

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2 JAQUELINE FAUSTO,

3 Appellant,

4 vs.

5 RICARDO SANCHEZ-FLORES, an
6 individual; VERENICE RUTH FLORES,
an individual

7 Respondents.

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9 **APPEAL FROM ORDER OF THE 8TH
JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA**

10 **APPELLANT'S OPENING BRIEF**

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1 **DISCLOSURE STATEMENT IN COMPLIANCE WITH NRAP 26.1**

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

6 1. JAQUELINE FAUSTO

7 2. Jason D. Guinasso, Esq., Joseph R. Ganley, Esq., Piers R. Tueller, Esq.,
8 and Alex R. Velto, Esq. of HUTCHISON & STEFFEN, PLLC, are and
9 have been at all times relevant to the District Court case through the
10 current appeal the attorneys of record for Jaqueline Fausto. No other
11 attorneys from Hutchison & Steffen are expected to appear before this
12 Court with respect to the appeal now pending.

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1 presume an employer is involved in the action and requires that a plaintiff has
2 wrongly relied on statements from an administrative agency. *See Copeland v.*
3 *Desert Inn Hotel*, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983). Simply, this
4 test is not applicable to non-administrative decisions and provides little
5 guidance for Nevada courts, litigants, or the public.

6 Further, this issue is of extreme importance to a group of Nevadans who
7 tend to be overlooked. Statewide, thousands of rape kits remain in a backlog.
8 And over the course of the last few years, the Attorney General's Office has
9 failed to adequately test the rape kits. This issue has been covered at length in
10 the media and affected a large number of people. And while the issue has been
11 largely remedied by the conscientious actions of the Attorney General's Office,
12 this case allows the Court to identify when equitable tolling applies for those
13 whose kits were overlooked. It also allows the Court to officially adopt or
14 decline the federal test (which creates a clearer standard for equitable tolling
15 than Nevada's current test), and could have far-reaching effects on a number
16 of rape victims. Therefore, this case warrants Nevada Supreme Court retention
17 pursuant to NRAP 17.

1 **III. ISSUES PRESENTED**

2 A. Whether the District Court erred in granting defendants' motion
3 to dismiss.

4 B. Whether the District Court erred in denying equitable tolling to
5 Ms. Fausto's claims when the State failed to process her rape kit within the
6 two-year statute of limitations period.

7 **IV. STATEMENT OF THE CASE**

8 Jaqueline Fausto went out to celebrate with people she considered
9 friends. After a night of dancing and a number of drinks, Ricardo Sanchez-
10 Flores sexually assaulted her in his car and raped her in his house. To this day
11 Ms. Fausto does not remember the whole night clearly. That's to be expected
12 after all: her attacker insisted on making her extremely intoxicated. But instead
13 of running to the court without hard evidence, Ms. Fausto went to a doctor for
14 a rape kit and filed a police report. The rape kit was not processed for more
15 than two years. During this time, as with most victims of sexual assault, Ms.
16 Fausto doubted what happened and tried to suppress it.

17 Only after the Nevada's two-year statute of limitations on tort actions
18 passed did Ms. Fausto get the results from the rape kit and the District
19 Attorney's Office bring charges. It was Ricardo's DNA. With the hard

1 evidence she needed to file suit, Ms. Fausto brought claims in the District
2 Court. The District Court dismissed her case with prejudice because the statute
3 of limitations had expired.

4 This case is an opportunity to tell all rape victims that they don't need
5 to be victimized by the State's failure. It's an opportunity to articulate a test
6 for when equitable tolling applies to tort claims—something this Court has
7 never done. And it's an opportunity for Ms. Fausto to have her day in court.

8 **V. STATEMENT OF FACTS**

9 **A. Factual Background**

10 In the early morning of December 31, 2016, Ricardo Sanchez-Flores
11 raped Ms. Fausto after he fed her drinks and promised to keep her safe. (1 JA
12 2, 4). As with many instances of sexual assault, Ms. Fausto knew Ricardo and
13 trusted him. *Id.* at 3. Ms. Fausto worked with Ricardo and his wife, Verenice
14 Ruth Flores, for a number of years. *Id.* at 2. But that night, and into the
15 following early morning, Ricardo “strategically [took] advantage of the trust
16 he had earned from his vulnerable business partner Ms. Fausto over the past
17 six years to ultimately sexually assault and rape Ms. Fausto from the confines
18 of his own home . . . while Ms. Fausto was intoxicated.” *Id.* Ricardo's own
19

1 wife witnessed the attack, walking in as Ricardo was raping Ms. Fausto. *Id.* at
2 005.

3 Ms. Fausto was very intoxicated but she never consented. The night was
4 supposed to be fun and filled with celebration. Ms. Fausto had just passed
5 three sections of the Certified Public Accountant Exam. *Id.* at 3. So, Ricardo
6 and his wife—Ms. Fausto’s longtime business partners—invited her out to
7 celebrate. *Id.* at 3.

8 Perhaps Ms. Fausto should have realized something was amiss. Ricardo
9 had already acted strangely, recommending that Ms. Fausto “leave her vehicle
10 for the evening ‘in case’ Ms. Fausto became too intoxicated from celebratory
11 drinks,” something out of character for Ricardo. But she had known these
12 people for years. *Id.* at 3.

13 After feeding her drinks, Ricardo forced Ms. Fausto into his vehicle. *Id.*
14 She “was so intoxicated [that] she needed help maneuvering from one location
15 to the next while she walked. As a result of Ms. Fausto’s intoxication, she was
16 mentally incapacitated.” *Id.* at 4. Ricardo led Ms. Fausto into the back seat of
17 his vehicle while his wife drove them to his home.

18 Ricardo quickly began sexually assaulting Ms. Fausto. *Id.* at 4. “During
19 the car ride, Ricardo [] committed several acts of open or gross lewdness by

1 willfully and unlawfully: squeezing the buttock, grabbing the breasts, grabbing
2 the genital areas of Ms. Fausto, and taking advantage of Ms. Fausto's inability
3 or incapability to resist or understand what Ricardo [] was doing to Ms.
4 Fausto.” *Id.* at 4. When they arrived at Ricardo’s home, Ms. Flores went to
5 bed and left Ms. Fausto alone with him. *Id.* at 4. He penetrated virtually every
6 orifice of Ms. Fausto’s body, with his penis, hands, and mouth. *Id.* at 5.

7 Eventually, Ms. Flores was woken by the noise of sexual assault. *Id.* at
8 5. She walked downstairs to find Ricardo raping Ms. Flores. *Id.* She
9 intervened minimally, only demanding that Ricardo leave the room. *Id.*

10 Ms. Flores was not interested in protecting Ms. Fausto, she was
11 interested in ensuring that Ms. Fausto did not remember that Ricardo raped
12 her. *Id.* at 5. When she drove Ms. Fausto to her car the next morning, Ms.
13 Flores asked if she remembered anything; Ms. Fausto said she did not. *Id.* at
14 6. Throughout this time, Ms. Flores was attempting to aid and abet Ricardo’s
15 sexual assault. *Id.*

16 That same day, Ms. Fausto went to the doctor to have a rape kit
17 administered. *Id.* Within the week, Ms. Fausto went to Las Vegas Metro
18 Police Department (“LVMPD”) to report the crime. *Id.* Ms. Fausto spoke with
19

1 Ms. Flores months later and told Ms. Flores that Ms. Fausto then understood
2 that Ricardo had sexually assaulted her. *Id.*

3 Not until over two years later, on February 2, 2019, was Ms. Fausto
4 notified that the lab had finally processed Ms. Fausto's rape kit and that it was,
5 in fact, Ricardo's DNA. *Id.* at 7. The Clark County District Attorney's Office
6 filed a criminal complaint soon after for sexual assault and open and gross
7 lewdness. *Id.* at 7.

8 **B. Procedural History**

9 Ms. Fausto filed her complaint against Ricardo and Ms. Flores in
10 District Court on July 3, 2019. *Id.* at 1-14. Her complaint included claims for
11 sexual assault and battery against Ricardo and intentional infliction of
12 emotional distress, false imprisonment, civil conspiracy, concerted action, and
13 negligence against both. *Id.* at 8-12.

14 Without filing an answer, the defendants filed a motion to dismiss or, in
15 the alternative, a motion to stay on July 24, 2019. *Id.* at 19-30. Ms. Fausto
16 opposed the motion on August 8, 2019. *Id.* at 32-51. She included in her
17 opposition a declaration in support. *Id.* at 52-55. The defendants replied in
18 support of their motion on August 19, 2019, *id.* at 63-71, and Ms. Fausto filed
19 an addendum to her opposition on September 10, 2019, *id.* at 81-86. Soon

1 after, on September 13, 2019, the defendants filed supplemental points and
2 authorities in response to Ms. Fausto's addendum. *Id.* at 87-134.

3 The District Court heard defendants' motion to dismiss or, in the
4 alternative, motion to stay on September 17, 2019, during which it considered
5 the motion, opposition, reply, addendum, and opposition to addendum. *Id.* at
6 135-52. It released its findings of fact and conclusions of law, and order
7 granting defendants' motion to dismiss on October 17, 2019. *Id.* at 153-165.

8 Ms. Fausto filed her notice of appeal and case appeal statement on
9 November 11, 2019. *Id.* at 166-82.

10 **C. The Parties' motion to dismiss briefings**

11 The defendants' motion to dismiss, or in the alternative motion to stay,
12 argued that Ms. Fausto's claims for sexual assault and battery, intentional
13 infliction of emotional distress, false imprisonment, concerted action, and
14 negligence are all time barred under NRS 11.190(4)(e)—which creates a two-
15 year statute of limitations. *Id.* at 20-21. Defendants' further argued that Ms.
16 Fausto's claim for concerted action is time barred because it is also a tort claim.
17 *Id.* at 21.

18 In addition to arguments about statute of limitations, defendants argued
19 that Ms. Fausto's civil conspiracy claim is precluded precisely because of the

1 other claims’ statutes of limitations—that a claim for civil conspiracy cannot
2 stand alone. *Id.* at 22. Defendants also argued that Ms. Fausto’s claim for
3 concerted action was insufficiently plead because defendants argued Ms.
4 Fausto did not plead that the defendants acted together. *Id.* at 25.

5 Alternatively, defendants’ requested that the civil action be stayed while
6 the criminal action proceeded. *Id.* at 26.

7 Ms. Fausto opposed the motion, arguing that under Nevada’s liberal
8 pleading standard, she sufficiently plead her causes of action. *Id.* at 32-33.
9 She argued that the statute of limitations in this case was tolled under the
10 “Discovery rule” and, therefore, the complaint was not time-barred on its face.
11 *Id.* at 40. Applying *Peterson v. Bruen*, 106 Nev. 271, 276-77, 792 P.2d 18, 21
12 (1990), Ms. Fausto argued that she discovered the nexus of her injuries and the
13 traumatic results of her sexual assault much later, which tolled the statute of
14 limitations. Ms. Fausto argued that she acted with due diligence in swiftly
15 seeking out a rape kit—but the State’s backlog prevented the kit from being
16 tested. *Id.* at 44. She also argued that it was a question of fact as to whether
17 the statute of limitations should be tolled. *Id.* at 44.

18 Ms. Fausto also argued that she plead concerted action sufficiently—
19 there is no requirement that there be a cognizable tort and her complaint

1 sufficiently pleaded the defendants acted in concert to cause her harm. *Id.* at
2 48. Ms. Fausto requested that the Court deny the stay. *Id.* at 49.

3 In submitting her opposition to the motion, Ms. Fausto submitted a
4 declaration of support for the opposition. In this declaration, Ms. Fausto
5 elaborated on her experience being the victim of sexual assault and explained
6 that discovery would yield evidence that makes tolling under the Discovery
7 Rule necessary. *Id.* at 52- 54.

8 Defendants replied in support of their motion, arguing that the
9 Discovery Rule does not apply in this case. *Id.* at 65. And they again reiterated
10 their arguments about civil conspiracy and concerted action. *Id.* at 67.

11 Ms. Fausto filed an addendum to her opposition to the motion to dismiss.
12 *Id.* at 81. In the addendum, Ms. Fausto reiterated the importance of adopting
13 the Discovery Rule to the facts and argued that, at a minimum, the District
14 Court should equitably toll the statute of limitations under either the Federal or
15 Nevada courts test. *Id.* at 82.

16 Defendants opposed the addendum, arguing that the statute of limitations
17 should not be tolled and requesting sanctions for the filing. *Id.* at 87, 90-99.

18 The District Court heard arguments on the motion, including arguments
19 about equitable tolling, and released its order on October 17, 2019.

1 **D. The District Court’s order**

2 The District Court concluded that neither the Discovery Rule nor
3 equitable tolling applied. *Id.* at 154. The District Court also denied the claim
4 for concerted action. *Id.* at 155. Specific to equitable tolling, the District Court
5 concluded solely that “equitable tolling does not apply in this case, because
6 Plaintiff was not prevented from obtaining vital information bearing on the
7 existence of her claim.” *Id.* at 154. The District Court failed to articulate the
8 standard to apply when addressing equitable tolling. *Id.* The District Court
9 dismissed the claims with prejudice. *Id.* at 156.

10 **VI. STANDARD OF REVIEW**

11 A district court’s order dismissing a “complaint under NRCP 12(b)(5)
12 ‘is subject to rigorous standard of review on appeal.’” *Buzz Stews, LLC v. City*
13 *of North Las Vegas*, 124 Nev. 224, 227, 181 P.3d 670, 672 (2008) (quoting
14 *Seput v. Lacayo*, 122 Nev. 499, 501, 134 P.3d 733, 734 (2006)). When ruling
15 on a NRCP 12(b)(5) motion, this Court “recognize[s] all factual allegations in
16 [] complaint as true and draw[s] all inferences in [] favor” of the complainant.
17 *Id.* at 228, 181 P.3d at 672. This Court will uphold the District Court’s
18 dismissal of the complaint “only if it appears beyond a doubt that it could prove
19 no set of facts, which, if true, would entitle it to relief.” *Id.* This Court also

1 reviews all legal conclusions de novo. *Seput*, 122 Nev. at 501, 134 P.3d at 735.

2 A complaint will not be dismissed for failure to state a claim unless it appears

3 beyond a doubt that plaintiff could prove no set of facts which, if accepted by

4 the trier of fact, would entitle him or her to relief. *Simpson v. Mars Inc*, 113

5 Nev. 188, 929 P.2d 966 (1997).

6 VII. ARGUMENT

7 **A. This Court should clarify that the doctrine of equitable tolling**
8 **applies to NRS 11.090(4)(e), adopt the federal standard, and**
9 **conclude that Ms. Fausto's claims are equitably tolled.**

10 "The Nevada Supreme Court has not published a case in which it was

11 faced with the prospect of applying the doctrine of equitable tolling to [NRS]

12 11.190(4)(e)." *Wisenbaker v. Farwell*, 341 F.Supp.2d 1160 (Nev. D. 2004).

13 However, this Court's lack of clear precedent does not mean Nevada fails to

14 recognize equitable tolling. Neither did it prevent the Nevada Federal District

15 Court from applying equitable tolling to tort claims resulting from an

16 administrative proceeding. *Id.* In *Wisenbaker*, it did precisely this—predicting

17 the Nevada Supreme Court would apply the same logic that it had applied in

18 employment and antidiscrimination law, the Federal District Court equitably

19 tolled the statutes of limitation because the facts compelled tolling as the fair

and just outcome. *Id.*

1 Returning to the central issue of this appeal: the Nevada Supreme Court
2 has “recogni[z]ed the doctrine of equitable tolling.” *Copeland v. Desert Inn*
3 *Hotel*, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983) (recognizing equitable
4 tolling under Nevada’s antidiscrimination statutes). But its recognized
5 standard is not broadly applicable. This Court articulated that the standard for
6 granting equitable tolling is specific to claims brought after an administrative
7 agency’s hearing and investigation. In *Copeland*, this Court outlined the
8 following factors for granting equitable tolling:

9 the diligence of the claimant; the claimant’s knowledge of
10 the relevant facts; the claimant’s reliance on authoritative
11 statements by the administrative agency that misled the
12 claimant about the nature of the claimant’s rights; any
13 deception or false assurances on the part of the employer
 against whom the claim is made; the prejudice to the
 employer that would actually result from delay during the
 time that the limitations period is tolled; and any other
 equitable considerations appropriate in the particular case.

14 *Id.* The *Copeland* test does not provide direction to district courts assessing
15 equitable tolling of a tort claim. *Copeland* asks a district court to consider the
16 “claimant’s reliance on authoritative statements made by the administrative
17 agency,” which is only relevant if the plaintiff is bringing suit after an
18 administrative agency denied her complaint. Similarly, some of the remaining
19 factors are tied to an adverse employee’s claim or an adverse employment

1 action, which—while applicable here because Ms. Fausto was sexually
2 assaulted by her employer—does not always apply in tort cases.

3 Instead of applying its existing test in *Copeland*, this Court should
4 consider adopting and applying the federal test. Because the Nevada Supreme
5 Court has not been clear in its application of equitable tolling to tort claims,
6 federal law offers a clearer test as a guide for Nevada equitable tolling. Under
7 the federal law, a plaintiff must show that: (1) she pursued her rights diligently;
8 and (2) “some extraordinary circumstances stood in her way.” *Kwai Fun Wong*
9 *v. Beebe*, 732 F.3d 1030, 1052 (9th Cir. 2013). Federal courts “follow [the]
10 tradition in which courts of equity have sought to ‘relieve hardships which,
11 from time to time, arise from a hard and fast adherence’ to more absolute legal
12 rules, which, if strictly applied, threaten the ‘evils of archaic rigidity.’” *Holland*
13 *v. Florida*, 130 S.Ct. 2549, 2563 (2010) (quoting *Hazel—Atlas Glass Co. v.*
14 *Hartford—Empire Co.*, 322 U.S. 238, 248, (1944)). In contrast, the equitable
15 tolling doctrine “enables courts to meet new situations [that] demand equitable
16 intervention, and to accord all the relief necessary to correct ... particular
17 injustices.” *Id.*

18 ///

19 ///

1 **1. Under the federal test, Ms. Fausto's claims should be equitably**
2 **tolled.**

3 Ms. Fausto's complaint satisfies the federal equitable tolling test and the
4 district court should have equitably tolled her claims.

5 **(a) Ms. Fausto pursued her rights as diligently as could be**
6 **expected.**

7 Ms. Fausto's diligence after the assault and reliance on the State of
8 Nevada to process her rape kit weighs heavily in favor of this Court equitably
9 tolling her claims. Equitable tolling "permits a plaintiff to avoid the bar of the
10 statute of limitations if despite all due diligence [she] is unable to obtain vital
11 information bearing on the existence of [her] claim." *Cada v. Baxter*
12 *Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (citing *Holmberg v.*
13 *Armbrecht*, 327 U.S. 392, 396 (1946)). The day after Ms. Fausto was raped,
14 she went to the doctor to have a rape kit administered. 1 JA 6. That same
15 week Ms. Fausto filed a complaint with LVMPD to report the crime. *Id.* As
16 soon as LVMPD reached out to Ms. Fausto, she interviewed with a detective
17 and told the detective everything she knew. *Id.* Ms. Fausto then turned over
18 the clothes she was wearing during the assault to the detective so that he could
19 continue his investigation. *Id.* at 7. The District Attorney's Office even

1 delayed proceeding until the results of the rape kit came back. *Id.* And, after
2 Ms. Fausto received the results of the rape kit—over two years after she
3 submitted it—Ms. Fausto contacted an attorney, the District Attorney’s Office
4 proceeded with a criminal complaint, and Ms. Fausto brought this lawsuit. *Id.*

5 Any facts that prove counter to Ms. Fausto’s diligence are a product of
6 the system’s failure and a symptom of a larger problem with the rape kit
7 backlog—when they don’t get results back, victims of sexual assault assume
8 they were wrong about what happened and suppress the knowledge they do
9 have. It’s psychological. For the District Court to conclude otherwise runs
10 counter to this Court’s required reading of the complaint, “draw[ing] all
11 inferences in [] favor” of the complainant. *Buzz Stews*, 124 Nev. at 227, 181
12 P.3d at 672. As was explained by an advocate for the Human Rights Watch:

13 My clients seem to assume that if they have not heard back
14 from the police, it is not because testing was not done; it was
15 because testing was done but there was no DNA in the kit.
Not hearing from the police can contribute to the self-blame
and doubt that victims are feeling about the rape.

16 Human Rights Watch, *Testing Justice: The Rape Kit Backlog in Los Angeles*
17 *City and County of Los Angeles* (2009), *available at* <http://www.hrw.org/node/81826>
18 (quoting Gail Abarbanel, director of the Rape Treatment Center at Santa

1 Monica-UCLA Medical Center, and an unidentified sexual assault nurse
2 examiner).

3 The State failed Ms. Fausto. It did not process the rape kit until more
4 than 2 years after she diligently sought it out and confirmed what she believed
5 happened while she was severely intoxicated. Ms. Fausto should not be
6 punished because she wanted to ensure the identity of her assailant. Ms.
7 Fausto's complaint makes clear there was a lot of uncertainty surrounding the
8 night of the assault. Ricardo and Ms. Flores knew Ms. Fausto was intoxicated
9 and took advantage of her.

10 Ms. Fausto had reason to believe she was assaulted by Ricardo, but that
11 was not enough to bring a claim. This Court should also consider other
12 inequities Ms. Fausto faced, notably, that victims of sexual assault already face
13 a bias, especially when there is alcohol involved. Historically, victims face
14 judicial bias or misconceptions that bringing civil claims makes victims greedy
15 or vindictive. *See* Tom Lininger, *Is it Wrong to Sue for Rape?*, 57 Duke L.J.
16 1557, 1585 (2008) ("A substantial number of judges seem to suspect the
17 motivations of women who allege that they have suffered sexual assault.").
18 Some judges even disfavor or deem a civil remedy for rape inappropriate. *See*
19 *id.* at 1585-86 (noting that "judges generally distrust complainants in rape

1 cases”); *see also* Deborah M. Golden, *It's Not All in My Head: The Harm of*
2 *Rape and the Prison Litigation Reform Act*, 11 Cardozo Women's L.J. 37, 41
3 (2004) (“The history of the U.S. legal system is replete with male judges
4 imposing additional hurdles on women complainants to protect the ‘man's
5 nightmarish fantasy of being charged with simple rape.’”). For instance, one
6 judge noted that in the civil suit for damages, the rape victim was “seeking to
7 vindicate primarily her own interests” as opposed to “a criminal case ... to
8 vindicate the public's interest in enforcement of our laws.” *Doe v. Shakur*, 164
9 F.R.D. 359, 361 (S.D.N.Y. 1996).

10 **(b) An extraordinary circumstance stood in Ms. Fausto’s way**
11 **to bringing her claim against Ricardo.**

12 An extraordinary circumstance stood in Ms. Fausto’s way to bringing
13 her claims against Ricardo. Nevada’s rape kit backlog was widely
14 documented. *See Megan Messerly & Michelle Rindels*, “As Nevada chips
15 away at its rape kit backlog with one-time funds, officials eye permanent
16 solution,” September 10, 2017 (Nevada Independent). For LVMPD, this back
17 log was especially burdensome, having at one point 6,500 backlogged kits and
18 estimating that it would take years to finish testing all of them. *Id.*

1 The Nevada Legislature even recognized the seriousness of the
2 circumstances Ms. Fausto faced. During the 2019 legislative session, the
3 Legislature passed Assembly Bill 142, which abolished the statute of
4 limitations for the prosecution of sexual assault where there is DNA evidence.
5 This Bill intended to provide “justice when [the victim’s] sexual assault kit
6 was never tested.” Attorney General Aaron D. Ford, Minutes of the Meeting
7 of the Assembly Committee on Judiciary, March 18, 2019. This bill, however,
8 applied only to criminal statutes of limitation, not civil. Testimony presented
9 in support of the bill explained the extraordinary circumstances survivors like
10 Ms. Fausto face. At one point, there were 8,000 untested rape kits, and it took
11 years to eliminate this backlog. *Id.* (Assemblywoman Krasner). These
12 survivors were deterred from bringing cases forward and the State was acting
13 negligently in failing to process the kits.

14 At worst, the District Court should have made reasonable inferences
15 from the complaint in favor of Ms. Fausto and allowed the complaint to survive
16 the motion to dismiss. Ms. Fausto plead that she waited until the DNA results
17 were back, that she was severely intoxicated, and that she didn’t fully
18 understand what occurred that evening. 1 JA 6-7. The reasonable inference
19 from these portions of the complaint is that she needed the DNA test to know

1 whether she was even sexually assaulted and to bring a claim. The District
2 Attorney's Office even brought additional charges after it received the kit and
3 realized the gravity of Ricardo's actions. *Id.* at 6-8. At a minimum, Nevada's
4 liberal pleading standard creates a question of fact that entitles Ms. Fausto to
5 discovery, and preserves the defendants' ability to argue why Ms. Fausto did
6 not file sooner at the summary judgment stage. The District Court should not
7 have dismissed Ms. Fausto's case at the motion to dismiss stage.

8 Like the case before this Court, a New Jersey court applied the doctrine
9 of equitable tolling to a sexual assault by a police officer when the assailant's
10 identity was unclear. *Dunn v. Borough of Mountainside*, 301 N.J. Super. 262,
11 279-81 (1997). Because the police officer intentionally withheld his identity,
12 the court tolled the statute of limitations to allow the victim to have her day in
13 court. Ms. Fausto also struggles to remember what happened. As expected,
14 Ms. Fausto was still in shock the morning after and did not fully understand
15 the nature of Ricardo's actions against her. *See* 1 JA 6. She made this clear
16 when talking with Ms. Flores. *Id.* While Ms. Fausto knew she was assaulted,
17 as expected when there is alcohol, there were a lot of unknowns. Like the
18 police officer in *Dunn*, Ricardo and his wife acted in concert to hide what he

1 had done. Their intentional attempt to conceal the facts behind Ms. Fausto's
2 claim alone justify this Court equitably tolling the statute of limitations.

3 Because this Court has not adopted a clear test for equitable tolling that
4 applies to tort claims, it should take this opportunity to clarify and adopt the
5 federal equitable tolling test. Under this test, it should balance equities and
6 conclude that Ms. Fausto's claims are equitably tolled because she acted
7 diligently and under unusual and extreme circumstances. Ms. Fausto deserves
8 her day in court. Her decision to delay filing until she knew what truly
9 happened was the most equitable action possible—she prevented her
10 complaint from falsely accusing Ricardo. Now that she knows Ricardo was
11 her rapist she should have her day in court.

12 **B. Even if this Court chooses not to adopt the federal test, Ms. Fausto's**
13 **complaint survives the Nevada test and this Court should reverse**
14 **the District Court's order and remand—concluding that Ms.**
15 **Fausto's claims are equitably tolled.**

16 Under the *Copeland* test, a balancing of equities weighs in favor of this
17 Court tolling Ms. Fausto's claims. Setting aside the factors tied to employment
18 matters after an administrative agency's ruling: 1) Ms. Fausto acted diligently;
19 2) Ms. Fausto did not possess knowledge of the DNA test results until they
were given to her more than two years after submitting her rape kit to the

1 authorities; 3) there is no prejudice to Ricardo from delay during the time that
2 the statute of limitations was tolled; and 4) other equitable considerations
3 weigh in favor of tolling.

4 First, Ms. Fausto acted diligently¹. She prudently got a rape kit, by
5 seeing a doctor the very next day. And even though there was uncertainty
6 about what happened December 30, 2016, Ms. Fausto sought out help
7 immediately. As is explained at length in the previous section of this Opening
8 Brief, Ms. Fausto did not delay or act negligently. Rather, she attempted to
9 ensure that she did not bring a false claim and went through the process as she
10 understood it—a process which happened to let her down.

11 Second, Ms. Fausto did not have knowledge of relevant facts, notably,
12 the results of a rape kit. During any action in court, rape kits are essential:
13 “[r]ape kits help identify unknown assailants, confirm the presence of a known
14 suspect's DNA, corroborate a victim's version of events in a contested assault,
15 and exonerate innocent suspects.” Milli Kanani Hansen, TESTING JUSTICE:
16 PROSPECTS FOR CONSTITUTIONAL CLAIMS BY VICTIMS WHOSE
17 RAPE KITS REMAIN UNTESTED, 42 Colum. Hum. Rts. L. Rev. 943, 944
18 (2011). “Untested kits contain readily available and highly probative evidence
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¹ See *supra* VII, A.

1 of a serious, violent crime.” *Id.* Ms. Fausto lacked knowledge of evidence
2 corroborating and confirming her story. This is the kind of knowledge, or lack
3 of knowledge, that should be considered in equity.

4 Ricardo was not prejudiced by Ms. Fausto’s delay in bringing the claim.
5 Quite the contrary, he was protected because of it. A baseless allegation can
6 ruin a person’s life. Were Ms. Fausto to have brought suit without the rape kit
7 as evidence, it could have opened herself to a defamation claim, an abuse of
8 prosecution claim, and could have jeopardized Ricardo’s and Ms. Flores’s
9 future without cause. The results of the rape kit helped Ms. Fausto truly know
10 what happened on December 30, 2016. She was in a house, severely
11 intoxicated, and taken advantage of. Ms. Fausto was not fully aware of what
12 happened. Who’s to say there was not another person in the house? The results
13 of the rape kit were the evidence Ms. Fausto needed to realize she was a victim
14 of sexual assault and to know the identity of the perpetrator.²

15 Sadly, absent equitable tolling, Ms. Fausto is left without a remedy
16 because the State of Nevada let her down when it failed to process the rape kit
17 quickly. Without objective evidence tying Ricardo to the assault, there was
18 nothing to support Ms. Fausto’s testimony and it would have been

19 ² See *supra* VII, A.

1 irresponsible to bring the claim sooner. Ms. Fausto asks this Court to toll the
2 statute of limitations on her claim because she deserves her day in court. This
3 Court should grant equitable tolling and restore Ms. Fausto's claims because
4 she was "prevented from doing so due to inequitable circumstances." *Ellis v.*
5 *General Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998).

6 **VIII. CONCLUSION**

7 Ms. Fausto respectfully requests that this Court reverse and remand the
8 District Court's order dismissing her complaint with prejudice because her
9 claims should be equitably tolled. This Court can toll Ms. Fausto's claims
10 under either the *Copeland* test or by adopting the federal test to provide clearer
11 direction for district courts.

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5 DATED this 13th day of March 2020.


Jason D. Guinasso, Esq.

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1 **ATTORNEY’S CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this brief complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5)
4 and the type style requirements of NRAP 32(a)(6) because this brief has been
5 prepared in a proportionally spaced typeface using Microsoft Word 2020 in 14
6 Point Times New Roman Font.

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

- 10 a. Proportionately spaced, has a typeface of 14 points or more and
11 contains 6,272 words; and
12 b. Does not exceed 30 pages.

13 3. Finally, I hereby certify that I have read this appellate brief, and to the
14 best of my knowledge, information, and belief, it is not frivolous or interposed
15 for any improper purpose. I further certify that this brief complies with all
16 applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1),
17 which requires every assertion in the brief regarding matters in the record to
18 be supported by a reference to the page and volume number, if any, of the
19 transcript or appendix where the matter relied on is to be found. I understand

1 that I may be subject to sanctions in the event that the accompanying brief is
2 not in conformity with the requirements of the Nevada Rules of Appellate
3 Procedure.

4 DATED this 13th day of March 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I certified that I am an employee of Hutchison & Steffen, PLLC and that on this date I caused to be served a true and correct copy of **APPELLANT’S OPENING BRIEF** on the following as indicated below:

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(Via Electronic service through the Nevada Supreme Court’s Eflex system)

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

Executed on March 14, 2020, at Reno, Nevada.



BERNADETTE FRANCIS