IN THE SUPREME COURT OF THE STATE OF NEVADA

JAQUELINE FAUSTO, Appellant, vs. RICARDO SANCHEZ-FLORES, an individual; VERENICE RUTH FLORES, an individual, Respondents.	SUPREME COURT CASE NO. 80074 (Appeal from 8th Judicial District Court Case No.: A-19-797890-C)

RESPONDENTS' ANSWER TO APPELLANT'S PETITION FOR EN BANC RECONSIDERATION

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I. SUMMARY OF THE ARGUMENTS

Appellant JAQUELINE FAUSTO ("FAUSTO") claims the District Court committed reversible error when it granted Respondents RICARDO SANCHEZ-FLORES' and VERENICE RUTH FLORES' ("Respondents") Motion to Dismiss. However, by FAUSTO's own admissions in her verified complaint, her tort claims for Sexual Assault and Battery, Intentional Infliction of Emotional Distress (outrage), False Imprisonment, and Negligence are barred by the statute of limitations and were properly dismissed by the District Court. The Panel properly agreed.

The legal contentions in FAUSTO's Petition for Review are not supported by the facts in this case. FAUSTO's verified complaint, the criminal complaint, the recorded statement, and FAUSTO's own testimony at the preliminary hearing in a criminal case reflect that FAUSTO fully understood the extent of her alleged injury on the date of the incident. Thus, the Panel properly concluded that FAUSTO had failed to show that she acted in a diligent manner, as she made no inquiry into the status of the DNA results, and she made no attempt to file a complaint pending receipt of the test results. The Panel further properly determined that FAUSTO failed to demonstrate extraordinary circumstances that prevented her from filing her complaint.

Under the Separation of Powers Clause of the Nevada Constitution, it is the Nevada Legislature that writes or amends the law. While NRS § 11.190(4)(a) may be subject to tolling if certain factors exist, Respondents assert that this case does not present any of the factors that would warrant such a result.

Finally, the verified complaint clearly asserts that FAUSTO understood the nature of the alleged conduct on the part of Respondent, Ricardo, no later than April 1, 2017. Thus, even if FAUSTO's obtaining a SANE exam and filing a criminal complaint within the first few days of January 2017 were not enough, FAUSTO's acknowledgment as to her understanding of the nature of Ricardo's conduct on April 1, 2017 provides all the evidence needed to conclude when FAUSTO "discovered" the facts constituting a cause of action. Thus, the general discovery rule cannot be applied.

Accordingly, this Court should deny FAUSTO's Petition for En Banc Reconsideration.

II. ARGUMENT

A. Fausto's Petition Should Be Denied

This appeal is not about whether or not NRS § 11.190(4)(e), a two year statute of limitations, should be tolled for rape victims who truly do not know the identify of their assailant, or even about whether the doctrine set forth in *Copeland v. Desert*

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Inn, 99 Nev. 823, 673 P.2d 490 (1983) should be expanded to include such situations. Rather, this case is clearly about whether the District Court properly applied NRS § 11.190(4)(e) to the specific facts of this case and whether the factors set forth in *Copeland* have been properly applied, where being in possession of all the necessary information, FAUSTO knowingly sat on her rights.

FAUSTO did nothing for over two years, and now wants this Court to deem that her lack of litigating this case for over two and a half years should be forgiven because she was waiting on the State of Nevada to provide her with the results of a rape test. In other words, FAUSTO did not act on her claims because she was waiting on the State of Nevada to make her case for her. FAUSTO asks this Court to ignore the clear and unambiguous language of NRS § 11.190(4)(e) in favor of a broad sweeping expansion of this Court's prior holding in *Copeland*. FAUSTO does not dispute that NRS § 11.190(4)(e), a two year statute of limitations, applies to the claims she has made against Respondents. Rather, she argues that this Court should carve out an exception for her because she allegedly could not effectively file a complaint until after she received the results of the rape kit. FAUSTO argues that, despite her obvious lack of diligence, requiring her to file a civil complaint within two years would have a substantial negative impact on others. But the facts of this

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case are unique in that Appellant sat on her rights. The facts of this case are simply not suitable for such a departure from this Court's prior holdings.

1. The Panel Stated That NRS 11.190(4)(e) Can Be Tolled When The Plaintiff Meets Relevant Tolling Factors. However, FAUSTO Failed To Show Diligence or Extraordinary Circumstances:

The panel opinion, upon which FAUSTO's petition is based, concluded that NRS § 11.190(4)(c) can be subject to equitable tolling when certain factors are demonstrated:

> Having concluded that NRS § 111.190(4)(c) is subject to equitable tolling, we turn our attention to the appropriate standard for its application to the limitations period in this statute. In *Copeland*, this court set forth nonexclusive factors to consider when determining whether equitable tolling is appropriate:
>
> > the diligence of the claimant; the claimants knowledge of the relevant facts; the claimants reliance on authoritative statement by the administrative agency that misled the claimant about the nature of the claimant's rights; any 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.
>
> 99 Nev. At 826, 673 P.2d at 492. . . However, while Fausto correctly asserts that some of the *Copeland* factors are specific to the context of that case, other factors – diligence of the claimant and any "equitable consideration appropriate in the particular case: – are generally applicable to tort-based claims barred by NRS § 11.190(4)(e). Moreover, consistent with the federal equitable tolling doctrine and other jurisdictions' equitable tolling jurisprudence, we have required plaintiffs to at least demonstrate that, despite their exercise of diligence, extraordinary circumstances beyond their control prevented them from timely filing their claims. *See Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1052 (9th Cir. 2013) (stating the under the federal standard a

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> claimant seeking equitable tolling must demonstrate "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way" (internal quotation marks omitted)); *see also Weaver v. Firestone*, 155 So. 3d 952, 957-58 (Ala. 2013)) (stating that "equitable tolling is available in extraordinary circumstances that are beyond the petitioners control and that are unavoidable even with the exercise of diligence.
>
> . . . Accordingly, having already recognized these factors in our own equitable tolling jurisprudence, we do not find it necessary to adopt the federal standard and instead direct courts to consider the relevant *Copeland* factors when determining whether to equitably toll NRS § 11.190(4)(e). Thus, when a plaintiff seeks to equitably toll the limitations period in NRS § 11.190(4)(e), the plaintiff must demonstrate that he or she acted diligently in pursuing his or her claim and that extraordinary circumstances beyond his or her control caused his or her claim to be filed outside the limitations period.
>
> * * *
>
> Sanchez-Flores, however, argues that equitable tolling is inapplicable because Fausto knew of the facts underlying her claims and did not need the rape kit results to assert her claims before the limitations period ended. We agree and conclude that Fausto failed to demonstrate that equitable tolling is warranted in this case.

The panel opinion went on to next apply the *Copeland* factors to the facts of this case. In examining whether or not FAUSTO was diligent in pursuing her claims the Panel concluded she had not, stating:

> *Diligence*
> First, the record shows that Fausto did not act diligently in bringing her claims. Fausto reported the facts of the sexual assault to the police in January 2017 yet did not seek counsel or assert her claims until two and a half years later. Though she contends that she needed the results of the rape kit test to prove her claims, she fails to demonstrate how she proactively pursued the rape kit results or that is was impossible for her to assert her civil claims absent those results. She made no inquiry into the status of the

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> DNA results, and she made no attempt to file a complaint pending receipt of the test results. *Cf. City of N. Las Vegas*, 127 Nev. At 640-41, 261 P.3d at 1077 (determining that the claimant exercised diligence where he asserted his claims less than two months after discovering the facts underlying the claims). Therefore, we conclude that Fausto has failed to show that she acted in a diligent manner.
>
> *Extraordinary circumstances*
> Moreover, Fausto has failed to demonstrate extraordinary circumstances that prevented her from filing her complaint. We reject Fausto's contention that without the rape kit results, "there was nothing to support [her] testimony." Fausto was not required to have DNA evidence before filing her civil complaint, and she could have amended her complaint if necessary, after receiving the rape kit results. *See* NRCP 8; NRCP 15. Although Fausto now argues that sexual assault victims assume that they are wrong about having been assaulted when they do not get rape kit results back and then she needed the result to confirm Ricardo had sexually assaulted her, Fausto did not allege below that she had doubts about her sexual assault because of the delay in processing the rape kit. Further, the record shows that she completed the rape kit the day after the alleged assault, filed two police reports within the following days, and notably, told Verenice in a text-message exchange four months later that she knew that Ricardo had sexually assaulted her that night. Thus, Fausto knew of the facts underlying her claims, and therefore, the lack of test results did not preclude her from filing her complaint. (Citation omitted).

After considering all of the facts in this case and applying the *Copeland* factors, the Panel correctly concluded that FAUSTO failed to demonstrate diligence or that an equitable circumstance prevented her from asserting her claims during the limitations period.

Despite the very sound reasoning behind the Panel's decision in this case, FAUSTO now argues that her case should be treated as a landmark case, ushering in a dramatic change in this Court's application of the appropriate factors.

FAUSTO's arguments simply ignore the facts alleged in FAUSTO's Complaint and which the District Court relied on: 1) FAUSTO's Complaint alleges tort claims occurred on or about December 30, 2016 and/or December 31, 2016; 2) FAUSTO knew of her alleged injuries at that time because she sought counseling, she made two reports to the police, and conducted a Sexual Assault Nurse Examiner Exam shortly following the alleged injury; and, 3) FAUSTO filed her civil complaint on July 3, 2019, more than two and a half years after the date she alleged the torts occurred.

The District Court appropriately interpreted the law, as it is written, and properly applied the law to the facts of this case, as alleged by FAUSTO. Based on the information before it, the District Court found that FAUSTO knew of her alleged injuries on or about December 30th or 31st, 2016, because FAUSTO sought counseling, made two reports to the police implicating Sanchez-Flores in explicit detail, and underwent a Sexual Assault Nurse Examiner (SANE) exam shortly following the alleged assault. These are simply not the acts of a person who is not aware of the alleged injuries or the identity of the person who allegedly injured her. The Panel saw it the same way.

Reliable DNA testing has only existed for a few decades, yet, defendants have been sued for similarly alleged conduct for centuries. To suggest that DNA evidence

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is now required to bring a lawsuit seriously lacks credibility, and FAUSTO offered nothing substantively to support such a claim. FAUSTO could have timely filed a civil complaint and obtained the DNA information through discovery using the processes the rules of civil procedure provide for. FAUSTO could have obtained the DNA profile from the police department pursuant to a subpoena and had FAUSTO timely filed her civil suit, she could have used the discovery tools available to obtain the same information she claims the State of Nevada denied her. FAUSTO simply made the choice to do nothing.

2. It is Not This Court's Role To Rewrite The Law as Written by the Legislature:

To be effective and not time-barred, FAUSTO's verified complaint needed to be filed on or before December 31, 2018. Here, FAUSTO's verified complaint was not filed until July 3, 2019, which is six months and four days after the statute of limitation deadline established by NRS § 11.190(4)(e).

> 4. Within 2 years.
> (e) Except as otherwise provided for in NRS § 11.215, an action to recover damages for injuries to a person or for the death of a person caused by the wrongful act or neglect of another.

FAUSTO asks this Court to ignore the clear and unambiguous language of NRS § 11.190 and carve out an exception based on the facts presented here. However, this Court has stated on several occasions that it is not the job of this Court to change the law. In *SFR Investments Pool I v. U.S. Bank, N.A.*, 334P.3d 408 this

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Court addressed the interpretation of what at the time was considered to be a controversial statute regarding HOA foreclosures. This court stated that if revisions to the foreclosure methods provided for in NRS Chapter 116 are appropriate, they are for the legislature to craft, not this court, *id* at 417. Likewise, in *Nevada Yellow Cab v. Eighth Judicial District Court*, 383 P.3d 246, 132 Nev. Adv. Op. 77, (2016), this Court discussed the lack of the Court's authority to change the law under the separation of powers clause of the Nevada Constitution:

> The principles supporting Nevada's Separation of Powers Clause, Nev. Const. Art. 3, § 1, preclude this court from having the "quintessentially legislat[ive] prerogative to make rules of law retroactive or prospective as we see fit." *Harper*, 509 U.S. at 95 (alteration in original (internal quotations omitted).
>
> > The powers of the Government of the State of Nevada shall be divided into three separate departments, – the Legislative, – the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to the one of these departments shall exercise any function, appertaining to either of the others..."
>
> Nev. Const. Art. 3, § 1. "[Legislative power is the power of law-making representative bodies to frame and enact laws, and to amend or repeal them. This power is very broad." *Gallaway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237 242 (1967); *see also Harper*, 509 U.S. at 107 (Scalia, J., concurring) (stating that it is "the province and duty of the judicial department to say what the law *is*, not what the law *shall* be." (Internal quotations and citation omitted)).

(132 Nev. Adv. Op. 77, at 10-11). Here, FAUSTO is requesting that this Court do what the Nevada Legislature chose not to do and carve out an exception to NRS § 11.190(4)(a) for her sole benefit. While, as noted in the Panel's decision, NRS §

11.190(4)(a) may be subject to tolling if certain factors exist, Respondents again assert that this case does not present any of the factors that would warrant such a result.

3. The General Discovery Rule Does Not Apply In this Case:

The Discovery Rule tolls the statute of limitation until FAUSTO "discovers or should have discovered **facts** supporting a cause of action." *Sorenson v. Pavlikowski*, 94 Nev. 440, 443-444, 581 P.2d 851, 853-854) (emphasis added). In order for the Discovery Rule to apply, the "complaint must allege: (1) the time and manner of discovery, and (2) the circumstance excusing delayed discovery." *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, (1990).

On the face of the verified complaint, FAUSTO alleges the time of discovery of the facts was December 31, 2016, by a Sexual Abuse Nurse Examiner ("SANE") Exam. (JA0006 at ¶ 37). FAUSTO's verified complaint further states she reported the alleged crime (which is the basis for her civil complaint) a week later. Finally, and most importantly, the verified complaint clearly asserts that FAUSTO understood the nature of the alleged conduct on the part of RICARDO no later than April 1, 2017. (JA0006 at ¶ 43, emphasis added). Thus, even if FAUSTO's obtaining a SANE exam and filing a criminal complaint within the first few days of January 2017 were not enough, FAUSTO's acknowledgment as to her understanding

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of the nature of RICARDO's conduct on April 1, 2017 provides all the evidence needed to conclude when FAUSTO "discovered" the facts constituting a cause of action.

FAUSTO's verified complaint does not allege that her memory was suppressed. To the contrary, FAUSTO's verified complaint avers that no later than April 1, 2017, she had a full understanding of the nature of RICARDO's alleged conduct. (JA0006, at ¶ 43). Thus, FAUSTO's claims for Sexual Assault and Battery, Intentional Infliction of Emotional Distress (outrage), False Imprisonment, and Negligence were properly dismissed, as they are barred by the statute of limitations.

III. CONCLUSION

Based on the foregoing, Respondents respectfully request that the Court deny Appellant's Petition for Rehearing.

DATED this 24th day of May, 2021.

Respectfully submitted by:
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP Rule 32 (a)(4), the typeface requirement of NRAP Rule 32(a)(5) and the type style requirement of NRAP Rule 32(a)(6) because this brief has been prepared in proportionately spaced typeface using WordPerfect X6 in 14 point and Times New Roman.

2. I further certify that this brief complies with the page- or typed-volume limitations of NRAP Rule 32(a)(7) because excluding the parts of the brief that are exempted by NRAP Rule 32(a)(7)(c), it is proportionately spaced, has a typeface of 14 points or more and contains 2859 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP Rule 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 found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements

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of the Nevada Rules of Appellate Procedure.

DATED this 24th day of May, 2021.

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CERTIFICATE OF SERVICE

I the undersigned , declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On May 24, 2021, I caused to be served a true and correct copy of the foregoing RESPONDENTS' ANSWER TO APPELLANT'S PETITION FOR EN BANC RECONSIDERATION upon the following:

BY ELECTRONIC SUBMISSION: submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

/s/ Candi Ashdown
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