

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.

Electronically Filed
May 15 2020 12:38 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
Case No.: 80074

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

10 **APPELLANT'S REPLY BRIEF**

11 JASON D. GUINASSO, ESQ.
12 Nevada Bar No. 8478
JOSEPH R. GANLEY, ESQ.
13 Nevada Bar No.5643
ALEX R. VELTO, ESQ.
14 Nevada Bar No.14961
Hutchison & Steffen, PLLC
15 500 Damonte Ranch Parkway
Suite 980
16 Reno, NV 89521
Tel.: 775-853-8746
17 Fax: 775-201-9611
jguinasso@hutchlegal.com
18 jganley@hutchlegal.com
avelto@hutchlegal.com
19 *Attorneys for Appellant*
Jaqueline Fausto

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 have
9 been at all times relevant to the District Court case through the current appeal
10 the attorneys of record for Jaqueline Fausto. No other attorneys from
11 Hutchison & Steffen are expected to appear before this Court with respect to
12 the appeal now pending.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

TABLE OF CONTENTS

APPELLANT’S REPLY BRIEF I

DISCLOSURE STATEMENT IN COMPLIANCE WITH NRAP 26.1 II

APPELLANT’S REPLY BRIEF1

I. INTRODUCTION.....1

1. The Standard of Review is to Look at the Face of the Complaint and Draw All Reasonable Inferences in Favor of Ms. Fausto.....4

2. There is No Separation of Powers Issue – Equitable Tolling is A Recognized Judicial Doctrine and an Expression of Legislative Intent. The Only Exception is When the Statue Claims Otherwise.5

3. Respondents’ Rejection of “Non-Binding” Cases is Misguided—the Cases Ms. Fausto Relied on in Her Opening Brief are Certainly Persuasive and Outline a Heuristic Technique this Court Can Apply For Analyzing Equitable Tolling and Clarify Nevada Law.7

4. The Litigation Privilege is Irrelevant—Rape Victims are Ignored and Not Believed When There is No Hard Evidence. Ms. Fausto’s Delay in Filing is Entirely Justified.8

II. CONCLUSION10

ATTORNEY’S CERTIFICATE OF COMPLIANCE11

CERTIFICATE OF SERVICE.....13

1

2

4

5

1

1 Because she didn't fully understand what happened that night, "Ms. Fausto
2 went to the doctor to get a rape kit." *Id.* at Paragraph 36. This psychological
3 reality has been explained by professionals who regularly interact with rape
4 victims. Victims "assume that if they have not heard back from the police, it
5 is not because testing was not done; it was because testing was done but there
6 was no DNA in the kit." Human Rights Watch, *Testing Justice: the Rape Kit*
7 *Backlog in Los Angeles City and County* (2009).

8 This Court's precedent dictates that it will "recognize all factual
9 allegations in [the] the complaint as true and draw all inferences in favor" of
10 Ms. Fausto. *Buzz Stews, LLC v. City of North Las Vegas*, 124 Nev. 224, 228,
11 181 P.3d 670, 672 (2008). Respondents' attempt to draw inferences in their
12 favor—arguing that Ms. Fausto knew she was raped, and that equity does not
13 require tolling the statute of limitations. They misapply the standard and fail
14 to establish there are no set of facts which, if accepted by the trier of fact, would
15 entitle Ms. Fausto relief. *See Simpson v. Mars Inc*, 113 Nev. 188, 929 P.3d
16 966 (1997).

17 Ms. Fausto pleaded that she waited until the DNA results were back, that
18 she was severely intoxicated, and that she didn't fully understand what
19 occurred that evening. 1 JA 6-7. The reasonable inference from these portions

1 of the complaint is that she needed the DNA test to know whether she was even
2 sexually assaulted and had a claim to bring. The District Attorney's Office
3 even waited to bring additional charges until after it received the kit, finally
4 realizing the gravity of Ricardo's actions. *Id.* at 6-8. At a minimum, Nevada's
5 liberal pleading standard creates a question of fact that entitles Ms. Fausto to
6 discovery, and preserves respondents' ability to argue why Ms. Fausto did not
7 file sooner at the summary judgment stage. For Ms. Fausto, Nevada's two-
8 year statute of limitations on tort actions should be equitably tolled because:
9 (1) she pursued her rights diligently; and (2) "some extraordinary circumstance
10 stood in her way." *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1052 (9th Cir.
11 2013).¹

12 Further, Respondents' Answering Brief explains precisely why this
13 Court should weigh in on the tolling of tort claims. Under this Court's existing
14 precedent, *Copeland* could not possibly apply to a tort action 'because it would
15

16 ¹A large portion of Respondents' Brief is irrelevant strawman arguments—
17 proving some people refuse to hear what rape victims are saying. This Court
18 can ignore those large portions of Respondents' Brief as it responds to
19 arguments not made in the Opening Brief. Ms. Fausto only argues equitable
tolling on appeal, she does not argue the discovery rule or address the
concerted action claim with specificity. Pages 8-15 regurgitate Respondents'
arguments from the District Court, ignoring the actual arguments Appellant
made on appeal.

1 be impossible for this Court to consider these factors . . . in this case.” RAB

2 15. This Court can give Ms. Fausto her day in Court and provide hope for
3 other rape victims who have been let down by Nevada’s failure to process their
4 rape kits.

5 **1. The standard of review is to look at the face of the complaint and**
6 **draw all reasonable inferences in favor of Ms. Fausto.**

7 The Answering Brief argues that the Court should look to the Court
8 minutes and Ms. Fausto’s sworn testimony. *See* RAB 21-23. However, “[a]n
9 oral pronouncement of judgment is not valid for any purpose; therefore, only
10 a written judgment has any effect, and only a written judgment may be
11 appealed.” *Rust v. Clark Cty. School District*, 103 Nev. 686, 689, 747 P.2d
12 1380, 1382 (1987). Further, the complaint is the focus of a NRCP 12(b)(5)
13 analysis. *Buzz Stews*, 124 Nev. at 227. This Court should, respectfully, focus
14 only on the complaint.

15 The District Court’s order woefully failed to address the potential
16 equitable tolling. The entirety of the District Court’s analysis of equitable
17 tolling makes up three sentences:

18 2.Equitable tolling does not apply in this case, because
19 Plaintiff was not prevented from obtaining vital information
bearing on the existence of her claim.

1 3. Pursuant to NRS 11.190(4)(e), an action to recover
2 damages for injuries to a person by a wrongful act or neglect
3 must be commenced within two (2) years of the wrongful
4 conduct or neglect. Therefore, NRS 11.190(4)(e) barred the
5 Plaintiff from bringing tort claims any date after December
6 31, 2018.

7 1 JA 176-77.

8 Not only did the District Court apply the wrong legal standard, she failed
9 to analyze any of the allegations made in the complaint and failed to consider
10 their reasonable inference in Ms. Fausto's favor. Ms. Fausto pleaded that she
11 was intoxicated, that she did not truly know what happened, and that she did
12 not file the complaint until she received the results of the rape kit—confirming
13 Ricardo raped her. The reasonable inference is that Ms. Fausto was precluded
14 from filing because the State failed to provide her the results she depended on.
15 Equity requires that her claim have been equitably tolled.

16 **2. There is no separation of powers issue – equitable tolling is a**
17 **recognized judicial doctrine and an expression of legislative intent.**
18 **The only exception is when the statute claims otherwise.**

19 Respondent argues that the separation of powers doctrine precludes this
Court from equitably tolling the statute. This argument has been struck down
by courts time and time again. Judicial adoption of “equitable-tolling practices
need not be regarded as a violation of the separation of powers, but can be seen

1 as a reasonable assumption of genuine legislative intent.” *McQuiggin v.*
2 *Perkins*, 569 U.S. 383, 409-410 (2013). “It is hornbook law that limitations
3 periods are customarily subject to equitable tolling, unless tolling would be
4 inconsistent with the text of the relevant statute. Congress must be presumed
5 to draft limitations periods in light of this background principle.” *Young v.*
6 *United States*, 535 U.S. 43, 49–50 (2002) (internal quotation marks and
7 citations omitted).

8 Here, NRS 11.190(4)(e) contains no express pre-emption of equitable
9 tolling, so it is a “reasonable assumption of genuine legislative intent.”
10 *McQuiggin*, 569 U.S. at 410. Further, this Court’s prior recognition of
11 equitable tolling in an administrative context, when a statute provided clear
12 timelines, disproves there is a separation of powers issue. *See Copeland v.*
13 *Desert Inn*, 99 Nev. 823 (1983). Given that the doctrine has been around for
14 an exceedingly long time, the Nevada Legislature can only be understood as
15 drafting statutes with equitable tolling in mind.

16 ///

17 ///

18 ///

19 ///

1 **3. Respondents' rejection of "Non-Binding" cases is misguided—the**
2 **cases Ms. Fausto relied on in her Opening Brief are certainly**
3 **persuasive and outline a heuristic technique this Court can apply**
4 **for analyzing equitable tolling and clarify Nevada law.**

5 Respondents' are correct that there are factual dissimilarities between
6 *Cada, Dunn, Wisenbaker*, and Ms. Fausto's claim. However, these distinctions
7 are without difference. The Nevada Supreme Court has never outlined the
8 elements of equitable tolling for tort claims so naturally that there is no
9 "binding" law. Ms. Fausto's reliance upon these cases in the Opening Brief
10 is certainly persuasive and show that equitable tolling as a principle is widely
11 accepted and should be accepted by this Court.

12 *Cada v. Baxter Healthcare Corp.*, allows for equitable tolling for a
13 plaintiff if "despite all due diligence [she] is unable to obtain vital information
14 bearing on the existence of [her] claim." 920 F.2d 446, 451 (7th Cir. 1990).
15 *Dunn v. Borough of Mountainside*, allows for equitable tolling when the
16 defendant withholds his identify, 301 N.J. Super. 262, 279-81 (1997).
17 *Wisenbaker v. Farwell*, analyzed and applied Nevada Supreme Court
18 precedent, concluding that there was a basis for equitable tolling applied to tort
19 actions. 341 F.Supp.2d (Nev. D. 2004).

1 Ms. Fausto's claim to equitable tolling falls squarely in this line of cases.
2 She was unable to obtain vital information bearing on her claim because the
3 State was in possession of the rape kit and DNA evidence establishing that
4 Ricardo had raped her. Ricardo and his wife actively attempted to hide what
5 happened to Ms. Fausto and convinced her that it didn't happen. And Ms.
6 Fausto is now bringing a tort claim that she believes should be equitably tolled,
7 something the Federal District Court of Nevada has recognized as permitted
8 under Nevada law given the direction this Court has gone in the past.
9 Therefore, this Court should toll the statute of limitations for Ms. Fausto.

10
11 **4. The litigation privilege is irrelevant—rape victims are ignored and**
12 **not believed when there is no hard evidence. Ms. Fausto's delay in**
13 **filing is entirely justified.**

14 Ms. Fausto's concern about being targeted for a defamation lawsuit is
15 not the only equitable consideration that prevented her from filing suit. Any
16 facts that prove counter to Ms. Fausto's diligence are a product of the system's
17 failure and a symptom of a larger problem with the rape kit backlog-when they
18 don't get results back, victims of sexual assault assume they were wrong about
19 what happened and suppress the knowledge they do have. This is explained at
length in the Opening Brief, victims "assume that if they have not heard back

1 from the police, it is not because testing was not done; it was because testing
2 was done but there was no DNA in the kit.” Human Rights Watch, Testing
3 Justice: the Rape Kit Backlog in Los Angeles City and County (2009).

4 Further, Ms. Fausto needed hard evidence to bring the claim. There is
5 immense bias about sexual assault, regardless of Respondents’ erroneous
6 assertion that the gender of the presiding judge matters. Victims face judicial
7 bias or misconceptions that bringing a claim makes them vindictive. *See* Tom
8 Lininger, *Is it Wrong to Sue for Rape?*, 57 Duke L.J. 1557, 1585 (2008). Put
9 simply, “judges generally distrust complainants in rape cases.” *Id.* at 1585.

10 The State’s failure to process the rape kit backlog is a sufficient
11 extraordinary circumstance that stood in Ms. Fausto’s way. At worst, the
12 District Court should have made reasonable inferences from the complaint in
13 favor of Ms. Fausto and allowed the complaint to survive the motion to
14 dismiss. Instead, the District court improperly left all reasonable inferences in
15 the moving parties’ favor, inconsistent with this Court’s recognized standard
16 of review. This Court should toll the statute of limitations so that Ms. Fausto
17 can truly have her day in court.

18 ///

19 ///

1 **II. CONCLUSION**

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

7 DATED this 15th day of May, 2020.

8
9 By: _____

Jason D. Guinasso, Esq.

Nevada Bar No. 8478

Joseph R. Ganley, Esq.

Nevada Bar No. 5643

Alex R. Velto, Esq.

Nevada Bar No. 14961

Hutchison & Steffen, LLC.

500 Damonte Ranch Parkway,

Suite 980

Reno, NV 89521

Tel.: 775-853-8746

Fax: 775-201-9611

Attorneys for Jaqueline Fausto

1 **ATTORNEY'S CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this Reply 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
6 14 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
11 and contains 1,986 words; and
12 b. Does not exceed 15 pages.

13 3. Finally, I hereby certify that I have read this Reply 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
17 28(e)(1), which requires every assertion in the brief regarding matters in the
18 record to be supported by a reference to the page and volume number, if any,
19 of the transcript or appendix where the matter relied on is to be found. I

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

4 DATED this 15th day of May, 2020.

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

By: 

Jason D. Guinasso, Esq.

Nevada Bar No. 8478

Joseph R. Ganley

Nevada Bar No. 5643

Alex R. Velto, Esq.

Nevada Bar No. 14961

Hutchison & Steffen, LLC.

500 Damonte Ranch Parkway,

Suite 980

Reno, NV 89521

Tel.: 775-853-8746

Fax: 775-201-9611

Attorneys for Jaqueline Fausto

1 **CERTIFICATE OF SERVICE**

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

6 John H. Wright, Esq.- john@wrightlawgroupnv.com
7 Christopher B. Phillips, Esq.- chris@wrightlawgroupnv.com
Attorneys for Respondents

8 (Via Electronic service through the Nevada Supreme Court's Eflex
9 system in accordance with the master service list)

10 Amy J. Smith, Esq.- amys@wrightlawgroupnv.com
11 THE WRIGHT LAW GROUP
2340 Paseo Del Prado,
Suite D-305
Las Vegas, NV 89102
12 (by mail with courtesy copy provided via email)
Attorneys for Respondents

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

14 Executed on May 15, 2020, at Reno, Nevada.

15
16 
17 _____
BERNADETTE FRANCIS