

**IN THE COURT OF APPEALS 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  
Jun 29 2021 03:19 p.m.  
COA Case No. 81779-COA  
Elizabeth A. Brown  
Clerk of Supreme Court  
District Court No.: A-17-764111-C

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**PETITIONERS' MOTION TO REISSUE ORDER AS A PUBLISHED  
OPINION PURSUANT TO NRAP 36(f)**

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## I. INTRODUCTION

Petitioners in this matter, by and through their counsel, and pursuant to NRAP 36(f), hereby file this motion to reissue the unpublished Order Granting Petition for Writ of Mandamus, issued by this Court on June 16, 2021, as an opinion to be published in the Nevada Reports as follows:

## II. CRITERIA FOR PUBLICATION

NRAP 36(c) states that “[a]n unpublished disposition, while publicly available, may not be cited as precedent except in very limited circumstances . . . .” Whereas, “[a] published disposition is an opinion designated for publication in the Nevada Reports and **may be cited as precedent**.” NRAP 36(c) [emphasis added].

This Court decides whether to publish a disposition if it:

- (1) Presents an issue of first impression;
- (2) Alters, modifies, or significantly clarifies a rule of law previously announced by the court; or
- (3) Involves an issue of public importance that has application beyond the parties.

NRAP 36(c).

For the reasons set forth below, Petitioners believe that this case is appropriate for publication because the reasoning set forth in the unpublished disposition has precedential value to medical malpractice cases and, therefore,

should be published as an opinion in the Nevada Reports to be cited as such.

### **III. THIS ORDER IS APPROPRIATE FOR PUBLICATION.**

This case is appropriate for publication in the Nevada Reports because it significantly clarifies the tolling provision contained in NRS 41A.097(3) and involves an issue of public importance that has application beyond the parties.

This case clarifies the holding in *Winn v. Sunrise Hospital and Medical Center*, 128 Nev. 246, 277 P.3d 458 (2012) and the limitations of the tolling provision. In brief, this case concludes that the concealment clause does not toll the one-year statute of limitations indefinitely, nor does it excuse the requirement of reasonable diligence by a plaintiff. The concealment clause only tolls the statute of limitations for the period of time in which the plaintiff was prevented or hindered from discovering information about potential medical malpractice claims. The discovery rule still applies, even in the face of alleged concealment tolling the statute of limitations. As is made clear in this case, concealment does not excuse the reasonable diligence requirement.

Additionally, this case involves an issue of public importance with application beyond the parties. In the context of medical malpractice actions, allegations of concealment are often raised in response to a Motion arguing that the statute of limitations expired prior to the action being filed. All present and future litigants need to know the precedential value of this case when addressing NRS

41A.097. Publication would assist the district courts in Nevada with making determinations pursuant to NRS 41A.097 on whether an action is untimely.

**A. The Order Clarifies Nevada Law.**

This Court's June 16, 2021 Order significantly clarifies a rule of law previously announced by the Court. There are no published opinions specifically holding that the tolling provision of NRS 41A.097(3) is not limitless. While *Winn* did hold that possession of medical records containing all the information necessary to discover alleged medical malpractice begins the one-year statute of limitations, this unpublished Order clarifies that the one-year statute of limitations is not tolled indefinitely. The discovery rule still operates and tolling is not "never-ending" until such time as the alleged concealment is remedied. *See* Order, page 5. A published opinion in the present case will clarify the rule of law set forth in *Winn*, as well as NRS 41A.097.

**B. The Order Involves an Issue of Public Importance Beyond the Parties.**

Medical malpractice cases are commonplace in Nevada, as are motions challenging the timeliness of a filing alleging medical malpractice. A party cannot toll the statute of limitations indefinitely by claiming concealment by the healthcare provider. Even when concealment is established, a party cannot avoid application of the statute of limitations once there is clear evidence of receipt of the complete medical records and access to facts which would have led an ordinarily

prudent person to investigate further into whether [the death] may have been caused by someone's negligence." *Winn*, 128 Nev. at 253, 277 P.3d at 463.

In the present case, 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 despite the holding in *Winn*. The district court judge's broad interpretation of the tolling provision is not unique to this case. This issue goes beyond the parties in the present case and will likely arise in future medical malpractice actions without a published opinion concretely stating that the tolling provision of NRS 41A.097(3) does not extend the statute of limitations indefinitely. A published opinion will provide guidance to plaintiffs and their counsel when deciding whether to pursue a claim for medical malpractice and timing for same. A published opinion will also provide guidance to district court judges who must review the timeliness of medical malpractice claims and apply NRS 41A.097.

**C. No Substantial Revisions of the Unpublished Order Will be Necessary.**

NRAP 36(g)(4) states that the granting of a motion to reissue an order as a published opinion is in the sound discretion of this Court. Publication is disfavored, however, "if revisions to the text of the unpublished disposition will result in discussion of additional issues not included in the original decision." NRAP 36(g)(4).

In this case, the Order issued by this Court on June 16, 2021, does not require revisions to the text for publication. The Order succinctly sets forth the background facts and procedural history pertinent to this Court's disposition of the Petition for Writ. Further, this Court sets forth a detailed analysis of the legal issues supporting its Order.

#### **IV. CONCLUSION**

Based upon the foregoing, Petitioners respectfully request the Court reissue its unpublished Order as an opinion to be published in Nevada Reports.

Dated this 29<sup>th</sup> of June, 2021

McBRIDE HALL

*/s/ Heather S. Hall*

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### **CERTIFICATE OF SERVICE**

I hereby certify that on this 29<sup>th</sup> day of June, 2021, I served the foregoing  
**PETITIONERS' MOTION TO REISSUE ORDER AS A PUBLISHED  
OPINION PURSUANT TO NRAP 36(f)** 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

Aaron Ford, Esq. Attorney General Office of the Attorney General 555 E. Washington Ave., Ste. 3900 Las Vegas, Nevada 89101 <i>Counsel for Respondent The Honorable Tierra Jones</i>	Aaron Heaton, Esq. Jared F. Herling, Esq. HEATON & ASSOCIATES, PLLC 5785 Centennial Center Blvd., Ste. 240 Las Vegas, Nevada 89149 Attorneys for Real Parties in Interest
Honorable Tierra Jones Eighth Judicial District Court Department X Regional Justice Center 200 Lewis Avenue Las Vegas, Nevada 89101 <i>Respondent</i>	

*/s/Candace Cullina*

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