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'S PETITION FOR REVIEW

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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 20th day of August, 2021.

HEATON & ASSOCIATES, PLLC

/s/ Jared Herling
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I. QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE COURT OF APPEALS ERRED BY FINDING THAT THE SIMPLE RECEIPT OF A DECEDENT'S MEDICAL RECORDS NEGATES CONCEALMENT BY A DOCTOR RENDERING THE CONCEALMENT PROVISION IN NRS 41A.097(3) INAPPLICABLE TO TOLL THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS

II. REASONS FOR REVIEW

This petition for review asks this Court to grant review under NRAP 40B to vacate the Court of Appeals' opinion issued in this case.[1] In its Opinion, the Court of Appeals unreasonably concluded that the receipt of a decedent's medical records negates the concealment provision of the medical malpractice statute of limitations in NRS 41A.097(3). The Court of Appeals reasoned that because the decedent's estate was in possession of records, it could not have been hindered (as a "reasonably diligent plaintiff") from procuring an expert affidavit even in the face of a doctor concealing the reason for the decedent's injuries because the medical records were all that were needed to demonstrate evidence of negligence. Op. at 8.

As set forth herein, the receipt of records should not be dispositive and should only be one fact considered by the finder of fact to determine whether a "reasonably diligent plaintiff" would have been hindered from timely filing suit when

[1] The Court of Appeals' Opinion (filed on August 5, 2021) is attached as **Exhibit 1**.

concealment is at issue. Accordingly, for this reason, Real Party in Interest, the Estate of Carol A. Gaetano, Deceased, Vincent Garbitelli, Administrator, urges this Court to grant this petition for review.

III. STANDARDS OF REVIEW

Pursuant to NRAP 40(B)(a), this Court will exercise its discretion to consider the merits of a petition for review when: (1) the question presented is one of first impression of general statewide significance; (2) the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or (3) the case involves fundamental issues of statewide public importance.

IV. LEGAL ARGUMENT

A. THE COURT OF APPEALS ERRED BY FINDING THAT THE RECEIPT OF A DECEDENT'S MEDICAL RECORDS NEGATES CONCEALMENT BY A DOCTOR RENDERING THE CONCEALMENT PROVISION IN NRS 41A.097 INAPPLICABLE TO TOLL THE STATUTE OF LIMITATIONS

In its opinion, the Court of Appeals unreasonably found that any tolling due to conealment (under NRS 41A.097(3)) ends when a party has "received the complete medical records . . . making procurement of the expert affidavit attainable without hindrance." Op. at 8. In so doing, the Court of Appeals put receipt of records above all other facts, thereby establishing a bright lined rule that holds that doctors may misrepresent and conceal their wrongdoing but trigger the statute of limitations

period by simply providing a patient with their records. Such an unfavorable rule of law cannot stand and therefore, the same is a matter of statewide significance, public policy and importance.

The Court of Appeals correctly noted in its Opinion, the controlling case law from the Nevada Supreme Court in *Winn v. Sunrise Hosp. & Medical Center*, 277 P.3d 458, 128 Nev. 246 (2012), which held that with respect to NRS 41A.097(3)'s tolling provision, the concealment must be the type that "would have hindered a reasonably diligent plaintiff from prodcuring an expert affidavit." Op. at 8. The Court of Appeals also correctly recognized that *Winn, supra,* found that the concealment "must have interfered with a reasonable plaintiff's ability to satisfy the statutory requirement that the complaint be accompanied by an expert affidavit." *Id.* (citing NRS 41A.071).

However, Real Party in Interest submits that the Court of Appeals failed to appreciate the difference between the "ability to procure an expert affidavit " and the "ability to *timely* procure an expert affidavit within the statute of limitations period". It is true that the receipt of medical records which evidences negligence would allow a party to discover that negligence (at some undefined point in time – no matter how long it took) and procure an expert affidavit. However, when concealment by a provider has resulted in a "lack of urgency" on the behalf of the

aggrieved party, the concealment hinders the "ability to timely procure an expert affidavit within the statute of limitations period" despite having records.

Here, Real Party in Interest has consistently alleged that Dr. Kushnir concealed her actions and knowingly misrepresented the cause of decedent's injuries. *See* Answering Brief at 2-3, attached hereto as **Exhibit 2**. Thus, despite having access to the medical records more than one year prior to filing the complaint, the estate was under the false assumption that no negligence occurred and accordingly, there was no sense of urgency to have the records reviewed. The finder of fact, and not the Court of Appeals, should be entitled to determine whether or not the estate had a sense of urgency and acted as a "reasonably diligent plaintiff" under *Winn, supra*, at 464, and whether or not that impacted the "timely" procurement of the expert affidavit and filing of the complaint. The mere receipt of records and a rule of law allowing the same to override concealment accrues to the benefit of the offending party and would create a perverse incentive for doctors to conceal their actions while simultaneously handing over records commencing the statute of limitations. The Court of Appeals prioritized mere receipt of records and deemed the same conclusive in the calculus of whether a plaintiff acted "reasonably diligent". All the facts and circumstances should be considered and weighed by the fact finder, in this case, the district court, to determine whether or not the concealment provision

in NRS 41A.097(3) can be satisfied. Accordingly, Real Party in Interest respectfully petitions this Court to grant review.

V. CONCLUSION

In summary, Real Party in Interest petitions this Court to grant review under NRAP 40B and vacate the Court of Appeals opinion due to an erroneous interpretation of the controlling case law in *Winn v. Sunrise Hosp. & Medical Center*, 277 P.3d 458, 128 Nev. 246 (2012) and an improper finding of fact which should have been left to the discretion of the district court and/or finder of fact.

Dated this 20th day of August, 2021.

HEATON & ASSOCIATES, PLLC

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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 2016 in 14-point Times New Roman font.

2. I further certify that this brief 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 either:

☐ proportionally spaced, has a typeface of 14 points or more and contains _____ words; or

☒ does not exceed 10 pages.

3. Finally, I hereby certify that I have read this 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 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.

Dated this 20th day of August, 2021.

HEATON & ASSOCIATES, PLLC

/s/ Jared Herling
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Supreme Court of Nevada on the 20th day of August, 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.

/s/ *Clarice Felix*
Clarice Felix, an employee of
Heaton & Associates

Exhibit 1

Exhibit 1

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHRISTINA KUSHNIR, M.D.; 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 DANIELLE JONES, DISTRICT JUDGE,
Respondents,
and
THE ESTATE OF CAROL A. GAETANO, DECEASED; AND VINCENT GARBITELLI, ADMINISTRATOR,
Real Parties in Interest.

No. 81779-COA

FILED

AUG 05 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Original petition for a writ of mandamus challenging a district court order denying a motion for summary judgment in a medical malpractice action.

Petition granted.

McBride Hall and Robert C. McBride and Heather S. Hall, Las Vegas, for Petitioners.

Heaton & Associates and Jared F. Herling, Las Vegas, for Real Parties in Interest.

BEFORE THE COURT OF APPEALS, GIBBONS, C.J., TAO and BULLA, JJ.

OPINION[1]

PER CURIAM:

Pursuant to NRS 41A.097(2), a medical malpractice action against a health care provider must be filed within one year of the injury's discovery or three years of the date of injury, whichever occurs first. NRS 41A.097(3) permits tolling of both limitations periods "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." And the Supreme Court of Nevada has interpreted the statute to warrant tolling where the health care provider's intentional concealment "would have hindered a reasonably diligent plaintiff from procuring an expert affidavit" as required under NRS 41A.071. *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 255, 277 P.3d 458, 464 (2012).

In this original proceeding, we consider whether the one-year limitations period is tolled for concealment where (1) the undisputed facts show that the plaintiffs were in possession of the medical records necessary to procure the expert affidavit more than a year prior to filing the complaint,

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[1]We originally resolved this petition in an unpublished order granting the petition and issuing a writ of mandamus. Petitioners subsequently filed a motion to publish the order as an opinion. We grant the motion and replace our earlier order with this opinion. *See* NRAP 36(f). Real parties in interest filed a petition for rehearing of our prior decision to grant the petition for a writ of mandamus. Having reviewed the petition, we deny rehearing. *See* NRAP 40(c).

and (2) the alleged concealment did not hinder the procurement of the affidavit. Because the plaintiffs had all necessary medical records and were therefore on inquiry notice of the claim more than a year before filing the complaint, and because the alleged concealment did not hinder the plaintiffs' ability to procure an expert affidavit, we conclude that the one-year statute of limitations expired and extraordinary writ relief is appropriate. We therefore grant the petition for a writ of mandamus and direct the district court to grant the defendants' motion for summary judgment.

I.

In December 2015, petitioner Christina Kushnir, M.D., performed a diagnostic laparoscopy on Carol Gaetano during which Gaetano sustained a perforation to her colon requiring hospitalization. It is unclear whether the procedure alone caused the perforation or whether it resulted in conjunction with Gaetano's advanced cancer. Gaetano died on January 17, 2016. Real party in interest and co-administrator of Gaetano's estate, Vincent Garbitelli, M.D., requested an autopsy from the coroner's office.[2] The coroner issued its autopsy report on January 22, 2016.

Dr. Garbitelli and Gaetano's estate (collectively the Estate) received Gaetano's complete medical records in August 2016. Approximately 15 months later, in November 2017, the Estate filed a complaint against Dr. Kushnir and her employer, Women's Care Center of Nevada, Inc. (collectively hereinafter Dr. Kushnir), alleging medical malpractice pursuant to NRS 41A.015. Dr. Garbitelli prepared the expert affidavit filed with the complaint. Dr. Kushnir filed a motion to dismiss, arguing that the complaint was untimely. The Estate opposed the motion

[2]Dr. Garbitelli is also Gaetano's second cousin.

on the ground that the one-year limitations period was tolled because Dr. Kushnir had allegedly concealed the true cause of Gaetano's perforated colon by telling the family it was caused by the cancer. The district court denied the motion, reasoning that more discovery needed to be conducted.

Later, after discovery was significantly completed, Dr. Kushnir moved for summary judgment, arguing again that the complaint was untimely. Specifically, Dr. Kushnir argued that the Estate was on inquiry notice of the claim as of August 2016, when it received a complete copy of Gaetano's medical records, and therefore the November 2017 complaint was untimely filed. After a hearing on the motion, the district court denied the request, concluding that "questions of fact exist with respect to Dr. Kushnir's alleged concealment." Dr. Kushnir now petitions this court for a writ of mandamus.

The gravamen of Dr. Kushnir's writ petition is that the Estate's medical malpractice complaint was untimely filed and therefore the district court was obligated to grant her motion for summary judgment pursuant to NRS 41A.097(2). Specifically, Dr. Kushnir contends that the Estate was on inquiry notice of the claim no later than August 2016, once it received the complete medical records, and therefore the complaint that the Estate filed in November 2017 was barred by the one-year statute of limitations. The Estate argues that the district court correctly denied the summary judgment motion because of unresolved facts regarding Dr. Kushnir's alleged concealment.

II.

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). Whether to consider a petition for a writ of mandamus is within this court's sound discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Ordinarily, extraordinary writ relief is not available to challenge a district court's order denying summary judgment, "but an exception applies when 'no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action.'" *Libby v. Eighth Judicial Dist. Court*, 130 Nev. 359, 363, 325 P.3d 1276, 1278 (2014) (quoting *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997)).

In this case, the district court denied Dr. Kushnir's summary judgment motion despite the fact that the Estate's complaint was plainly untimely and tolling was unavailable, as the alleged concealment had not hindered the Estate's ability to discover the alleged malpractice and procure an expert affidavit. Because the facts relevant to the timeline of events are not in dispute, and because the district court was obligated to dismiss the action pursuant to clear statutory authority, we elect to exercise our discretion and entertain this writ petition.

III.

"NRS 41A.097(2)'s one-year limitation period is a statutory discovery rule that begins to run when a plaintiff knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action." *Id.* at 364, 325 P.3d at 1279 (internal quotation marks omitted). "[A] person is put on 'inquiry notice' when he or she should have known of facts that 'would lead an ordinarily prudent person to investigate the matter further.'" *Winn*, 128 Nev. at 252, 277 P.3d at 462 (quoting *Black's Law Dictionary* 1165 (9th ed.

2009)). Accordingly, for purposes of NRS 41A.097(2), an injury is discovered once the injured party possesses facts that would lead "an ordinarily prudent person to investigate further into whether [his or her] injury may have been caused by someone's negligence." *Id.* at 253, 277 P.3d at 462.

Pursuant to NRS 41A.097(3), however, "[subsection 2's] 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." Thus, a plaintiff seeking to toll subsection 2's one-year discovery period must show an intentional concealment and "establish that he or she satisfied subsection 2's standard of 'reasonable diligence.'" *Winn*, 128 Nev. at 255, 277 P.3d at 464. In short, the Estate must establish that (1) Dr. Kushnir "intentionally withheld information," and (2) "that this withholding would have hindered a reasonably diligent plaintiff from procuring an expert affidavit." *Id.*

A.

As a preliminary matter, we note that for purposes of this petition we assume (without deciding) that Dr. Kushnir intentionally withheld and/or concealed information following the surgery. Nevertheless, for the reasons articulated below, the Estate's medical malpractice claim fails as a matter of law.[3]

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[3]Although we assume concealment for purposes of our analysis herein, we note that the Estate's concealment claim rests, at best, on dubious grounds. To the extent the Estate contends that Dr. Kushnir engaged in active and fraudulent concealment by proffering a non-negligent explanation for Gaetano's perforated colon (i.e., that Gaetano's advanced cancer was the primary cause of the perforation, not the laparoscopy) and failing to acknowledge that she was negligent, such an assertion finds little support in law, as one's mere denial of negligence is not tantamount to fraudulent concealment. *See Grimmett v. Brown*, 75 F.3d 506, 515 (9th Cir.

In its answering brief, the Estate concedes and agrees with Dr. Kushnir that the Estate received Gaetano's complete medical records in August 2016. Further, Dr. Garbitelli's expert affidavit, which was attached to the November 2017 complaint, states that his expert medical opinions contained therein are based on his "education, training, 40 years of medical practice, *review of the medical records* and facts o[f] this case." (Emphasis added.) Thus, the undisputed facts establish that the discovery rule was triggered in August 2016 when Garbitelli "had facts before him that would have led an ordinarily prudent person to investigate further," thereby putting him on inquiry notice of the cause of action. *Winn*, 128 Nev. at 253, 277 P.3d at 462. As a result, the one-year statute of limitations expired in August 2017, making the November 2017 complaint untimely. We therefore conclude that Dr. Kushnir correctly asserts that the one-year statute of limitations had run on the Estate's medical malpractice claim.

Despite these undisputed facts, the Estate appears to argue that the concealment clause tolls the one-year statute of limitations indefinitely and that a claim of concealment forgives the reasonable diligence requirement. Therefore, the Estate argues, the district court correctly denied Dr. Kushnir's summary judgment motion. We conclude, however, that these arguments are unpersuasive.

B.

First, the tolling provision is not limitless. Although NRS 41A.097(3) states that "[subsection 2's] time limitation is tolled for any

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1996) ("A failure to 'own up' does not constitute active concealment." (emphasis omitted)); *cf. Joynt v. Cal. Hotel & Casino*, 108 Nev. 539, 542, 835 P.2d 799, 801 (1992) (recognizing that it is the plaintiff's burden to prove a defendant's negligence).

period during which the provider of health care has concealed any act, error or omission," possibly suggesting never-ending tolling, *Winn* clarifies that the concealment must be of the type that "would have hindered a reasonably diligent plaintiff from procuring an expert affidavit." *Winn*, 128 Nev. at 255, 277 P.3d at 464. In other words, the concealment must have interfered with a reasonable plaintiff's ability to satisfy the statutory requirement that the complaint be accompanied by an expert affidavit. *See* NRS 41A.071.

Here, the alleged concealment was Dr. Kushnir's statement that Gaetano's advanced cancer, and not the laparoscopic procedure, caused the perforation to her colon. But this alleged concealment did not impact Dr. Garbitelli's ability to procure an expert affidavit. Indeed, Dr. Garbitelli's affidavit states that it was the medical records that revealed the alleged negligence—medical records that had been in his possession since August 2016 and admittedly served as the sole factual basis for his medical opinions. Accordingly, even assuming that Dr. Kushnir concealed the true cause of the perforated colon, the tolling period, if any, ended in August 2016 when Dr. Garbitelli received the complete medical records and the Estate was put on inquiry notice of the claim, making procurement of the expert affidavit attainable without hindrance. Therefore, the one-year statute of limitations expired in August 2017—approximately three months before the complaint was filed.

Nevertheless, relying on *Winn*, the Estate argues that the concealment tolls the statute of limitations despite the discovery rule. The Estate misconstrues *Winn*. In *Winn*, the supreme court concluded that although the plaintiff's complaint was filed more than one year after discovery of the injury, 128 Nev. at 253-54, 277 P.3d at 463, it could not affirm the district court's grant of summary judgment based on the statute

of limitations because "factual issues remain[ed] as to whether Sunrise concealed records from Winn so as to warrant tolling." *Id.* at 258, 277 P.3d at 466. Those unresolved factual issues related directly to whether the undisclosed information was material to the plaintiff's claim, thus hindering the procurement of an expert affidavit. *Id.* at 256, 277 P.3d at 465. In this case, as explained above, no such hindrance occurred, as the Estate possessed the complete medical records in August 2016 and those records provided Dr. Garbitelli with all the information necessary to discover the alleged medical malpractice and prepare his expert affidavit. Accordingly, *Winn* is unavailing on this point.[4]

C.

Second, the Estate's argument that concealment forgives the reasonable diligence requirement is without merit. *Winn*, in fact, manifestly states the opposite. The *Winn* court noted specifically that "a plaintiff seeking to toll subsection 2's one-year discovery period must . . . establish that he or she satisfied subsection 2's standard of 'reasonable diligence.'" *Id.* at 255, 277 P.3d at 464. Thus, reasonable

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[4]The Estate also contends that footnote 4 in the *Winn* opinion expressly authorizes "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." (Emphasis added.) This, however, is not what footnote 4 holds. Rather, footnote 4 holds that the tolling provision of subsection 3 applies to both the three-year and one-year limitations periods of subsection 2 and that a plaintiff's independent discovery of his or her claim will not commence the one-year limitations period if the defendant's ongoing concealment (e.g., failure to produce medical records) continues to hinder the plaintiff's ability to procure an expert affidavit. *Winn*, 128 Nev. at 254 n.4, 277 P.3d at 463 n.4. Here, as explained in the body of the opinion, Dr. Kushnir's alleged concealment did not hinder the Estate's ability to procure its expert affidavit.

diligence is clearly required, and the Estate was not reasonably diligent here, as it waited almost 3 months to review the medical records and approximately 15 months to file its complaint after being placed on inquiry notice in August 2016. Consequently, we conclude that this contention is meritless as it finds no support in controlling law. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's contention that is not cogently argued or lacks the support of relevant authority).[5]

IV.

In sum, we conclude that extraordinary writ relief is warranted because no disputed issues of material fact exist as to when the Estate was on inquiry notice of the cause of action and, based on those same undisputed facts, subsection 3's tolling provision is inapplicable. *See Libby*, 130 Nev. at 363, 325 P.3d at 1278. The irrefutable facts, therefore, establish that the one-year statute of limitations expired in August 2017, making the November 2017 complaint untimely. As a result, "pursuant to clear authority under a statute or rule, the district court [wa]s obligated to

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[5]Additionally, the Estate suggests the November 2017 complaint was timely because it was filed "within one year of Dr. Garbitelli having *actual knowledge* of [Dr.] Kushnir's negligence." (Emphasis added.) Actual knowledge, however, is not the standard; rather, subsection 2's one-year limitations period is triggered "when a plaintiff knows or, through the use of reasonable diligence, *should have known of facts* that would put a reasonable person on inquiry notice of his cause of action." *Libby*, 130 Nev. at 364, 325 P.3d at 1279 (emphasis added) (internal quotation marks omitted). Therefore, this contention, too, fails as a matter of law.

dismiss [the] action." *Id.* (quoting *Smith*, 113 Nev. at 1345, 950 P.2d at 281).[6]

We therefore grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to grant petitioners' motion for summary judgment.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[6]Insofar as the parties raise arguments that are not specifically addressed in this opinion, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

Exhibit 2

Exhibit 2

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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Attorneys for Real Party in Interest the Estate of Carol A. Gaetano, Deceased, Vincent Garbitelli, Administrator

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
Eighth Judicial District Court, Department 10
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