**IN THE SUPREME COURT OF THE STATE OF NEVADA**

VENETIAN CASINO RESORT, LLC; LAS VEGAS SANDS, LLC,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KATHLEEN DELANEY, DISTRICT JUDGE,

Respondents,

and

JOYCE SEKERA,

Real Party in Interest.

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**OPPOSITION TO PETITIONERS' EMERGENCY MOTION FOR RELIEF UNDER NRAP 27(e)**

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## 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 Justices of this Court may evaluate possible disqualification or recusal.

Joyce Sekera is an individual.

Claggett & Sykes Law Firm and the Galliher Law Firm have appeared on behalf of Joyce Sekera in this matter.

DATED this 24th day of March, 2020

CLAGGETT & SYKES LAW FIRM

By /s/ *Micah S. Echols*
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## I. INTRODUCTION

This is the third motion for emergency stay relief that Petitioners/Defendants ("Defendants") have filed in this case. In all three motions Defendants have not explained why an emergency stay is appropriate. Plaintiff/Real Party in Interest ("Plaintiff") asks that this Court deny Defendants' motion for stay. In reviewing Defendants' writ petition, the Court should also consider declining Defendants' writ petition because appellate courts generally decline to review discovery orders by extraordinary writ relief, and Defendants have not met their burden. Notably, it is Defendants' burden to move for a protective order under NRCP 26(c), despite their attempts within their NRAP 27(e) motion to shift the burden to Plaintiff. Moreover, it is Defendants' burden to demonstrate a privacy interest that they are allegedly protecting. *See* NRCP 49.015 (Privileges recognized only as provided). Yet, Defendants have not identified any substantive right of privacy.

Defendants request stay relief for this Court to review a discovery order mandating the production of similar incident reports. Defendants allege that its motion was filed to avoid the "violation of privacy rights for hundreds of [third-party] individuals." Mot. at 2. Yet, appellate courts generally do not review discovery orders since an appeal from a final judgment is an available and appropriate remedy. *Valley Health Sys., Ltd. Liab. Co. v. Eighth Judicial Dist. Court of Nev.*, 127 Nev. 167, 171, 252 P.3d 676, 678 (2011). An appellate court

will review a discovery order when it is made without regard to relevance or if it requires disclosure of privileged information. *Id.* at 252 P.3d at 678-79. Yet, Defendants have not alleged that the subject discovery order was issued without regard to relevance. Defendants also have not alleged that the discovery is subject to a privilege, which is their burden to invoke this Court's original jurisdiction. The only allegation Defendants have made is that disclosure would allegedly and generally violate privacy rights of unknown third parties. Yet, Defendants do not provide any legal authority which would confer standing to allow them to assert the privacy rights of unknown third parties. Similarly, Defendants do not identify any substantive legal authority to demonstrate privacy rights held by unknown third parties. Defendants also cannot explain how they will be harmed by producing the required information. Thus, Defendants have wholly failed to satisfy the NRAP 8(c) factors for this Court to enter a stay, particularly on an emergency basis.[1]

[1] In fact, Defendants have not even attached the order to their motion for which they seek emergency stay relief. And, they fail to demonstrate that they first presented the arguments in their motion to the District Court, which violates the requirements of NRAP 27(e)(4): "If the relief sought in the motion was available in the district court, the motion shall state whether all grounds advanced in support of the motion in the court were submitted to the district court, and, if not, why the motion should not be denied."

## II. LEGAL ARGUMENT

### A. DEFENDANTS HAVE NOT SATISFIED THE LEGAL STANDARDS FOR GRANTING A MOTION FOR STAY.

When considering a motion for a stay, this Court generally considers four factors: (1) Whether the object of the writ petition will be defeated if the stay is denied; (2) whether petitioner will suffer irreparable or serious injury if the stay is denied; (3) whether real party in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether petitioner is likely to prevail on the merits in the appeal or writ petition. *See Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000) (citing NRAP 8(c); *Kress v. Corey*, 65 Nev. 1, 189 P.2d 352 (1948)).

First, the object of the writ petition will not be defeated if Defendants' stay request is denied. The object of Defendants' writ petition is to conceal information about the third parties who had incidents on Defendants' marble floors. If a stay is not granted, then Defendants will be required to produce incident reports by March 30, 2020. Tellingly, however, Defendants have not presented any legal authority demonstrating that they have standing to assert privacy interests of unknown third parties. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (appellate courts do not consider arguments not cogently argued). Similarly, Defendants have not demonstrated that such unknown third parties have a substantive legal reason to withhold incident reports. *Id.*

Second, Defendants will not suffer irreparable harm or injury if the stay is denied. Defendants argue that they will be required to divulge "confidential" information of third parties. However, Defendants do not explain how they will be injured by the production of the information or under what legal basis the information is confidential. Very simply, Defendants have not articulated a procedural or substantive legal reason for withholding evidence. Thus, Defendants' position amounts to nothing more than delaying the release of relevant evidence in an attempt to defeat Plaintiff's claim.

Third, Plaintiff will suffer irreparable or serious injury if the stay is granted. Plaintiff will suffer by being forced to relitigate a discovery order that was correctly decided. Defendants' attempt at relitigation and mere delay is inappropriate for a writ petition and wasteful of judicial resources. Plaintiff will be unable to achieve justice if Defendants succeed in their delay campaign by continuing to conceal incident reports from Plaintiff.

### B. DEFENDANTS ARE UNLIKELY TO PREVAIL ON THE MERITS BECAUSE THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION AND THIS COURT DOES NOT GENERALLY REVIEW PRETRIAL DISCOVERY ORDERS.

A writ of mandamus is an inappropriate vehicle for addressing Defendants' grievance. *See Valley Health* at 171, 252 P.3d at 678 "[Writs of mandamus] are generally not available to review discovery orders." "[T]here have been two main situations where this court has issued a writ to prevent improper discovery: blanket

discovery orders with no regard to relevance, and discovery orders compelling disclosure of privileged information." *Id.* at 171, 252 P.3d at 679.

The subject discovery was not ordered under a blanket order without regard to relevance, nor does it contain privileged information. Instead, Defendants argue that some of the information has an unspecified privacy interest. Therefore, as is the case with most discovery orders, the appropriate vehicle for redress is an appeal from a final judgment, not a petition for a writ of mandamus. *Id.* Defendants are inappropriately and wastefully attempting to relitigate their relevance argument, which is not a noted exception in Nevada law for appellate review of pretrial discovery orders. In other words, it is improper for this Court to review the factual issues of relevancy in the context of Defendants' writ petition. *See State v. Garaventa Land & Livestock Co.*, 61 Nev. 407, 411, 131 P.2d 513, 514 (1942) (this Court does not disturb findings even where there is conflict evidence).

**1. Plaintiff met her burden for proving relevance.**

Defendants make numerous accusations of how Plaintiff supposedly fell short on her burden to establish relevance but do not cite the record as to how Plaintiff's argument was inadequate. Instead, Defendants cite *Eldorado Club v. Graff*, 78 Nev. 507, 377 P.2d 174 (1962), for the contention that prior incidents are generally not admissible to establish notice in slip and falls involving a temporary substance. Mot. at 6. Defendants misuse *Eldorado Club* to accuse Plaintiff of

failing to establish the relevance and proportionality of the discovery at issue. But relevance and proportionality are only considered in a writ petition of a blanket order made without consideration of relevance. As such, this Court does not need to consider Defendants' argument because it did not allege that the District Court's order was issued without regard to relevance.

Alternatively, Defendants' reliance on *Eldorado Club* is inaccurate. The defendant in *Eldorado Club* argued that the court could not admit a prior incident to establish his knowledge of the dangerous condition because that condition (a foreign substance) was not permanent. *Eldorado Club v. Graff*, 78 Nev. 507, 509, 377 P.2d 174, 175 (1962). However, this Court held that prior similar incidents could be admitted when "the conditions surrounding the prior occurrences have continued and persisted." *Id.* at 511, 377 P.2d at 176. In the instant case, Plaintiff believes that the incidents surrounding the falls on Venetian's slippery marble floors have continued and persisted, which entitles her to receive the discovery and determine for herself the relevancy according to NRCP 26(b)(1) which states, "Information within [the] scope of discovery need not be admissible in evidence to be discoverable." However, Defendants are requesting that Plaintiff be kept from investigating the conditions surrounding the prior occurrences by blocking the incident reports altogether or redacting the witness contact information.

### 2. Defendants have no viable argument that the information contained in the incident reports is private.

Defendants do not argue that any part of the discovery ordered includes privileged information. Instead, Defendant generally argues that the District Court has provided Plaintiff with "unfettered access to personal and sensitive information of individuals who are not party to this action." Mot. at 8. Plaintiff believes that the information contained in the incident reports includes evidence of similar incidents and contact information of potential witnesses. In *Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 192, 561 P.2d 1342, 1343-44 (1977), the discovery order was overturned because it included carte blanche discovery of all information in tax returns and medical records without regard to relevance. The issue in *Schlatter* is supported by law because medical and financial information is protected by privacy laws such as HIPAA, and the discovery order was made without regard to relevance. However, in the instant case, the District Court considered the relevance of the information and the subject incident reports are records kept in the regular course of business without any privacy laws that restrict disclosure. When a victim adds information to the Defendants' incident report, they do so voluntarily, to a private third-party business for the Defendants' benefit. Thus, Defendants have failed to demonstrate a privilege. According to NRS 49.015(1)(b) and (c), no person, including Defendants, "[have] a privilege to . . . [r]efuse to disclose any matter . . . [or] [r]efuse to produce any object or writing."

Defendants also cite a federal case where particularized information about the prior slip and falls had already been produced to the plaintiff. The plaintiff in *Izzo v. Wal-mart Stores, Inc.*, requested "facts and circumstances surrounding any other slip and fall." No. 2:15-cv-01142-JAD-NJK, 2016 U.S. Dist. LEXIS 12210, at *11 (D. Nev. Feb. 2, 2016). The court reasoned that further discovery on prior slip and falls was unduly burdensome because plaintiff had the list of prior incidents and the discovery would require weeks or months of work to prepare. *Id.* at *13. *Izzo* is distinguishable from the instant case because that defendant was asserting privilege for their protectable interest and the requesting party was asking for far more than the incident reports that Plaintiff has requested.

In another federal case cited by Defendants, a court addressed the privacy of hotel guests who gave their addresses and phone numbers to secure a room. *See Rowland v. Paris Las Vegas*, No. 13CV2630-GPC (DHB), 2015 U.S. Dist. LEXIS 105513, at *6-7 (S.D. Cal. Aug. 11, 2015). In that case, the plaintiff requested the names addresses and phone numbers of all prior hotel guests "who complained, reported or otherwise informed" the defendant of slippery floors. *Id.* at *6. This request broadly requested the defendant to go through their hotel guest records and provide all information linked with those guests. The defendant raised a concern over the guest's constitutional right to privacy, and the court held that "[f]ederal courts ordinarily recognize a constitutionally-based right of privacy that **can be**

**raised** in response to discovery requests." *Id.* at *7 (emphasis added). The court goes on to explain that the right is not absolute and is subject to a balancing test. *Id.* In this case, the information was given voluntarily for the Defendants' benefit in connection with the incidents, as opposed to being mandated at registration for a hotel room. Importantly, Defendants have not raised a constitutionally based right of privacy, nor has it suggested the Court apply a federal balancing test. Without articulating the claimed right, or even identifying the legal authority that would supposedly create a constitutional right of privacy, Defendants have not demonstrated the right to extraordinary relief or emergency stay relief. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

Individuals do have a right to protect "private facts" from being released by government entities in accordance with the Fourth Amendment of the United States Constitution. *See Montesano v. Donrey Media Grp.*, 99 Nev. 644, 650-51, 668 P.2d 1081, 1085 (1983). However, information freely given to a non-public entity during an investigation of incidents is not considered private and does not invoke the Constitution. The statements and incidents to be produced were given voluntarily without privacy implication. *See* NRS 49.385(1) (Waiver of privilege by voluntary disclosure) ("A person upon whom these rules confer a privilege against disclosure of a confidential matter waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents

to disclosure of any significant part of the matter."). Thus, it is unclear how the unknown third parties have any privacy interest in voluntarily provided information. Particularly because Defendants have failed to identify any legal authority to support their generalized arguments, they have not satisfied NRAP 8(c) to demonstrate that they are likely to success on the merits of their writ petition. Instead, Defendants have only demonstrated that they have filed a third writ petition and a third emergency motion to delay this litigation and continue to conceal relevant discovery.

## III. CONCLUSION

In summary, this Court should deny Defendants' emergency motion because they have simply failed to carry their burden under the NRAP 8(c) factors for a stay or the NRAP 27(e) factors for emergency relief.

Dated this 24th day of March, 2020.

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## CERTIFICATE OF SERVICE

I certify that I am an employee of Claggett & Sykes Law Firm and that on the 24th day of March, I submitted the foregoing **OPPOSITION TO PETITIONERS' EMERGENCY MOTION FOR RELIEF UNDER NRAP 27(e)** for filing via the Court's e-Flex electronic filing system which will send electronic notification to the following:

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