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.

Supreme Court Case No. 81779-COA

District Court No. A-17-764111-C

REAL PARTY IN INTEREST THE ESTATE OF CAROL A. GAETANO, DECEASED, VINCENT GARBITELLI, ADMINISTRATOR'S ANSWER TO CHRISTINA KUSHNIR, M.D., AND WOMEN'S CANCER CENTER OF NEVADA, INC.'S 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 Justices of this Court may evaluate possible disqualification or recusal.

Real Parties in Interest, The Estate of Carol A. Gaetano, Deceased, Vincent Garbitelli, Administrator, are represented by the law firm Heaton & Associates. There is no parent corporation or publicly owned company owning more than ten percent of the stock in the Real Parties in Interest and/or their counsel's firm.

Dated this 25th day of January, 2021.

HEATON & ASSOCIATES, PLLC

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I. ISSUE PRESENTED FOR REVIEW

Whether the District Court was within its discretion under NRS 41A.097(3) to deny Kushnir's Motion for Summary Judgment in light of the alleged "concealment" regardless of whether the injury was "discovered" over a year prior to the filing of the Complaint via the Estate's receipt of medical records.

II. OVERVIEW AND SUMMARY OF ARGUMENT

This Court should deny Petitioners, Dr. Kushnir and Women's Cancer Center of Nevada's (hereinafter collectively referred to as "Kushnir") writ petition as a matter of law. Kushnir has ignored the controlling authority in *Winn v. Sunrise Hospital and Medical Center*, 128 Nev. 246. 277 P.3d 458 (Nev. 2012) which makes clear that the Nevada Supreme Court created an exception to the "inquiry notice" based "discovery rule" which tolls the medical malpractice statute of limitations in NRS 41A.097 when the injured party satisfies the two-prong test governing concealment. This test applies even if the aggrieved party has their entire medical chart. This two-prong test asks: 1) whether the defendant intentionally withheld information, and 2) whether the withholding would have hindered a reasonably diligent plaintiff from procuring an expert affidavit. *Id*. at 464. The two-part test is a factual inquiry and therefore, properly resolved by the district court. If the test is satisfied, the statute of limitations is tolled regardless

of when an aggrieved party received medical records, was put on "inquiry notice" and/or "discovered" their injury. As applied to a dispositive motion, and in order to avoid summary judgment in a defendant's favor, the plaintiff need only show a disputed issue of material fact with respect to the test.

Accordingly, the Respondent District Court was well within its discretion to deny Kushnir's Motion for Summary Judgment based on an application of law and fact and Real Party in Interest, the Estate of Carol A. Gaetano, Deceased, Vincent Garbitelli, Administrator (hereinafter referred to as the "Estate"), requests that Kushnir's Petition for Writ of Mandamus be denied.

III. RELEVANT FACTUAL BACKGROUND

The Estate agrees that it filed its initial Complaint and Expert Affidavit on November 3, 2017. The Estate agrees that the Ms. Carol Gaetano ("Decedent") died on January 17, 2016. The Estate agrees that Dr. Vincent Garbitelli, administrator of the Estate (hereinafter, "Dr. Garbitelli") received Decedent's medical records in August of 2016.

However, in Kushnir's recitation of the facts, she has conveniently omitted several notable points from her Petition. Primarily, Dr. Garbitelli has contended that Kushnir lied and concealed her negligence via a telephone call in January of 2016. PET APPX0163 – PET APPX0164. Subsequently, Dr. Garbitelli obtained Decedent's medical records but did not begin reading them until November of

2016. PET APPX0161. Dr. Garbitelli did not discover that Dr. Kushnir blatantly deceived him until the "end of November of 2016" after he had read and reviewed the extensive hospital and medical records at which time, he learned of Kushnir's negligence in treating Decedent. PET APPX0164.

Kushnir asserts in her Petition that Dr. Garbitelli testified that there was no misrepresentation made by Dr. Kushner to him on their subject telephone call in January of 2016. Such a representation in Kushnir's Petition is patently false and hinges on piecemeal deposition testimony that is calculatedly taken out of context. A true reading of the deposition testimony combined with the other evidence shows that Dr. Garbitelli has maintained, from the early stages of this case, that Dr. Kushnir concealed and misrepresented her care of Decedent to him. PET APPX0164. Specifically, Dr. Garbitelli testified that Dr. Kushnir represented to him that Decedent's cancer spontaneously perforated the colon. *Id*. In reality, the Estate submits that it was Dr. Kushnir who caused the perforation and knowingly attempted to cover up her wrongdoing. *Id*.

Dr. Garbitelli has repeatedly explained the concealment perpetrated by Defendant Dr. Kushnir at the time of their telephone call on January 2nd of 2016. Over the phone, Dr. Kushnir told Dr. Garbitelli that Decedent was "seriously ill with Stage IV cancer". PET APPX0171. Dr. Kushnir advised Dr. Garbitelli that "the cancers spontaneously perforated" Decedent. *Id.*; PET APPX0164. Dr. Garbitelli testified that on this call, "there was [nothing] that Dr. Kushnir told

[him] that [he believed] was untruthful or misrepresented." *PET APPX0082*. Dr. Garbitelli was clearly referencing his belief as of the date of this call and not his retrospective belief after reviewing the records. Two pages prior in his deposition testimony he stated that on the same phone call, Decedent had "spontaneously perforated in several places" due to cancer and that there was "widespread cancer; peritonitis; respiratory failure". PET APPX 0080 – PET APPX 0081.

Dr. Garbitelli explained that he did not review the pertinent medical records until November of 2016. PET APPX0164. He made clear that it was not until the "end of November of 2016" after he had "thoroughly read and reviewed the extensive hospital and medical records of Carol Gaetano" that it "became clear to [him] that Dr. Kusnir falsely stated Carol's medical conditions and diagnoses and concealed professional negligence." *Id*. The Complaint was filed on November 3, 2017, within one year of Dr. Garbitelli having actual knowledge of Kushnir's negligence and after he realized that Dr. Kushnir had lied. PET APPX0016.

The Estate posits that Dr. Kushnir's misrepresentations materially affected and delayed the Estate's "discovery" of actionable facts that are the basis of this suit. Logically, why would Dr. Garbitelli have had any sense of urgency in getting started with his review of the medical records if he was informed of a non-negligent explanation for Decedent's injuries? At a minimum, these assertions created enough dispute as to the material facts to have warranted denial of Kushnir's Motion for Summary Judgment.

As set forth herein, the sole legal issue is whether Dr. Kushnir's alleged concealment could toll the statute of limitations such that the filing of the Estate's Complaint on November 3, 2017 was timely, even if the Estate had possession of Decedent's records and/or "discovered" the injury more than one year prior. This issue should be resolved in the Estate's favor as the district court was well within its discretion to deny Kushnir's Motion for Summary Judgment, rendering Kushnir's Petition without merit.

IV. STANDARDS OF REVIEW

A writ of mandamus is available "to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Where there is no plain, speedy, and adequate remedy in the ordinary course of law, extraordinary relief may be available. *Id.*

Importantly, writ petitions are not appropriate to resolve outstanding factual issues. *See Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) ("As we have repeatedly noted, an appellate court is not an appropriate forum in which to resolve disputed questions of fact."). Writ relief is typically available only when there is no plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170; NRS 34.330; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). And, generally, an appeal is an adequate legal remedy precluding writ relief. *Pan*

v. Eighth Judicial Dist. Court, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). Even if the appellate process would be more costly and time consuming than a mandamus proceeding, it is still an adequate remedy. *See County of Washoe v. City of Reno*, 77 Nev. 152, 156, 360 P.2d 602 (1961). In that regard, this Court avoids piecemeal appellate review and seeks to review possible errors only after a final judgment has been entered. *Moore v. Eighth Judicial Dist. Court*, 96 Nev. 415, 417, 610 P.2d 188, 189 (1980). Further, it is within the complete discretion of this Court to determine if a petition will be considered. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

V. LEGAL ARGUMENT

A. THE DISTRICT COURT WAS WITHIN ITS DISCRETION TO DENY KUSHNIR'S MOTION FOR SUMMARY JUDGMENT IN LIGHT OF THE ALLEGED CONCEALMENT PURSUANT TO NRS 41A.097(3).

Kushnir incorrectly asserts that the Petition presents a matter of first impression. Kushnir is belied by the medical malpractice statute itself (NRS 41A.097(2)) as well as the controlling case law in *Winn v. Sunrise Hospital and Medical Center*, 128 Nev. 246. 277 P.3d 458 (Nev. 2012) which has already addressed this specific issue. Thus, this is not a matter of first impression and an evaluation of the statute itself as well as the *Winn* case demonstrates that here, the Respondent District Court was well within its discretion to deny Kushnir's Motion for Summary Judgment.

For context, the medical malpractice statute of limitations in NRS 41A.097(2) provides in relevant part:

> 2. Except as otherwise provided in subsection 3, an action for injury or death against a provider of health care may not be commenced more than 3 years after the date of injury or 1 year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first . . .
>
> 3. This time limitation is tolled for any period during which the provider of health care has concealed any act, error or omission upon which the action is based and which is known or through the use of reasonable diligence should have been known to the provider of health care.

It is clear that the "time limitation is tolled for any period" whatsoever where a "provider of health care has concealed" their actions" which are known or should be known to the provider. *Id*. Based on the black letter law, there is simply no exception to concealment even if a plaintiff has their medical records or has "discovered or through the use of reasonable diligence should have discovered the injury". *Id*.

Going one step further, in *Winn v. Sunrise Hospital and Medical Center*, 128 Nev. 246. 277 P.3d 458 (Nev. 2012), the Nevada Supreme Court clearly and succinctly outlined what is controlling law in the State of Nevada regarding concealment as applied to its ability to toll the medical malpractice statute of limitations under NRS 41A.097. In short, the *Winn* Court articulated a two-pronged test to determine whether concealment tolls the statute of limitations as

addressed in more detail below. However, a brief overview of the posture of the case is first necessary for context.

Procedurally, *Winn* involved an appeal from the district court's granting of a motion for summary judgment based on the medical malpractice statute of limitations. *Id.* at 460. The case surrounded a December 14, 2006 heart surgery on a 13-year-old girl which resulted in a brain injury. *Id*. at 461. The day after surgery, the girl's father was informed of the brain injury. *Id*. The doctors could not explain how the injury occurred. *Id.*

By January of 2007, the girl's father had retained an attorney for purposes of bringing a medical malpractice case against the providers, including the hospital and doctors. *Id*. On February 14, 2007, medical records were received from the hospital which although incomplete, contained the post-operative report of the surgeon suggesting an inappropriate amount of air in the girl's left ventricle during the surgery. *Id*. Additional records were received from the hospital in December of 2007 and by February 12, 2008, a complete set was provided by the hospital. *Id*. Suit was filed on February 3, 2009 against the hospital and doctors after obtaining an affidavit wherein the expert relied primarily on the postoperative report of the surgeon that had been received on February 14, 2007. *Id*.

The defendant medical providers argued that the suit was untimely for two reasons: first, the injury was discovered the day after surgery (December 15, 2006) and second, the complaint was not filed until February 3, 2009 (much

longer than a year). *Id*. at 461. The district court granted the defendants' motion for summary judgment and the appeal followed.

In its unanimous *en banc* decision, the Court resolved the following three legal issues: 1) what constitutes "discovery" for purposes of triggering the one-year discovery period in NRS 41A.097; 2) what constitutes "concealment" as defined in NRS 41A.097; and 3) whether "concealment" can "serve as a basis for tolling the one-year discovery period" of NRS 41A.097. *Id*. at 462. The *Winn* Court found that concealment can toll the one-year discovery period and was therefore, unable to affirm the district court's finding that the statute of limitations had run because of the existence of a disputed issue of fact. *Id*. at 465. Likewise, Respondent Judge Tierra Jones was well within her discretion to find for the Estate based on recognizing a disputed issue of material fact regarding Dr. Kushnir's concealment and therefore, was within her discretion to deny Kushnir's Motion for Summary Judgment here.

(1) CONCEALMENT TOLLS THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS DESPITE THE "DISCOVERY RULE"

In terms of the "discovery" rule and when the statute of limitations would ordinarily commence absent concealment, the *Winn* Court, relying on *Massey v. Litton*, 99 Nev. 723, 669 P.2d 248 (Nev. 1983), held that:

> [A] Plaintiff discovers his injury "when he knows or, through the use of reasonable diligence, should have known of the facts that would put a reasonable person on inquiry notice of his cause of action.

Id. At 462 (internal quotations omitted).

In *Winn*, the district court had determined that the date of "discovery" was the date after surgery, when the father was informed of the brain injury. The Nevada Supreme Court disagreed with the district court's finding because the "accrual date for a statute of limitations is a question of law only when the facts are uncontroverted." *Id*. at 463 (citing *Day v. Zubel*, 112 Nev. 972, 977, 922 P.2d 536, 539 (1996) (additional citations omitted). Despite its disagreement as to the exact date of "discovery", the Supreme Court believed that the evidence irrefutably demonstrated that the injury was discovered no later than February 14, 2007; the date that the initial medical records were received which contained the postoperative report showing the inappropriate amount of air in the girl's ventricle during the surgery. *Id.* Thus, the Supreme Court viewed that date as the date of "discovery" since that marked the date that the plaintiffs and their attorneys had "inquiry notice" because they "had access to facts that would have led an ordinarily prudent person to investigate further" as to whether the injury could have been caused by negligence. *Id*. at 463. The *Winn* plaintiffs on appeal asserted that the hospital concealed their actions by not providing the full medical chart until February 12, 2008. *Id*. at 461.

If the Supreme Court's analysis in *Winn* ended here with the "discovery rule" and "inquiry notice" based on the victim's receipt of medical records, the statute of limitations would have expired on February 14, 2007, and the Supreme Court would have affirmed the district court's granting of summary judgment since the *Winn* plaintiffs filed their complaint on February 3, 2009. *Id*. at 461.

Similarly, this is where Dr. Kushnir would like this Court to end the inquiry here, i.e. the date that the Estate received the medical records which Kushnir argues created inquiry notice. However, in *Winn*, the Supreme Court continued its analysis in regards to the alleged concealment, stating "factual issues remain[ed] as to whether the one-year discovery should have been tolled" such that the filing by February 3, 2009, was timely. In other words, the concealment rule applies to toll the one-year "discovery" and "inquiry notice" rules. This means that even if an aggrieved party has "discovered" their injury and is put on "inquiry notice" via receipt of their records, the statute can still be tolled for concealment. Because of this specifically defined exception to the discovery rule based on concealment, Kushnir's Petition is without merit.

(2) THE TWO-PRONG TEST ON CONCEALMENT AND WHEN IT PROVIDES A TOLLING BENEFIT TO THE AGGRIEVED PARTY

The Supreme Court in *Win, supra,* articulated a "two-prong test" to determine whether "concealment" tolls the statute of limitations regardless of the "discovery" and/or "inquiry notice" date of the injury. The two-prong test asks: 1) whether the defendant intentionally withheld information, and 2) whether the withholding would have hindered a reasonably diligent plaintiff from procuring an expert affidavit. *Id*. At 464. These are factual issues left to the discretion of the district court. *See Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) ("As we have repeatedly noted, an appellate court is not an appropriate forum in which to resolve disputed questions of fact.").

Because the two-prong test was a factually unresolved issue in *Winn*, the Supreme Court was unable to affirm the district court's summary judgment and vacated the order as to the allegedly concealing defendant. *Id*. at 465. In crafting its jurisprudence, the Nevada Supreme Court acknowledged that the concealment "exception . . . Embodies the common law concept that a wrongdoer should not be able to take advantage of his own wrong." *Id*. at 466 (citing *Smith v. Boyett*, 908 P.2d 508, 512 (Colo. 1995). Logic and reason demand the same. The law cannot allow a doctor to commence a statute of limitations by simply handing over their patient's medical records while simultaneously concealing their wrongdoing. If that were possible, many victims would accept their provider's word and never look at the records. The law would create an irrational incentive to lie and deceive which simply cannot stand. Therefore, Kushnir's assertion that the statute of limitations is not tolled for concealment if a patient has received their records defies *Winn* as well as logic and reason and would inappropriately allow a wrongdoer to "take advantage of his own wrong." *Id.*

The Supreme Court in *Winn* went even further to recognize specifically in Footnote 4 of its decision that other jurisdictions in some instances refused to toll their discovery periods in their statute of limitations based on concealment. *Id*. at FN4. The Supreme Court explicitly rejected the same, explaining that "[w]e decline to follow this approach, as subsection 3's plain language [NRS 41A.097] makes clear that the tolling-for-concealment exception applies to subsection 2 [of NRS 41A.097 and the "discovery" rule] as a whole . . ." *Id*.

Therefore, Nevada law does not preclude a plaintiff from timely filing suit even more than a year after receiving medical records (i.e. "discovering" the injury based on "inquiry notice") if the two-prong test for concealment is satisfied. For purposes of this Petition, however, all that is necessary for a finding in the Estate's favor is recognition that Respondent Judge Jones' denial of Kushnir's Motion for Summary Judgment was within her discretion based on her determination that disputed issues of material fact existed with respect to the alleged concealment.

(3) RESPONDENT JUDGE JONES CORRECTLY RESOLVED THE ISSUES OF LAW AND FACT IN THE ESTATE'S FAVOR

Winn, supra, and this case should reach the same result based on the similarities highlighted below:

	Winn v. Sunrise	**This Case**
Receipt of Medical Records suggesting negligence	February 14, 2007. *Winn v. Sunrise Hospital and Medical Center*, 128 Nev. 246. 277 P.3d 458, 461 (Nev. 2012)	August 2016. PET APPX0164.
Date case filed	February 3, 2009. *Id.*	November 3, 2017. PET APPX0016.
Gap in time between receipt of records and filing the case	About 23 months	About 14 months
Allegation of concealment?	Yes based on withholding medical records. *Id.*	Yes based on Dr. Kushnir's affirmative act in lying about her care

		and treatment of decedent. PET APPX0164.
Application of doctrine of Concealment	Nevada Supreme Court vacated summary judgment because factual issues remained as to whether the two-prong test on concealment was satisfied. *Id*. at 463.	This Court of Appeals should find the District Court was within its discretion to deny Kushnir's Motion for Summary Judgment based on the factual issue of concealment.
Result/Conclusion	Statute of limitations can be tolled due to concealment. *Id.*	This Court of Appeals should find the statute of limitations can be tolled due to concealment.

What is clear from *Winn* is that even if medical records are received (i.e. triggering the date of "discovery" and "inquiry notice") the aggrieved party is not precluded from timely filing the complaint. When concealment is at issue, the district court is to apply the two-prong test to determine 1) whether the defendant intentionally withheld information, and 2) whether the withholding would have hindered a reasonably diligent plaintiff from procuring an expert affidavit. *Id*. at 464. Interestingly, the "concealment" in *Winn* amounted to a mere withholding of medical records. This case involves Dr. Kushnir's affirmatively deceitful act of misrepresenting and lying about her care and treatment of Decedent as well as the cause of Decedent's injuries. The egregiousness of the "concealment" is tenfold to that in *Winn*.

The Respondent District Court here was within its discretion to find that a

disputed issue of material fact existed as to Dr. Kushnir's deliberate concealment such that it hindered a reasonably diligent plaintiff like the Estate from procuring an expert affidavit and filing suit, and/or that it was a factual issue more appropriately left to the jury. Respectfully, this Court should not try to resolve the outstanding factual issues on the merits of the Estate's claim of concealment but should defer to the District Court. *See Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) ("As we have repeatedly noted, an appellate court is not an appropriate forum in which to resolve disputed questions of fact."). Because it was within the discretion of the District Court to resolve the concealment issue in the Estate's favor, it was within its discretion to also deny Kushnir's Motion for Summary Judgment.

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VI. CONCLUSION

In summary, this Court should deny Kushnir's Petition for Writ of Mandamus because the applicable statute in NRS 41A.097(2) provides an exception to the one-year discovery rule based on concealment. Further, the controlling case law, *Winn v. Sunrise Hospital and Medical Center*, 128 Nev. 246. 277 P.3d 458 (Nev. 2012) explained this clear exception to the "discovery rule" of NRS 41A.097 and articulated its two-prong test to determine the same. Respondent Judge Tierra Jones was within her discretion to resolve the issues of law and fact in favor of the Estate, finding disputed issues of material fact existed thereby appropriately denying Kushnir's Motion for Summary Judgment.

DATED this 25th day of January, 2021.

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DECLARATION AND CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Answer 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 sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed in Nevada, this 25th day of January, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **REAL PARTY IN INTEREST THE ESTATE OF CAROL A. GAETANO, DECEASED, VINCENT GARBITELLI, ADMINISTRATOR'S ANSWER TO CHRISTINA KUSHNIR, M.D., AND WOMEN'S CANCER CENTER OF NEVADA, INC.'S PETITION FOR WRIT OF MANDAMUS** with the Supreme Court of Nevada on the 25th day of January, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Robert C. McBride, Esq.
Heather S. Hall, Esq.

I further certify that the foregoing document was mailed via U.S. Mail to the following:

Honorable TIERRA JONES, District Court Judge
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