreme Court

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**PETITION FOR WRIT OF MANDAMUS**

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ROBERT C. McBRIDE, ESQ.

Nevada Bar No.: 007082

[rmcbride@cktfmlaw.com](mailto:rmcbride@cktfmlaw.com)

HEATHER S. HALL, ESQ.

Nevada Bar No.: 010608

[hshall@cktfmlaw.com](mailto:hshall@cktfmlaw.com)

Carroll, Kelly, Trotter, Franzen, McBride & Peabody

8329 W. Sunset Road, Suite 260

Las Vegas, Nevada 89113

Attorneys for Petitioners

## **ROUTING STATEMENT**

This Petition raises as a principal issue a question of statewide public importance in compliance with NRAP 17(a)(14). As such, jurisdiction over this matter is retained by the Nevada Supreme Court. This matter does not fall within any of the categories presumptively assigned to the Court of Appeals pursuant to Nevada Rule of Appellate Procedure 17(b).

## **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS**

Petitioners, Christina Kushnir, M.D. and Women's Cancer Center of Nevada, Inc. (erroneously named as Women's Care Center of Nevada) are represented by Robert C. McBride, Esq. and Heather S. Hall, Esq. of the law firm of Carroll, Kelly, Trotter, Franzen, McBride & Peabody. Real Party in Interest in this case is The Estate of Carol A. Gaetano, Deceased, Vincent Garbitelli, represented by Zoe Terry, Esq. of the law firm of Terry Law Group.

Petitioners, Christina Kushnir, M.D. and Women's Cancer Center of Nevada, Inc. (erroneously named as Women's Care Center of Nevada), hereby petition this Court to issue a writ of mandamus pursuant to Nevada Rule of Appellate Procedure 21, and based on this Court's original jurisdiction set forth in Article 6 §4 of the Nevada Constitution, and NRS §34.160 and §34.320.

Petitioners respectfully petition this Court for a Writ of Mandamus directing

Respondent to reverse her ruling denying Dr. Kushnir and Women's Cancer Center of Nevada's Motion to Dismiss based on NRS 41A.097. On the face of the Complaint filed in this matter, the claims for medical malpractice/wrongful death were untimely. Pursuant to NRS 41A.097, Plaintiff had one year from the date of decedent's death to file suit. As alleged in the Complaint, decedent died on January 17, 2016 at Valley Hospital Medical Center. PET APPX0001. Plaintiff waited until November 3, 2017 to file the Complaint, nearly eleven months after the statute of limitations had run. Because the uncontroverted facts alleged in the Complaint establish that this action is untimely, a writ should issue.

## **I. ISSUES PRESENTED**

- a. Whether Plaintiff's Complaint is untimely.
- b. Whether Plaintiff had before him, information which would have led a reasonable person to inquire further into whether he had any claims against Dr. Kushnir and Women's Cancer Care Center prior to November 3, 2016.

## **II. INTRODUCTION**

This Court's immediate action is necessary to prevent further prejudice as a result of misinterpretation and misapplication of Nevada Revised Statute Section 41A.097. Petitioners, 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 respectfully petition this Court for a Writ of Mandamus directing Respondent to dismiss all claims brought against these Petitioners in the above-entitled action, as the claims filed on November 3, 2017 are untimely.

Plaintiff had before him, information which would have led the reasonably prudent person to investigate prior to November 3, 2016. Inquiry notice for purposes of the statute of limitations was triggered no later than the date Plaintiff received the initial medical records. That occurred in the summer of 2016, making the November 3, 2017 Complaint untimely.

### **III. FACTUAL AND PROCEDURAL HISTORY**

On November 3, 2017, Plaintiff The Estate of Carol A. Gaetano, Deceased, Vincent Garbitelli, Administrator, filed a Complaint against Christina Kushnir, M.D. and Women's Cancer Center of Nevada, Inc. (erroneously named as Women's Care Center of Nevada). PET APPX0001. Plaintiff also filed an Affidavit in support of the Complaint. PET APPX0004 – 10. At the time of filing, Vincent Garbitelli, himself a physician, was representing Plaintiff and serving as the affiant expert. *Id.*

As evident from the Complaint, the care at issue took place in November and December of 2015. PET APPX0002. Plaintiff alleges that Dr. Kushnir did an unnecessary and contraindicated diagnostic laparoscopy on December 9, 2015,

allegedly resulting in a perforated colon and acute peritonitis. *Id.* Decedent Carol Gaetano died on January 17, 2016. PET APPX0001.

Neither the Complaint, nor the affidavit authored and filed by Dr. Garbitelli make any mention of any alleged misrepresentations by Christina Kushnir, M.D. Initially, Plaintiff was not represented by counsel in this case. From the caption of the case, it was unclear whether Dr. Garbitelli was an individual Plaintiff in this case.

On December 25, 2017, Dr. Kushnir and Women's Cancer Center of Nevada filed their Motion to Dismiss Plaintiffs' Complaint pursuant to NRS 41A.097, arguing that the action was untimely. PET APPX0011 – 17. As stated in the Motion, the Complaint makes allegations related to care and treatment that occurred in November and December 2015 and related to Ms. Gaetano's January 17, 2016 death. PET APPX00013. In order to be timely, a wrongful death claim needed to be filed by January 17, 2017. *Id.* Instead, Plaintiff waited until November

In response, Plaintiff filed an Opposition to the Motion to Dismiss on January 2, 2018. PET APPX0018 – 22. In that Opposition, Dr. Garbitelli alleged that on January 2, 2016, he personally spoke with Dr. Kushnir who advised that his Aunt Carol Gaetano had stage 4 cancer and that her cancer had spontaneously perforated her colon in multiple locations. PET APPX0019. Plaintiff also claimed

that the statute of limitations was tolled while he pursued an action with the Nevada State Board of Medical Examiners. *Id.* In that Opposition, Dr. Garbitelli acknowledges that he received the medical records from Dr. Kushnir's office in the summer of 2016. *Id.* He also acknowledges receiving 7800 pages of hospital records in the fall of 2016, but states he was unable to read them until shortly before November 24, 2016. *Id.*

On January 23, 2018, Defendants/Petitioners filed their Reply in Support of the Motion to Dismiss addressing Plaintiff's Opposition. PET APPX0023 – 30. As set forth in the Reply, NRS 41A.097 has no tolling provision for Board matters, nor does it allow Plaintiff to delay reviewing medical records in an effort to extend the statute of limitations. PET APPX0028.

On January 30, 2018, the respondent heard oral arguments on the Motion to Dismiss. PET APPX0037 – 47. Respondent concluded that discovery needed to be conducted into the alleged concealment of Dr. Kushnir, but disregarded the date medical records were received, which provides uncontroverted evidence of inquiry notice. PET APPX0046. The Order denying the Motion to Dismiss was entered on March 5, 2018. PET APPX 31 – 36.

Respondent manifestly abused its discretion by failing to grant the Motion to Dismiss. The focus on alleged misstatements, with no regard for the date Plaintiff received medical records, was error that warrants a writ to correct.

#### **IV. REASONS WHY WRIT SHOULD ISSUE**

This Court should exercise its discretion to issue a Writ of Mandamus in this case directing Respondent to dismiss this case, because the denial of the Motion was a manifest abuse of discretion. This misapplication of the law will cause Petitioners to proceed to trial on claims that are far beyond the one year statute contained in NRS §41A.097. There is no adequate, speedy remedy available at law to address this continuing injury to Petitioners.

This Court should also grant this Petition for Writ of Mandamus so that it can clarify an important issue of law and make clear that the standard for determining whether the statute of limitations has run is one of inquiry notice, not actual notice. *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997). In addition, the strong public interest in and public policy behind the medical malpractice statutes contained in Chapter 41A of the Nevada Revised Statutes weigh heavily in favor of clarifying this important issue.

#### **V. LEGAL ARGUMENT**

##### **A. Writ of Mandamus Standard**

A writ of mandamus is an extraordinary remedy that may be issued to compel an act that the law requires. *Cote v. Eighth Judicial District Court*, 175 P.3d 906, 907-08, 124 Nev. Adv. Rep. 3, 4 (Nev. 2008). A writ of mandamus may also issue to control or correct a manifest abuse of discretion. *Id.* A writ shall

issue when there is no plain, speedy and adequate remedy in the ordinary course of law. NRS §34.170; *Sims v. Eighth Judicial District Court*, 206 P.3d 980, 982, 125 Nev. Adv. Rep. 13 (Nev. 2009). This Court has complete discretion to determine whether a writ will be considered. *Halverson v. Ross Miller*, 186 P.3d 893, 896, 124 Nev. Adv. Rep. 47 (Nev. 2008) (“the determination of whether to consider a petition is solely within this court’s discretion.”); *Sims*, 206 P.3d at 982 (“it is within the discretion of this court to determine whether these petitions will be considered.”).

**B. Respondent Manifestly Abused its Discretion When it Denied  
the Motion to Dismiss.**

Plaintiff’s claims against Dr. Kushnir and Women’s Cancer Center are barred because they were filed in violation of the statute of limitations. The statute of limitations for medical malpractice actions is found in NRS §41A.097, which provides in relevant part:

Except as otherwise provided in subsection 3, 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, for:



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

[Emphasis added].

This Court has clarified the discovery rule set forth in NRS §41A.097. Specifically, this Court held that “the statute of limitations begins to run when the patient has before him facts which would put a reasonable person on inquiry notice of his possible causes of action, whether or not it has occurred to the particular patient to seek further medical advice.” *Massey v. Litton*, 99 Nev. 723, 727-28, 669 P.2d 248, 251-52 (1983). The focus is on the patient’s knowledge or access to facts rather than on his discovery of legal theories. *Id.* at 728, 252. Thus, once the patient has “inquiry notice” of his cause of action, the statute of limitations begins to run. *Id.* Even under the discovery rule, the plaintiff must use reasonable diligence to discover the injury. NRS §41A.097. Learning of decedent’s death and waiting eleven months to review medical records is not reasonable diligence and Respondent’s decision to deny the Motion to Dismiss was error.

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**C. In a Wrongful Death Case, the Injury Is the Death and the  
Statute of Limitations Began Running on the Date of Death.**

The appropriate accrual date for the statute of limitations is a question of law when the facts are uncontroverted. *Day v. Zobel*, 112 Nev. 972, 922 P.2d 536 (1996), citing *Nevada Power Co. v. Monstanto Co.*, 955 F.2d 1304, 1307 (9th Cir.1992). The uncontroverted facts in this case are that the decedent died on January 17, 2016 and Vincent Garbitelli was immediately advised of her death.

This Court has held that “the statute of limitations begins to run when the patient has before him facts which would put a reasonable person on inquiry notice of his possible causes of action, whether or not it has occurred to the particular patient to seek further medical advice.” *Massey v. Litton*, 99 Nev. 723, 727-28, 669 P.2d 248, 251-52 (1983). The focus is on the patient’s knowledge or access to facts rather than on his discovery of legal theories. *Id.* at 728, 252; *See also Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1111, 751 P.2d 923, 928, 245 Cal. Rptr. 658, 662 (1988) (“It is the discovery of facts, not their legal significance, that starts the statute”). Thus, once the patient has “inquiry notice” of her cause of action, the statute of limitations begins to run. *Id.*

In a wrongful death case, the injury is the death. *Pope v. Gray*, 104 Nev. 358, 760 P.2d 763 (1988). In *Pope v. Gray*, this Court determined that the discovery rule applied in *Massey* also applies to cases dealing with medical

malpractice wrongful death actions by heirs. The Court utilized the *Massey* rule and held that the statute of limitations does not necessarily begin to run from the date of death, but from the date that plaintiff discovers or reasonably should have discovered the legal injury.

Actual notice of a definite cause of action is not required to trigger NRS §41A.097's one year statute of limitations. *Massey*, 99 Nev. at 728, 669 P.2d at 252. This Court has further explained that "a patient **discovers** his *legal injury* **when** he knows or, through the use of reasonable diligence, **should have known of facts that would put a reasonable person on inquiry notice** of his cause of action." *Id.* [Emphasis added]. Only inquiry notice of Plaintiff's possible legal injury is required to trigger Plaintiff's statute of limitations. *Pope*, 104 Nev. at 362.

Plaintiff's Complaint states that Carol Gaetano's date of death was January 17, 2016. PET APPX0001. Dr. Garbitelli has never alleged Ms. Gaetano's death was concealed from him. Further, there is no allegation that Dr. Kushnir concealed any information whatsoever. The date of death triggered inquiry notice and Plaintiff only had until January 17, 2017 to bring claims against these Petitioners for care that was rendered in November and December 2015, allegedly resulting in decedent's death.

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**D. Any Alleged Concealment by Christina Kushnir, M.D. Does  
Not Toll the Statute of Limitations Beyond the Time Dr.  
Garbitelli Received the Medical Records.**

The allegation that Dr. Kushnir concealed information is notably absent from the Complaint filed in this case. Only upon receiving the Motion to Dismiss did Dr. Garbitelli raise an allegation of a January 2, 2016 phone call with Dr. Kushnir, in which she purportedly misled Dr. Garbitelli about the nature of his aunt's cancer and death. Dr. Kushnir denies such concealment occurred. However, even accepting the allegations of concealment as true, this does not alter the uncontroverted facts of this case.

Dr. Garbitelli admits that he was in possession of Dr. Kushnir's medical records in the summer of 2016. The proper measure is not what Dr. Garbitelli did with facts known or available to him, but what "the ordinarily prudent person" would have done. *Winn v. Sunrise Hospital & Medical Center*, 128 Nev. 246, 251, 277 P.3d 458, 462, 2012 Nev. LEXIS 61, at 10-11 (2012). An ordinarily prudent person had sufficient information available by the summer of 2016 to wonder if Dr. Kushnir's care may have been the cause of Ms. Gaetano's death. Plaintiff Dr. Garbitelli is not the ordinary person. He is a physician and his own affiant expert. Thus, he clearly possessed specialized knowledge far beyond the ordinary person.

In *Winn v. Sunrise Hospital and Medical Center, supra.*, this Court addressed the issue of when the discovery date provided in NRS §41A.097(2) can be determined as a matter of law. The *Winn* Court held the plaintiff was put on inquiry notice of his potential causes of action on the date when the patient's guardian ad litem received the pertinent medical records. *Id.* at 253, 463. This Court held that the evidence in that case did:

“Irrefutably demonstrate that Winn discovered Sedona’s injury no later than February 14, 2007 – **the date when he received the initial 182 pages of medical records.** At this point, Winn had not only hired an attorney to pursue a medical malpractice action, but he also had access to Dr. Ciccolo’s postoperative report that referenced air being present in Sedona’s heart at inappropriate times during the surgery. By this point at the latest, Winn and his attorney had access to facts that would have led an ordinarily prudent person to investigate further into whether Sedona’s injury may have been caused by someone’s negligence.”

*Id.* [Emphasis added].

Here, Dr. Garbitelli was unrepresented by counsel and, thus, did not need counsel to file his claims in this case. Just like in *Winn*, the date Dr. Garbitelli received the initial pages of medical records – the summer of 2016 – is the very latest the statute of limitations could have been triggered. Thus, the Complaint

filed on November 3, 2017 was past the one year statute of limitations. Dr. Garbitelli's unique position as a physician and his serving as his own expert make any argument that he did not have sufficient information or access to information meritless. Dr. Garbitelli acknowledges being in possession of the initial medical records in the summer of 2016. NRS §41A.097 does not allow for the statute to be tolled until the expert chooses to read the medical records.

Plaintiff's position and ultimately, that of Respondent, demanded far too much of "inquiry notice." "Inquiry notice" is the trigger starting the investigation. An "ordinarily prudent person" suspecting wrongdoing may not delay suit until after he or she apprehends the full extent of the negligence or injury. See, e.g., *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1111, 751 P.2d 923, 928, 245 Cal. Rptr. 658, 662 (1988) ("[s]o long as suspicion [of wrongdoing] exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her").

Pursuant to *Winn*, the evidence irrefutably demonstrates Plaintiff was on inquiry notice of his causes of action against Petitioners more than one year before filing the Complaint. Plaintiff's Complaint was not filed until November 3, 2017, in clear violation of the one year statute of limitations. Even if this Court were to find that there is a material question of fact as to whether Dr. Kushnir concealed information, once Plaintiff got the medical records in the summer of 2016, inquiry notice most certainly began.

Contrary to the authority above, Respondent denied the Motion to Dismiss and is allowing discovery to proceed. This was clearly erroneous pursuant to the above authority. Based upon the holdings of both *Pope* and *Winn*, Respondent was required to grant the Motion to Dismiss manifestly abused its discretion when it failed to do so. A Writ of Mandamus is the proper remedy for this manifest abuse of discretion.

## VI. CONCLUSION

In accordance with the above, Petitioners respectfully request that this Court grant their Petition for Writ of Mandamus and Order the Respondent to enter an Order dismissing Plaintiff's medical malpractice/wrongful death claims.

DATED this 26<sup>th</sup> day of September, 2018.

CARROLL, KELLY, TROTTER, FRANZEN,  
McBRIDE & PEABODY

By: Heather S. Hall

ROBERT C. McBRIDE, ESQ.

Nevada Bar No.: 007082

HEATHER S. HALL, ESQ.

Nevada Bar No.: 010608

8329 W. Sunset Road, Suite 260

Las Vegas, Nevada 89113

Attorneys for Petitioners

*Christina Kushnir, M.D. & Women's Cancer  
Center of Nevada, Inc. (erroneously named as  
Women's Care Center of Nevada)*

### NRAP 26.1 DISCLOSURE

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

Petitioners, Christina Kushnir, M.D. and Women's Cancer Center of Nevada, Inc. (erroneously named as Women's Care Center of Nevada), are represented by the law firm Carroll, Kelly, Trotter, Franzen, McBride & Peabody. There is no parent corporation or publicly owned company owning more than ten percent of the stock in Women's Cancer Center of Nevada, Inc.

DATED this 26<sup>th</sup> day of September, 2018.

CARROLL, KELLY, TROTTER, FRANZEN,  
McBRIDE & PEABODY

By: Heather S. Hall

ROBERT C. McBRIDE, ESQ.

Nevada Bar No.: 007082

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Center of Nevada, Inc. (erroneously named as  
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**AFFIDAVIT OF VERIFICATION IN SUPPORT OF PETITION FOR  
WRIT OF MANDAMUS**

STATE OF NEVADA )

) ss:

COUNTY OF CLARK )

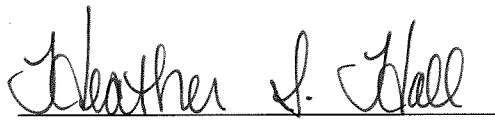
I, Heather S. Hall, Esq., being first duly sworn, on oath, deposes and states:

1. I am licensed to practice law in this court and I am an attorney with the law firm of CARROLL, KELLY, TROTTER, FRANZEN, McBRIDE & PEABODY, attorneys for Petitioners, Christina Kushnir, M.D. and Women's Cancer Center of Nevada, Inc. (erroneously named as Women's Care Center of Nevada), and provide this affidavit in support of their PETITION FOR WRIT OF MANDAMUS.
2. I certify that I have read this Petition, and to the best of my knowledge, information and belief, this Petition complies with the form requirements of Rule 21(d), and that it is not frivolous or interposed for any improper purpose such as to harass, cause unnecessary delay or needless increase in the cost of litigation.
3. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure; including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a

reference to the appendix where the matter relied upon 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 requirements of the Nevada Rules of Appellate Procedure.

4. All documents contained in Petitioners' Appendix, filed herewith, are true and correct copies of the pleadings and documents they are represented to be in the Petitioners' Appendix and as cited herein.
5. This Petition also complies with the requirements of NRAP 21(d) and 32(c)(2).

FURTHER YOUR AFFIANT SAYETH NAUGHT.



Heather S. Hall, Esq.

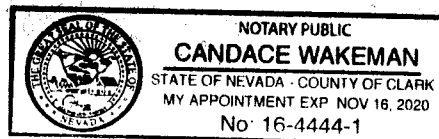
SUBSCRIBED and SWORN to before me

this 26<sup>th</sup>, September 2018.



Notary Public in and for said

County and State



## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this Petition 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 2007 in 14-point Times New Roman font.

2. I further certify that this Petition complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

- ✓ proportionally spaced, has a typeface of 14 points or more and contains 4,153 words; and/or
- ✓ does not exceed 30 pages.

3. Finally, I hereby certify that I have read this Petition, 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 Petition 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 26<sup>th</sup> day of September, 2018.

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Attorneys for Petitioners

*Christina Kushnir, M.D. & Women's Cancer  
Center of Nevada, Inc. (erroneously named as  
Women's Care Center of Nevada)*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26<sup>th</sup> day of September, 2018, I served the foregoing **PETITION FOR WRIT OF MANDAMUS** 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</i> <i>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