

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

CHRISTINA KUSHNIR, MD, and  
WOMEN'S CARE CENTER OF NEVADA,  
INC.

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.

Electronically Filed  
Sep 14 2020 08:57 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
District Court No.: A-17-764111-C

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**PETITION FOR WRIT OF MANDAMUS**

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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 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, Inc.) are represented by the law firm McBride Hall. 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 11<sup>th</sup> of September, 2020.

McBRIDE HALL

  
\_\_\_\_\_  
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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 am an attorney with the law firm of McBRIDE HALL, attorneys for Petitioners, Christina Kushnir, M.D. and Women's Cancer Center of Nevada, Inc., and hereby 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.

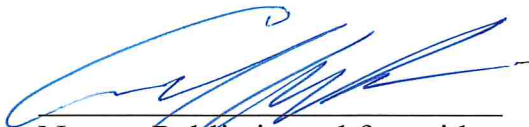
4. All documents contained in Petitioners' Appendix, filed herewith, are true and correct copies of the pleadings and documents they are represented to be in the Petitioners' Appendix and as cited herein.
5. This Petition also complies with the requirements of NRAP 21(d) and 32(c)(2).

FURTHER YOUR AFFIANT SAYETH NAUGHT.

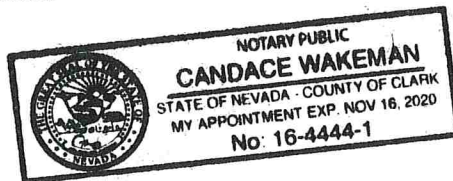
  
Heather S. Hall, Esq.

SUBSCRIBED and SWORN to before me

this 11<sup>th</sup> day of September, 2020.



Notary Public in and for said  
County and State



## **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 properly retained by the Nevada Supreme Court. There is no existing authority which would require the Nevada Court of Appeals hear this matter and it does not fall within any of the categories presumptively assigned to the Court of Appeals pursuant to Nevada Rule of Appellate Procedure 17(b).

The Petition raises issues which bear directly upon all providers of healthcare in the state of Nevada, including Dr. Kushnir and Women's Cancer Center of Nevada, Inc. The district court erroneously interpreted NRS 41A.097(3) to mean that an indefinite extension of the statute of limitations is created when a plaintiff alleges the healthcare provider engaged in concealment. Any tolling which potentially applies under NRS 41A.097(3) ends once a plaintiff receives a complete copy of the medical records upon which the action is based. The district court's finding to the contrary creates unjust and illogical results which will unfairly prejudice and burden healthcare providers in the state of Nevada.

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## **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, Inc.) are represented by Robert C. McBride, Esq. and Heather S. Hall, Esq. of the law firm of McBride Hall. Real Parties in Interest, The Estate of Gaetano and Vincent Garbitelli Administrator are represented by Jared Herling, Esq. of the law firm of Heaton & Associates.

Pursuant to this Court's original jurisdiction set forth in Article 6 §4 of the Nevada Constitution, NRS 34.160 and 34.320, Petitioners Christina Kushnir, M.D. and Women's Cancer Center of Nevada, Inc. (hereinafter referred to as "Women's Cancer Center") respectfully petition this Court for a Writ of Mandamus directing Respondent to reverse her ruling denying Dr. Kushnir's and Women's Cancer Center's Motion for Summary Judgment. As a result of Respondent's erroneous determination that the tolling provision of NRS 41A.097(3) is indefinite and receipt of the complete medical records does not begin inquiry notice for purposes of NRS 41A.097(2), Petitioners are forced to continue defending this litigation which is well outside the statute of limitations.

### **I. ISSUES PRESENTED**

1. Whether the tolling provision of NRS 41A.097(3) extends the statute of limitations indefinitely.

2. Whether receipt of the complete medical records stops any tolling of the statute of limitations due to “concealment”.

## **II. INTRODUCTION**

This Court’s immediate action is necessary to prevent further prejudice due to misinterpretation and misapplication of NRS 41A.097(2) and (3). Petitioners, Christina Kushnir, M.D. and Women’s Cancer Center, by and through their counsel of record, Robert C. McBride, Esq., and Heather S. Hall, Esq., of the law firm of McBride Hall, respectfully petition this Court for a Writ of Mandamus directing Respondent to enter summary judgment in favor of Petitioners.

Based upon the undisputed facts in this case, the one-year statute of limitations for inquiry notice expired before the Complaint in this matter was filed on November 3, 2017. Carol Gaetano died on January 17, 2016 after a hospitalization at Valley Hospital beginning on December 10, 2015. Plaintiffs allege that on December 9, 2015, Dr. Kushnir performed a diagnostic laparoscopy at Valley Hospital that resulted in a perforated colon and acute peritonitis, requiring the subject hospitalization and ultimately causing decedent’s death. PET APPX0017. Decedent died on January 17, 2016 at Valley Hospital Medical Center. PET APPX0016. Throughout Ms. Gaetano’s hospital stay, her cousin, Dr. Vincent Garbitelli frequently communicated with her team of medical providers at Valley Hospital via phone from New York. He was directly involved in making

medical decisions for his cousin and was advised of her death on the date it occurred – January 17, 2016. PET APPX0085.

In Nevada, the injury in a wrongful death claim is the death. The appropriate inquiry for determining when the statute of limitations begins to run is when a plaintiff was put on inquiry notice. In addition to being Ms. Gaetano's cousin, Dr. Garbitelli is also the co-administrator of Ms. Gaetano's Estate and serving as his own medical expert in this matter as of the time the Complaint was filed. Dr. Garbitelli was not only on inquiry notice as of the date of Carol Gaetano's death, but was actually inquiring into the cause of Carol Gaetano's death and potential malpractice claims when he immediately requested an autopsy from the Clark County Coroner's Office.

There is no allegation here that Dr. Kushnir took an affirmative action to prevent or hinder Dr. Garbitelli's ability to file his Complaint. Instead, Dr. Garbitelli asserted he had a phone call with Dr. Kushnir on January 2, 2016 and she did not say she caused the colon perforations Ms. Gaetano experienced. Dr. Garbitelli claimed that Dr. Kushnir made a statement that the colon perforations Ms. Gaetano experienced following the December 9, 2015 surgery were caused by her widespread cancer, not the surgery and this was a misrepresentation. Dr. Kushnir did not make any misrepresentation because the cancer did, in fact, cause the perforations. However, even assuming that allegation to be true, the district

court was required to grant summary judgment because any tolling created by NRS 41A.097(3) ended once Dr. Garbitelli was in receipt of the complete Valley Hospital medical records. Dr. Garbitelli was in receipt of the complete Valley Hospital medical records in August 2016, after the hospital transmitted those paper records to him on August 9, 2016. PET APPX0123. Therefore, he only had until August 2017 to bring suit. The Complaint filed on November 3, 2017 was untimely.

The district court committed clear error in determining that a question of fact remained as to whether there was any concealment by Dr. Kushnir and denying the Motion for Summary Judgment. The district court reached the unreasonable conclusion that the tolling provision is without end and does not cut off once the complete medical records are received. This error calls for this Court's immediate intervention as the misapplication of NRS 41A.097(3) will impact future medical malpractice matters pending in the Eighth Judicial District Court and other Nevada courts.

### **III. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

This is a professional negligence action based upon care and treatment provided to decedent Carol Gaetano by Defendants. PET APPX0016 - PET APPX0018. Plaintiffs are the Estate of Carol Gaetano and Vincent Garbitelli, as the Administrator of the Estate of Carol Gaetano. *Id.* Plaintiffs' Complaint was

filed on November 3, 2017. *Id.* Vincent Garbitelli, M.D. is the second cousin of decedent Carol Gaetano. At the time of Ms. Gaetano's death on January 17, 2016, he had not seen Ms. Gaetano face-to-face in more than 20 years. PET APPX0078. In addition to this matter, Dr. Garbitelli filed two other lawsuits which were ultimately dismissed. PET APPX0066 – PET APPX0068.

In the current case, Plaintiffs allege that on December 9, 2015, Dr. Kushnir performed a diagnostic laparoscopy that resulted in a perforated colon and acute peritonitis, requiring hospitalization. PET APPX0017. Decedent died on January 17, 2016 at Valley Hospital Medical Center. PET APPX0016. The Complaint was filed on November 3, 2017 by Vincent Garbitelli, who is a physician, second cousin of decedent and the co-administrator of decedent's Estate. *Id.* Simultaneously, Dr. Garbitelli filed an Affidavit in support of the Complaint. PET APPX0020 – PET APPX0026. Dr. Garbitelli's signature is dated October 20, 2017. PET APPX0026. Plaintiffs were initially not represented by counsel.

On December 25, 2017, Dr. Kushnir and Women's Cancer Center filed a Motion to Dismiss Plaintiffs' Complaint on the grounds that the Complaint was untimely. For the first time, in opposing the Motion, Dr. Garbitelli alleged that he spoke with Dr. Kushnir on January 2, 2016 and Dr. Kushnir "deliberately concealed" the true nature of Carol Gaetano's perforated colon. The district court denied the Motion without prejudice, concluding that discovery needed to be

conducted into the alleged concealment of Dr. Kushnir. The Order denying the Motion to Dismiss was entered on March 5, 2018. Dr. Kushnir and Women's Cancer Center subsequently filed a Petition for Writ of Mandamus and the Nevada Court of Appeals declined to intervene. The Court of Appeals did not address the merits of the statute of limitations defense.

Once the case proceeded in the district court, Plaintiffs were represented by counsel and the attorneys began conducting discovery. On January 17, 2020, the defense took the deposition of Dr. Garbitelli. PET APPX0058 – PET APPX0082. Dr. Garbitelli acknowledged in his deposition that Dr. Kushnir did not misrepresent any information to him during that January 2, 2016 call. PET APPX0082.

The discovery process revealed a multitude of undisputed facts demonstrating that inquiry notice began more than one year before the Complaint was filed on November 3, 2017. A little over a month after Ms. Gaetano's death, Dr. Garbitelli had consulted an attorney regarding filing suit for Ms. Gaetano's medical care. PET APPX0047; PET APPX0063.

Dr. Garbitelli testified that he requested an autopsy from the coroner's office and the purpose of requesting an autopsy was to see if the coroner could shed some light on decedent's cause of death. PET APPX0073; PET APPX0076. Dr. Garbitelli instructed the coroner to focus on decedent's abdomen, shared with the

coroner that Dr. Kushnir (the surgeon who operated on decedent) had said that decedent's cancer spontaneously perforated her colon and caused her to have peritonitis and asked the coroner whether he could shed any light on that. PET APPX0073 – PET APPX0076. The autopsy report is dated January 22, 2016 and the coroner concluded that Ms. Gaetano died as a result of multi-organ failure due to septic shock due to her carcinoma. PET APPX0128 – PET APPX0130.

Dr. Garbitelli understood that in order to pursue a medical malpractice case, he would need to become administrator of Carol Gaetano's Estate. PET APPX0063. Dr. Garbitelli then took active steps to become the co-administrator of his cousin's Estate for the purpose of pursuing a medical malpractice claim. On March 1, 2016, Bryan Lowe, Esq. filed the Petition for Issuance of Letters of Co-Administration and this document was signed by Dr. Garbitelli on February 26, 2016. PET APPX0089 – PET APPX0096. The two executors appointed by Ms. Gaetano's will declined to act as executors because they did not want to follow through with Dr. Garbitelli's recommendation to obtain decedent's medical records. PET APPX0070 – PET APPX0071.

On July 1, 2016, Dr. Garbitelli was appointed co-administrator of Carol Gaetano's Estate. PET APPX0120 – PET APPX0121. By July 15, 2016, Dr. Garbitelli was the co-administrator of Carol Gaetano's Estate and actively requesting her medical records. On that date, he submitted paperwork requesting



decedent's Valley Hospital Medical Center chart for the stated purpose of "Administrator of Estate – Records Review". PET APPX0085; PET APPX0124.

On August 9, 2016, Dr. Garbitelli authorized a credit card charge of \$937.92 and decedent's Valley Hospital records were mailed to him that same day. PET APPX0123 – PET APPX0126. In August of 2016, Dr. Garbitelli also received Dr. Kushnir's office chart, which included the December 9, 2015 Operative Report from Valley Hospital. PET APPX0065 – PET APPX0066. On December 16, 2016, in a Status Report to the probate court, Dr. Garbitelli confirmed what was clear from his actions since learning of Carol Gaetano's death on January 17, 2016 – he was "pursuing a medical malpractice lawsuit on behalf of the Estate of Carol Gaetano." PET APPX0143.

All of these undisputed facts served as the basis for the Motion for Summary Judgment on the statute of limitations and were presented to the district court. The district court heard the Motion for Summary Judgment on April 28, 2020. PET APPX0192 – PET APPX0200. During the hearing, Real Parties in Interest took the position that unless and until Dr. Kushnir admits she caused the perforation instead of the patient's widespread metastatic disease throughout her abdomen, the statute of limitations is tolled indefinitely:

"And so there's clearly an allegation of misrepresentation and that brings into play the tolling of the statute of limitations pursuant to NRS 41(a). And

so the statute is tolled for any period of time during which there is a concealment, and it's not corrected. Arguably, the statute of limitations is still open. Dr. Kushnir never corrected and never, you know, had done anything to basically, you know, start the statute to run.”

PET APPX0197.

Counsel for Petitioners highlighted that there was no evidence to support the contention that anything was misrepresented or concealed during the January 2, 2016 phone call that hindered the Plaintiffs' ability to timely file a complaint. PET APPX0195. Further, any possible tolling stopped once Dr. Garbitelli received the complete Valley Hospital records in August 2016. PET APPX0196.

Despite the undisputed evidence of when Dr. Garbitelli received the medical records, Respondent determined that there is still a genuine issue of material fact as to what was misrepresented to Dr. Garbitelli from Dr. Kushnir and denied the Motion for Summary Judgment. PET APPX0200. The Order denying the Motion was entered on May 18, 2020. PET APPX0201 – PET APPX0205. In reaching this decision, Respondent misapplied NRS 41A.097(3). Even if Respondent was correct in concluding that there remains a question of fact as to whether the statute of limitations was tolled due to some intentional act of Dr. Kushnir, this statute does not create an indefinite tolling of the statute of limitations. Pursuant to *Winn v. Sunrise Hospital and Medical Center*, 128 Nev. 246, 277 P.3d 458 (Nev. 2012),

Dr. Garbitelli's receipt of the Valley Hospital medical chart in August 2016 irrefutably started the one-year discovery period. A Writ should issue to promote judicial economy and resolve the limitation of NRS 41A.097(3), as this is likely to arise in future medical malpractice cases.

#### **IV. REASONS WHY THE COURT SHOULD HEAR ISSUES**

Whether to consider a writ of mandamus is within this Court's discretion. *Libby v. Dist. Ct.*, 130 Nev. 359, 325 P.3d. 1276 (2014) (citing *Smith v. Dist. Ct.*, 107 Nev. 674, 818 P.2d. 849 (1991)). As a general rule, the Nevada Supreme Court will not exercise its discretion to challenge district court orders denying summary judgment, but an exception applies when no disputed factual issues exist and, pursuant to clear authority under a statute or a rule, the district is obliged to dismiss an action. *Id.*

This Petition involves a matter of first impression – whether the tolling provision of NRS 41A.097(3) tolls the statute of limitations in a medical malpractice or wrongful death action indefinitely. As there is potential for the district courts to inconsistently interpret NRS 41A.097(3) and misapply it in many medical malpractice cases, this Court should exercise its discretion to entertain this Petition and provide guidance on this important issue of law.

NRS 41A.097(3) only tolls the statute of limitations for the period of time in which the party was prevented or hindered from discovering information about

potential medical malpractice claims. A party cannot toll the statute of limitations without end by merely alleging concealment by a medical provider. Once the party claiming concealment receives information to provide a reasonable person with inquiry notice, i.e., the complete medical records, the statute of limitations begins to run.

In this matter, there is no factual dispute as to when the medical records were received by Dr. Garbitelli and this is strictly an interpretation of law. This is an important issue before the Court involving proper application of the tolling provision of NRS 41A.097(3). This Court has the opportunity to make clear that the tolling provision, if found to be applicable, does not allow for an indefinite extension of the statute of limitations in wrongful death/medical malpractice cases. Any tolling cuts off once information is received to put a reasonable person on notice. The undisputed factual issues demonstrate that Dr. Garbitelli received the complete medical records in August of 2016. The Complaint filed nearly 16 months later was untimely and summary judgment should have been entered in favor of Dr. Kushnir and Women's Cancer Center.

## **V. LEGAL ARGUMENT**

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

A writ of mandamus is an extraordinary remedy which is available to compel the performance of an act that the law requires or to control an arbitrary or

capricious exercise of discretion. NRS 34.160; *Piroozi v. Eighth Judicial Dist. Court*, 131 Nev. 1004, 1006, 363 P.3d 1168, 1170 (2015). Statutory interpretation is reviewed de novo, even in the context of a Petition for Writ. *Libby*, 130 Nev. at 363, 325 P.3d at 1279. In the context of a writ petition, this Court gives deference to the district court's findings of fact, but reviews questions of law de novo. *Gonski v. Dist. Ct.*, 126 Nev. 551, 557, 245 P.3d 1164, 1168 (2010).

**B. The Date of Death Started the Statute of Limitations Absent Application of the Tolling Provision of NRS 41A.097(3).**

NRS 41A.097 provides that, “An action for injury or death may not be commenced more than three years after the date of injury or **one year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first.**” NRS 41A.097(2) [Emphasis added].

As a general rule, a cause of action begins to accrue when the wrong occurs and a party sustains injury for which relief can be sought. *Peterson v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990) (citing *Nelson v. A.H. Robbins, Co.*, 515 F. Supp. 623, 625 (N.D. Cal. 1981)). The current medical malpractice statute of limitations begins to run for purposes of the one-year period once the plaintiff discovers the legal injury. *Massey v. Litton*, 99 Nev. 723, 669 P.2d 248 (1983);

*Pope v. Gray*, 104 Nev. 358, 760 P.2d 763 (1988); NRS 41A.097. In a wrongful death case, the injury is the death. *Pope*, 104 Nev. at 362-63.

The determination of when the statute begins to run can be made as a matter of law when there is uncontroverted evidence that proves that the plaintiff discovered or should have discovered the facts giving rise to a claim. *Siragusa v. Brown*, 114 Nev. 1384, 1400 – 1401, 971 P.2d 801, 812 (1998) (citing *Nevada Power Co. v. Monsanto Co.*, 955 F.2d 1304, 1307 (9<sup>th</sup> Cir. 1992)).

Although “the [medical malpractice] statute **may have harsh results in some cases**, it cuts with sharp but clean edge.” *Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, 122 Nev. 1298, 148 P.3d 790 (2006) [Internal citations omitted]. Ms. Gaetano died on January 17, 2016 and Dr. Garbitelli was advised immediately. medical decisions for his cousin and was advised of her death on the date it occurred – January 17, 2016. PET APPX0085. Upon learning of her death, he quickly requested an autopsy to determine cause of death. PET APPX0073; PET APPX0076. He also immediately took action to become co-administrator of the Estate to pursue a medical malpractice claim. PET APPX0063; PET APPX0089 – PET APPX0096. In this instance, there is no doubt that the statute began to run as of the date of injury, Carol Gaetano’s death on January 17, 2016, absent any tolling of the statute of limitations.

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**C. NRS 41A.097(3) Only Applies to Intentional Acts Which  
Prevent or Hinder a Plaintiff's Ability to Learn Information  
Necessary to File Suit.**

In *Winn v. Sunrise Hospital & Med. Center*, this Court determined that the tolling provision of NRS 41A.097(3) only applies when there has been an intentional act that objectively hindered a reasonably diligent plaintiff from timely filing suit. *Winn v. Sunrise Hospital and Medical Center*, 128 Nev. 246, 254 – 55, 277 P.3d 458, 464 (Nev. 2012).

There is no allegation here that Dr. Kushnir took an affirmative action to prevent or hinder Dr. Garbitelli's ability to file his Complaint. Instead, Real Parties in Interest claim that Dr. Kushnir spoke to him on January 2, 2016 and did not tell him she caused the subject perforations. The reason why is simply because the cancer caused the perforations, not Dr. Kushnir. Most significantly, however, an allegation that Dr. Kushnir failed to admit medical malpractice during a phone call with Dr. Garbitelli does not rise to the level necessary to apply NRS 41A.097(3)'s tolling provision.

In *Winn*, this Court discussed the definition of concealment for purposes of NRS 41A.097(3) and that it must include two elements: "(1) an intentional act by one party that (2) prevents or hinders another party from learning something." *Winn*, 128 Nev. at 255, 277 P.3d at 464. As recognized in *Winn*, the Nevada

Legislature intended for NRS 41A.097(3) to apply only in situations where **both** of these elements are present. *Id.*

The deposition of Plaintiff Dr. Garbitelli was taken on January 17, 2020. During his deposition, Dr. Garbitelli was asked about the January 2, 2016 call with Dr. Kushnir. PET APPX0079 – PET APPX0082. He testified at length about his recollection of the call and the medical information relayed to him concerning his cousin Carol Gaetano. *Id.* Dr. Garbitelli was specifically asked:

Q. The call that you had on the second, was there anything that Dr. Kushnir told you that you believe was untruthful or misrepresented?

A. Nothing.

PET APPX0082, lines 11 – 14.

Any allegation that Dr. Kushnir misled Dr. Garbitelli during the January 2, 2016 phone call is directly refuted by Dr. Garbitelli's sworn deposition testimony. Importantly, Plaintiffs have never alleged that Dr. Kushnir engaged in any concealment of the records, nor would such an allegation be supported by any evidence. Valley Hospital has exclusive control of the hospital medical records. Furthermore, Plaintiffs have never claimed Valley Hospital concealed the hospital medical records. Additionally, the December 9, 2015 Operative Report from Valley Hospital was included in Dr. Kushnir's office chart which Dr. Garbitelli acknowledges having in August 2016. PET APPX0065 – PET APPX0066; PET



APPX0136 – PET APPX0137.

The burden is on Real Parties in Interest to demonstrate that, despite reasonable diligence on their part, there was an intentional act by Dr. Kushnir that prevented or hindered a timely Complaint. That was not demonstrated and application of NRS 41A.097(3) is not supported by the evidence.

**D. Even if Respondent was Correct in Its Determination There is a Question of Fact Whether There Was Concealment, Receipt of the Medical Records Stops Any Tolling of the Statute of Limitations.**

Even if Respondent correctly determined that there was a question of fact as to whether Dr. Kushnir concealed information which hindered Dr. Garbitelli's ability to file a Complaint, his receipt of the Valley Hospital Medical Center medical records began the inquiry notice period. The bell commencing the investigation period rang no later than the date Dr. Garbitelli received the complete medical records. *Winn v. Sunrise Hosp. & Med. Center*, 128 Nev. 246, 251 – 52, 277 P.3d 458, 462 – 63 (Nev. 2012).

It is undisputed that Dr. Garbitelli received the complete Valley Hospital records and Dr. Kushnir's office records in August 2016. PET APPX0065 – PET APPX0066; PET APPX0123; PET APPX0136 – PET APPX0137. Based upon these undisputed facts, even if NRS 41A.097(2) was tolled due to "concealment",

receiving the medical records upon which this action is based began the inquiry notice period as a matter of law. Dr. Garbitelli waited until November 3, 2017 to file his Complaint which is more than one year beyond his receipt of medical records in August 2016. Respondent was required to grant the Motion for Summary Judgment and the failure to do so was error.

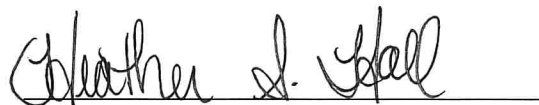
A party cannot toll the statute of limitations indefinitely by claiming “concealment”. Any tolling of the statute of limitations (however much Petitioners may disagree with its applicability) ended when Dr. Garbitelli received the medical records in August 2016. This action is not based on any facts that were not otherwise contained in those medical records.

## **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 summary judgment in favor of Dr. Kushnir and Women’s Cancer Center.

Dated this 11<sup>th</sup> of September, 2020

McBRIDE HALL

A handwritten signature in black ink, appearing to read "Robert C. McBride", is written over a horizontal line.

ROBERT C. McBRIDE, ESQ.

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## **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 5,232 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

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 11<sup>th</sup> day of September, 2020

McBRIDE HALL

  
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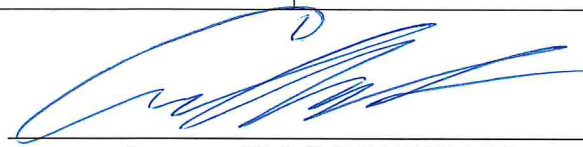
### CERTIFICATE OF SERVICE

I hereby certify that on this 11<sup>th</sup> day of September, 2020, 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

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