

No. _____

IN THE SUPREME COURT OF THE STATE OF NEVADA

CANDICE SHAFFER AND TRAVIS HEINRICH,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT, IN AND FOR THE COUNTY OF CLARK,
STATE OF NEVADA, AND THE HONORABLE NADIA KRALL,

Respondents,

and

MARK SHAFFER AND MYVEGAS MAGAZINE,

Real parties in interest.

From the Eighth Judicial District Court, County of Clark, Dept. IV
Dist. Court Case No. A-18-781276-C

**PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF
PROHIBITION**

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NRAP 26.1(A) DISCLOSURE

Under NRAP 26.1, the undersigned counsel of record certifies 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. The following law firm has represented Petitioner Candice Shaffer in this litigation: Stein Law Group. The following law firm previously represented Petitioner Travis Heinrich: Walsh & Friedman.

DATED: January 21, 2022

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NRAP 17 & 21(A)(3)(A) ROUTING STATEMENT

The Petition for Writ of Mandamus or, in the alternative, Writ of Prohibition falls in one category presumptively assigned to the Court of Appeals under NRAP 17(b)(13) because it challenges a discovery order involving NRCP 16(b), 16.1(e)(2), EDCR 1.90(b)(3), and EDCR 2.55 (b).

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STATEMENT OF THE CASE

This petition raises important questions about (1) the dismissal of a case under NRCP 16.1(e)(2) when a plaintiff failed to hold a timely case conference, failed to circulate a timely draft or file Joint Case Conference Report (“JCCR”), and never filed a JCCR or independent case conference report (“ICCR”), and (2) the power of a district court to set a trial when no case conference report was filed, as required by NRCP 16.1(e)(2); no scheduling order was entered, as required by NRCP 16.1(b)(1), EDCR 1.90(b)(3) and EDCR 2.55(b); and, under EDCR 2.60(a), setting a trial is *prohibited* in the Eighth Judicial District Court before a scheduling order is entered.

Because neither a case conference report was filed by Plaintiffs nor a scheduling order entered by the district court, Petitioners have been prejudiced by being denied the opportunity to participate in case management, conduct discovery, and to be apprised of the litigation deadlines required in a scheduling order under NRCP 16(b)(3)(A), EDCR 1.90(b)(3), and EDCR 2.55(b). Also, Petitioners must defend themselves at a trial by ambush set by the district court on a five-week stack commencing February 7, 2022, in violation of EDCR 2.60(a).

Plaintiffs Mark Shaffer and his magazine MYVEGAS Magazine (“Plaintiffs”) sued his daughter Candice Shaffer (“C. Shaffer”), Travis Heinrich (“Heinrich,” and with C. Shaffer, “Petitioners”), and Cassandra Youssef (“Youssef”) alleging defamation, conspiracy, breach of contract, and various business torts. Plaintiffs failed to hold a timely early case conference (“ECC”), failed to timely circulate a proposed JCCR, and concede they never filed a case conference report.

C. Shaffer, joined by Heinrich, sought to enforce NRCP 16.1(e)(2) by moving to dismiss Plaintiffs’ First Amended Complaint on November 8, 2021, or in the alternative, continue the improperly set trial. In their *untimely* filed opposition to the motion to dismiss, Plaintiffs failed to address the factors for dismissal under NRCP 16.1(e)(2) described *Arnold v. Kip*, 123 Nev. 410, 168 P.3d 1050 (2007). Instead, they wrongly accused Petitioners of the delay, but offered no support for their finger pointing, offered no facts demonstrating that Petitioners *induced or caused* the delay, and presented no evidence of *good cause for the delay*. Plaintiffs also argued that they should be excused for *never filing* a case conference report because their failure to file was not willful, contended that Petitioners will not be prejudiced, and decried that Plaintiffs will

be prejudiced — all excuses which the *Arnold* Court instructed should not be considered by district courts under NRCP 16.1(e)(2). *See Arnold v. Kip*, 123 Nev. 410, 168 P.3d 1050 (2007).

The district court issued a minute order dated January 5, 2022, denying Petitioners’ motion to dismiss, but offered no explanation other than “NRCP 1 and EDCR 1.10 [sic]¹ state that the procedures in District Court shall be administered to secure the efficient, just and inexpensive determination in every action and proceeding.” Formulaic recitals of these rules alone do not demonstrate that the court’s ruling was not arbitrary and capricious when cited in a vacuum.

There exists no conflict between NRCP 1 and EDCR 1.10 and NRCP 16.1(e)(2). These rules apply to *all* civil cases and if application of these rules, without more, is sufficient to deny a motion to dismiss under NRCP 16.1(e)(2), NRCP 1 and EDCR 1.10 would effectively eviscerate NRCP

¹ There exists no NRCP 1.10. The district court was referring to EDCR 1.10 (Scope, construction and implementation of rules) provides, “These rules govern the procedure and administration of the Eighth Judicial District Court and all actions or proceedings cognizable therein. They must be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice.”

16.1(e)(2). *See e.g., Arnold v. Kip, 123 Nev. at 416, 168 P.3d at 1053* (holding that requiring a defendant to demonstrate prejudice or for a court to determine whether the defendant has suffered prejudice as a condition to granting a dismissal without prejudice would largely eviscerate the rule because it would allow plaintiffs to exceed the deadline for filing a case conference report if the defendant could not demonstrate prejudice). NRCP 16.1(e)(2) is harmonious with NRCP 1a because its very purpose is “to administered to secure the efficient, just and inexpensive determination in every action and proceeding.”

The district court’s order denying Petitioners’ Motion to Dismiss was an arbitrary and capricious exercise of discretion because it was not only unsupported by the evidence, but it was also unsupported by the established rules of law governing dismissal of a motion under NRCP 16.1(e)(2).

Similarly, the district court’s denial of Petitioners’ alternative motion to continue trial until after a case conference report is filed and scheduling order entered was contrary to the plain meaning of EDCR 2.60(a) which prohibits setting a trial before a scheduling order is entered.

Having denied Petitioners' motion to dismiss and alternative motion to continue the trial, this case remains set for trial on the February 7, 2022, five-week stack. A stay of the trial by this Court before the scheduled trial is necessary because a trial without the opportunity to participate in case management, conduct discovery and have deadlines scheduled is patently unfair to Petitioners, and, in the alternative, writ review by February 7, 2022, to determine if the action should be dismissed or trial continued.

ISSUE PRESENTED

1. Did the district court err by refusing to grant Petitioners' motion to dismiss under NRCP 16.1(e)(2) when Plaintiffs *never* filed a case conference report, *failed* to show good cause for not doing so, and failing to do so has impeded the prosecution of the case?

2. Did the district court err by refusing to grant Petitioners' alternative motion to continue the trial date when doing so violated EDCR 2.60(a) and denied Petitioners the ability to participate in case management, conduct and complete discovery, and to be apprised of the litigation deadlines as mandated by NRCP 16.1(b), EDCR 1.90(b)(3), and EDCR 2.55(b)?

RELIEF SOUGHT

Petitioners request that the Court issue a writ of mandamus instructing the district court to dismiss Plaintiffs' First Amended Complaint because it was an abuse of discretion not to do so when Plaintiffs failed to address *any* the factors articulated by the Nevada Supreme Court in *Arnold v. Kip*, 123 Nev. 410, 168 P.3d 1050 (2007), failed to provide good cause to file a case conference report, and failed to file a case conference report, which has impeded the timely prosecution of this case. Because setting the trial before a scheduling order is entered violates the clear and unambiguous language of EDCR 2.60(a), Petitioners request that the Court issue a writ of prohibition prohibiting the trial set on a five-week stack commencing February 7, 2022, until a case conference report is filed, a scheduling order issued, and the parties have sufficient time to join parties, amend the pleadings, complete discovery, and file pre-trial motions.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Parties and Pleadings.

Plaintiffs Mark Shaffer and MYVEGAS Magazine (“Plaintiffs”) filed their original complaint on September 18, 2018.² Plaintiffs filed their First Amended Complaint on May 3, 2019 (the “FAC”).³ Heinrich filed his Answer to the FAC on June 21, 2019 (the “Heinrich Answer”).⁴ C. Shaffer filed her Answer and Counterclaim on August 16, 2019 (the “C. Shaffer Answer”).⁵

II. Because Plaintiffs’ Never Filed a Case Conference Report, a Scheduling Order Was Never Entered.

Plaintiffs failed to schedule a timely Early Case Conference (“ECC”). The language in NRCP 16.1(b)(2)(a) is clear and unambiguous, “the early case conference must be held within 30 days after service of an answer by the *first answering defendant*.” *Dornbach v. Tenth Judicial Dist. Court of Nev.*, 130 Nev. 305, 310, 324 P.3d 369, 372 (2014), (“Unambiguous language in a rule "is given 'its ordinary meaning[.]").

² PA 23 – 32.

³ PA 33 – 59.

⁴ PA 61 – 66.

⁵ PA 68 – 81.

Heinrich’s Answer was filed on June 21, 2019, making him the “first answering defendant” under NRCP 16.1(b)(2)(a). Plaintiffs had to hold an ECC by Monday, July 22, 2019.⁶ Plaintiffs did not serve their Notice of ECC until September 12, 2019, scheduling the conference for September 25, 2019 —65 days after the ECC had to be held under NRCP 16.1(b)(2).⁷ C. Shaffer’s pro bono counsel, Attorney Michael Stein, participated in the ECC telephonically while Heinrich and Plaintiffs’ counsel, Attorney Sagar Raich, attended it at Attorney Raich’s office.⁸

Because Heinrich’s Answer was filed on June 21, 2019, Plaintiffs had to file the JCCR by February 16, 2020.⁹ Plaintiffs did not even circulate the first draft of the JCCR until April 1, 2020 — *a month and 16 days past the 240-day deadline* and 189 days after the ECC.¹⁰ Attorney

⁶ Under NRCP 16.1(b)(2), “The early case conference must be held within 30 days after service of an answer by the first answering defendant[.]” Because 30 days from June 21, 2019, was Sunday, July 21, 2019, the conference had to be held on or before Monday, July 22, 2019.

⁷ PA 158-60.

⁸ PA 178, ¶2; PA 182, ¶2.

⁹ February 16, 2020 is 240 days after June 21, 2019; NRCP 16.1(e)(2) (If the plaintiff does not file a case conference report within 240 days after *service of an answer by a defendant*) (emphasis added).

¹⁰ PA 187, PA 182 ¶3, PA 178, ¶3.

Stein submitted proposed revisions.¹¹ On April 8, 2021, Attorney Brian Schneider, on behalf of Plaintiffs, sent an e-mail to Attorney Stein with revisions to the draft JCCR, but failed to send it pro se litigant Heinrich (the “April 8 e-mail”).¹² A draft JCCR was attached to the April 8 e-mail (the “April 8 Draft JCCR”), but Attorney Schneider *never sent* Heinrich the April 8 Draft JCCR.¹³

Plaintiffs *failed to send* the first draft JCCR to C. Shaffer’s counsel and Heinrich *before* the NRCP 16.1(e)(2) 240-day period expired,¹⁴ *failed to send Heinrich* the April 8 Draft JCCR, and *failed to follow up*

¹¹ PA 185.

¹² PA 185.

¹³ PA 185; PA 182, ¶3; PA 178, ¶¶3-4.

¹⁴ Heinrich filed his answer to the FAC on June 21, 2019, making the 240-day deadline for filing a JCCR February 16, 2020. NRCP 16.1(e)(2) (“If the plaintiff does not file a case conference report within 240 days after service of an answer by a defendant, the court . . . may dismiss the case.”). The first draft of a JCCR was not circulated until April 1, 2020, over a month passed the 240-day deadline for filing a JCCR..

with Attorney Stein or Heinrich on the status of the draft JCCR.¹⁵ Petitioners never refused to file a JCCR.¹⁶ A JCCR was never finalized, submitted to the discovery commissioner, nor filed with the district court.¹⁷

Because no case conference report was filed by Plaintiffs, a scheduling order was never entered by the district court as required by NRCP 16(b), EDCR 1.90(b)(3), and EDCR 2.55(b).

III. The Order Statistically Closing Case and the Status Checks Held Without Notice on June 15 and June 17, 2021.

On May 10, 2021, the Court mistakenly entered a Civil Order To Statistically Close Case based upon the Default Judgment entered *only* against Youssef.¹⁸ Attorney Raich and Attorney Stein agreed upon and signed a Stipulated [and Order] to Reopen Matter (the “Stipulation and Order”) explaining:

[S]ome of the parties have filed responsive pleadings while other have not responded and have been defaulted. The Parties that have filed claims and/or counterclaims have not

¹⁵ PA 185; PA 182, ¶¶3-4; PA 178, ¶¶3-5.

¹⁶ PA 183, ¶5; PA 178-179, ¶¶3-5.

¹⁷ PA 178-179, ¶¶5-6; PA 119

¹⁸ PA 89-90.

received adjudication or judgment on said claims. As such, it is necessary to reopen this matter such that the issues may be adjudicated at a trial.¹⁹

Heinrich did not sign the stipulation, but Attorney Raich nevertheless submitted the Stipulation and Order to the Court and it was signed by the Court and entered on May 19, 2021.²⁰ The Stipulated and Order also included this language:

Accordingly, the Parties stipulate to the reopening of this matter with a status check set for this matter ***at the court's convenience on or after June 15, 2021***. (Emphasis added).²¹

Consistent with the typical practice in the Eighth Judicial District Court, Attorney Stein believed the court would issue an order setting a status check for a date “at the court’s convenience on or after June 15, 2021.”²² However, instead, the district court held a status check on June 15, 2021, without issuing an order or notice to counsel and the pro se litigant Heinrich. Attorney Stein did not learn of the status check until November 2, 2021, when he telephoned Raich about the *Amended* Order

¹⁹ PA 92-95.

²⁰ PA 92-95.

²¹ PA 92.

²² PA 19-20, ¶13.

Setting Civil Bench Trial and Calendar Call because he was confused about issuing an Amended Order setting a trial since (a) a joint case conference report had not been filed; (b) no scheduling order was never issued by the Court; and (c) No Order Setting Civil Bench Trial had previously been entered.²³ Attorney Raich *incorrectly* told Attorney Stein he was the “*only one who attended* the status check” and was thereafter unwilling to address this issue and that he was ready for trial.²⁴

Further, Notice of Entry of the Stipulation and Order was *never sent* to the parties nor filed so Heinrich never knew about the stipulation regarding the scheduling of a status check.²⁵ So even if the stipulation to schedule a status check could be interpreted as, in fact, setting a date for a status check, Heinrich was never afforded the opportunity to know about a status check.

²³ PA 20-21, ¶¶ 14-17.

²⁴ PA 20-21, ¶¶ 14-16,

²⁵ PA 207.

Because of Attorney Raich’s representations, Mr. Stein reviewed the Eighth Judicial District Court Portal and learned, for the first time, that the clerk of court or court calendared a status check for June 15, 2021, but no order or notice was entered or served.²⁶ Attorney Stein did not see the update to the docket and did not receive notice of the status check.²⁷ Because Attorney Stein did not see the change in the docket and did not receive separate notice of the status check, he did not attend.²⁸

Senior Judge Michael A. Cherry presided over the June 15, 2021, status check and, *contrary to* Attorney Raich’s representations, he *was not present* at the June 15 status check.²⁹

Because neither Attorney Raich nor Attorney Stein – the only attorneys who signed the Stipulation and Order – attended the June 15 status check, it appears both understood the provision in the

²⁶ PA 20, ¶14.

²⁷ PA 20, ¶14.

²⁸ PA 20, ¶14.

²⁹ PA 20, ¶15; PA 98.

Stipulation and Order, “a status check set for this matter *at the court’s convenience on or after June 15, 2021*,” was intended to give the Court flexibility to schedule a status check for a date and time convenient for the Court on or after June 15, 2021. The *only attorney present* at the June 15, 2021, status check was Heinrich’s former attorney Anthony F. De Martino of Walsh & Friedman, who neither participated in the drafting of or signed the Stipulation and Order, as reflected in the Court Minutes.³⁰

Mr. De Martino advised the stipulation and order [regarding the case being statistically closed] was circulated, but believed it was *submitted without a signature*; requested a continuance. Court So Ordered. (Emphasis added).

The status check was continued to August 17, 2021, but neither Attorney Stein nor Heinrich received an order or notice from the Court that the status check had been rescheduled.³¹ Attorney Raich was present and upon the Court’s inquiry:

Stated the case was ready to go to trial, however dates were pushed, and noted a default motion was granted with one of the defendants. Mr. Raich requested the case go to trial.³²

³⁰ PA 20, ¶15; PA 98.

³¹ PA 16; PA 98.

³² PA 100.

Attorney Raich *failed* to advise the court that no case conference report had been filed and no scheduling order had been entered by the Court.³³

No stipulations were filed in this case (e.g., stipulation to extend time to hold the ECC or file a joint case conference) and, because no discovery has been permitted or a scheduling order entered, Petitioners are not ready for trial.³⁴

IV. The *Amended* Order Setting Civil Bench Trial and Calendar Call.

Based upon Attorney Raich's representations at the June 17, 2021, status check, the Court entered an *Amended* [sic] Order Setting Civil Bench Trial and Calendar Call on October 7, 2021, before a case conference report was filed and a scheduling order entered.³⁵ Because no scheduling order has been entered nor has a prior order setting trial been entered, the order setting trial was improper under EDCR 2.60(a) which *mandates* that a scheduling order be entered before a trial date may be set.

³³ PA 100.

³⁴ PA 20, ¶18.; PA 183, ¶5.

³⁵ PA 102-104.

V. The District Court Denied Petitioners' Motion to Dismiss or, in the alternative, to Continue the Trial Date.

C. Shaffer's Motion to Dismiss was filed and served on November 8, 2021.³⁶ Heinrich's timely Joinder was filed on November 12, 2021.³⁷ Plaintiffs' Opposition was due by November 22, 2021. EDCR 2.20(e). Plaintiffs' Opposition was untimely filed on November 29, 2021—a week after it was due.³⁸ C. Shaffer filed an errata to the motion to dismiss on December 8, 2021.³⁹ C. Shaffer's reply brief was timely filed on December 15, 2021.⁴⁰

The district court issued a minute order dated January 5, 2022, denying Petitioners' motion to dismiss and alternative motion to continue

³⁶ PA 1-105.

³⁷ PA 107-117.

³⁸ PA 118-129.

³⁹ PA 130-160 (The errata addressed the wrong document attached as exhibit 6 to the Motion to Dismiss. 24 blank exhibits sheets were inadvertently attached. The correct document was attached to the errata as Exhibit 25 (PA 158-160) due to the blank sheets, but referred to in the errata as Exhibit 1 to the Errata).

⁴⁰ PA 161-208.

trial.⁴¹ A final order was entered on January 11, 2022, with Notice of Entry of Order served and filed on January 12, 2022.⁴²

This petition for mandamus or, in the alternative, prohibition followed. The case is scheduled for a five-week trial stack beginning February 7, 2022.⁴³

THE WRIT SHOULD ISSUE

I. Writ Review is Warranted in This Case.

An appellate court has discretion to consider a petition for a writ of mandamus. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197-98, 179 P.3d 556, 558-59 (2008). "A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station[,] or to control an arbitrary or capricious exercise of discretion." *Id* at 197, 179 P.3d at 558. A writ of prohibition is applicable when a tribunal acts "without or in excess of [its] jurisdiction." NRS 34.320; *see also Club Vista Fin.*

⁴¹ PA 192-193.

⁴² PA 194-204.

⁴³ PA 102.

Servs., LLC v. Eighth Judicial Dist. Court, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012).

An appellate court may consider writ petitions challenging interlocutory district court orders denying motions to dismiss if "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Int'l Game Tech., Inc.* at 197, 179 P.3d at 559. Because NRCP 16.1 is relevant in nearly all civil cases, its construction and application involve important legal issues needing clarification. *Dornbach v. Tenth Judicial Dist. Court of Nev.*, 130 Nev. 305, 308, 324 P.3d 369, 371 (2014). Consideration of this petition promotes judicial economy and administration because questions about the early case conference, case conference reports, scheduling orders, and enforcement of the Eighth Judicial District Court Rules arise early in the proceedings, affect the remainder of the case, and cannot be adequately addressed on appeal after a case has proceeded through the full extent of litigation. *Dornbach v. Tenth Judicial Dist. Court of Nev.*, 130 Nev. at 308, 324 P.3d at 371. "Where the circumstances establish urgency or strong necessity, or an important issue of law requires clarification and

public policy is served by this court's exercise of its original jurisdiction, this court may exercise its discretion to consider a petition for extraordinary relief." *Schuster v. Eighth Judicial Dist. Court*, 123 Nev. 187, 190, 160 P.3d 873, 875 (2007).

An appeal from the final judgment typically constitutes an adequate and speedy legal remedy, *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008), but where no rule or statute provides jurisdiction for the court to entertain an appeal, relief must be sought by an original writ petition under NRS Chapter 34. An appellate court has jurisdiction to consider an appeal only when the appeal is authorized by statute or court rule. *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 444, 874 P.2d 729, 732 (1994). "No order of the lower court, no sanction, or permit, can authorize this court to take cognizance of a matter on appeal unless the right of appeal clearly appears as a matter of law." *State v. State Bank & Tr. Co.*, 36 Nev. 526, 538, 137 P. 400, 403 (1913). Under NRAP 3A(b), this Court has no jurisdiction to review an appeal of the district court's denial of Petitioners' alternative motion to continue the trial set in violation of EDCR 2.60(a).

Given the mandatory language in EDCR 2.60(a), a writ petition is the only appropriate vehicle to seek review of the district court's denial of Petitioners' motion to continue the trial set in violation of EDCR 2.60(a). *See Nelson v. Nelson* , 136 Nev.Adv.Rep. 36, 466 P.3d 1249, 1252-53 (Nev. 2020); *see also Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) ("A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." (footnote omitted)).

"In the context of writ petitions," this court "review[s] district court orders for an arbitrary or capricious abuse of discretion." *City of Henderson v. Eighth Judicial Dist. Court* , 137 Nev.Adv.Rep. 26, 489 P.3d 908, 910 (Nev. 2021)(citation omitted). "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law." *City of Henderson v. Amado* , 133 Nev. 257, 259, 396 P.3d 798, 800 (2017) (citing *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011)).

However, the Court reviews questions of law . . . de novo, even in the context of writ petitions. *City of Henderson v. Eighth Judicial Dist. Court* , 137 Nev.Adv.Rep. 26, 489 P.3d 908, 910 (Nev. 2021)(citation omitted). Rules of statutory construction apply to court rules. *Weddell v. Stewart* , 127 Nev. 645, 651, 261 P.3d 1080, 1084-85 (2011) (citations omitted). Therefore, interpretation of court rules is a question of law that the Court *reviews de novo*, even in the context of a writ petition. *Int'l Game Tech., Inc.* at 198, 179 P.3d at 559. (Emphasis added). If the plain meaning of a rule is clear on its face, then this Court should not look beyond the rule's language. *See Dekker/Perich/Sabatini Ltd. v. Eighth Judicial Dist. Court* , 137 Nev.Adv.Rep. 53, 495 P.3d 519, 522-23 (Nev. 2021) (citation omitted).

II. The District Court Erred by Denying Petitioners' Motion to Dismiss.

The district court denied Petitioners' motion to dismiss Plaintiffs' FAC and alternative motion to continue the trial set, but did not explain its ruling other than citing NRCP 1 and EDCR 1.10. The district court's denial of the motion to dismiss and the alternative motion to continue the trial was arbitrary and capricious because it was neither supported by the evidence nor law governing dismissal of a

complaint under NRCP 16.1(e)(2) or the prohibition of setting a trial before a scheduling order is entered. EDCR 2.60(a).

A. Petitioners participated in the litigation and did nothing to prevent Plaintiffs from filing a case conference report.

The Nevada Rules of Civil Procedures state that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." NRCP 1. It is incumbent upon the person suing to diligently pursue their claim. The Nevada Supreme Court has held that it is the plaintiff upon whom the duty rests to use diligence at every stage of the proceeding to expedite his case to final determination. *Thran v. First Judicial Dist. Court ex rel. Ormsby County*, 79 Nev. 176, 181, 380 P.2d 297, 300 (1963). The defendant is *only required to meet plaintiff step by step* as the plaintiff proceeds through the litigation. *Id.* (Emphasis added).

To further the speedy determination of cases in Nevada, the Nevada Supreme Court has provided NRCP 16.1 to facilitate the process of discovery in civil cases, and to provide detailed procedures which the Nevada Supreme Court believes will "aid in the efficient and fair

administration of justice." *Mays v. District Court*, 105 Nev. 60, 768 P.2d 877 (1989). NRCP 16.1(e)(2) clearly sets forth that *plaintiff must file* a case conference report within 240 days after an appearance by the defendant. The Rule places the burden upon plaintiff to file the case conference report and provides that the complaint may be dismissed, without prejudice, for failure to do so.

Plaintiffs argued in their opposition brief that their failure to file a case conference report is excusable because "Plaintiffs were working in good faith to develop discovery plans" referring to the April 8 e-mail and April 8 Draft JCCR. Plaintiffs argued that because Attorney Stein did not respond to the April 8 e-mail, Plaintiffs should be excused for their failure to file a case conference report within the 240-day period under NRCP 16.1(e)(2).

This specious argument ignored that Plaintiffs failed to send the first draft JCCR to Petitioners before the 240-day period expired, never sent Heinrich the April 8 Draft JCCR, and never followed up with Petitioners on the status of the draft JCCR. Petitioners never refused to file a JCCR, but had Plaintiffs followed up with Heinrich and Attorney Stein regarding the status of the April 8 Draft JCCR and both

refused to respond or otherwise agree on a final draft, Plaintiffs could have filed an ICCR as mandated by NRCP 16.1(c)(1)(A). Plaintiffs offered no good cause for not filing a case conference report. Petitioners did not cause Plaintiffs' failure to circulate a draft JCCR before the 240-day period expired under NRCP 16.1(e)(2) or to file a case conference report. Plaintiffs' own dilatoriness was the cause.

Plaintiffs' argument that Petitioners failed to participate in litigation was demonstrably false. They filed Answers to FAC, attended the ECC, and attended Youssef's default judgment hearing in which Attorney Stein participated. Attorney Stein requested revisions to the untimely April 8 Draft JCCR and signed the stipulation and order to re-open this case after it was closed by the district court in error.

Plaintiffs' argument that Attorney Stein's oversight to respond to the April 8 e-mail, which Heinrich never received, was not good cause for never filing a case conference report.

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B. Whether Plaintiffs’ were willful in their failure to file a case conference report is not a relevant factor for granting a motion to dismiss under NRCP 16(e)(2).

Like the defendants in *Arnold* who unsuccessfully “claimed that the failure [to file a case conference report] was inadvertent and thereby insufficient to warrant dismissal,” *Arnold v. Kip*, 123 Nev. 410, 413, 168 P.3d 1050, 1052 (2007), Plaintiffs asserted that Petitioners must show “willful noncompliance” by Plaintiff.⁴⁴ In *Arnold*, the Court rejected this argument. *Arnold*, 123 Nev. at 415, 168 P.3d at 1053.

Unambiguous language in a rule is given its ordinary meaning unless it is clear that this meaning was not intended. *Dornbach v. Tenth Judicial Dist. Court of Nev.*, 130 Nev. 305, 310, 324 P.3d 369, 372 (2014). Nothing in the language of NRCP 16.1(e)(2) or *Arnold* required willful noncompliance before dismissal is appropriate under NRCP 16.1(e)(2), and Plaintiffs provided no good explanation for failing to file a case conference report.

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⁴⁴ Rules of statutory construction apply to court rules. *Weddell v. Stewart*, 127 Nev. 645, 651, 261 P.3d 1080, 1084-85 (2011) (citations omitted).

C. Injury to Petitioners is presumed.

Plaintiffs wrongly asserted in their opposition brief that Petitioners are not prejudiced by Plaintiffs' failure to file a joint case conference report and erroneously conclude that dismissal would not be appropriate.⁴⁵ The Supreme clarified in *Arnold*:

Nothing in the language of NRCP 16.1(e)(2) . . . requires the defendant to demonstrate prejudice or the district court to determine whether the defendant has suffered prejudice as a condition to granting a dismissal without prejudice. To hold otherwise would largely eviscerate the rule because it would allow plaintiffs to exceed the deadline for filing a case conference report as long as the defendant could not demonstrate prejudice.

See Arnold v. Kip, 123 Nev. at 416, 168 P.3d at 1053 (emphasis added).

But Petitioners have been prejudiced. They are being forced to defend themselves at a trial without having had the opportunity participate in case management, to conduct and complete discovery, or be apprised of litigation deadlines.

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⁴⁵ PAA 120-122.

D. Under *Arnold*, the alleged prejudice to Plaintiffs is not a relevant factor for granting a motion to dismiss under NRCP 16(e)(2).

Plaintiffs mistakenly claimed that “Defendants delay [sic] this case for years and now seek dismissal for not having filed a case conference report would be highly prejudicial to the Plaintiffs.”⁴⁶ First, “[n]othing in the language of NRCP 16.1(e)(2) . . . requires . . . the district court to determine whether the defendant has suffered prejudice as a condition to granting a dismissal without prejudice.” *Arnold v. Kip*, 123 Nev. 410, 415, 168 P.3d 1050, 1053 (2007). Second, the Supreme Court has instructed, “the district court's consideration of a motion to dismiss without prejudice should address factors that promote the purpose of the rule, rather than factors that focus on the consequences to the plaintiff resulting from his or her failure to comply with the rule.” *Arnold*, 168 P.3d at 1053. Third, Plaintiffs offered no facts to support their contention that Petitioners delayed this case. To the contrary, Plaintiffs delayed this litigation since the original complaint was filed.

⁴⁶ PA 121.

1. Plaintiffs' delay relating to pleadings.

Plaintiffs filed their original complaint on September 18, 2018. No summons was issued and 8 months passed until Plaintiffs' FAC was filed and summonses issued on May 3, 2019. Under NRCP 4(e)(2), the case could have been dismissed after 4 months.

2. Plaintiffs failure to timely hold the ECC.

Plaintiffs inaccurately asserted that the Notice of ECC and ECC were timely because their Notice of ECC was sent “only 21 days after the Plaintiffs' answer to the counterclaims were filed.”⁴⁷ The language in NRCP 16.1(b)(2)(a) is clear and unambiguous, “the early case conference must be held within 30 days after service of an answer by the first answering defendant.” Heinrich filed his Answer on June 21, 2019, making him the “first answering defendant” under NRCP 16.1(b)(2)(a).⁴⁸ Plaintiff did not serve their Notice of ECC until

⁴⁷ PA 121.

⁴⁸ PA 61 – 66.

September 12, 2019, scheduling the conference for September 25, 2019

—65 days after the ECC had to be held under NRCP 16.1(b)(2).⁴⁹

3. Plaintiffs failure to timely circulate the draft JCCR and never filed a case conference report.

Plaintiffs did not even circulate the first draft of the JCCR until April 1, 2020 — a month and 16 days past the 240-day deadline to file a case conference report and 189 days after the ECC.⁵⁰ Plaintiffs filed neither a JCCR nor ICCR. Nothing and no one prevented Plaintiffs from circulating a draft JCCR before the 240-day period expired, following up with Attorney Stein about the April 8 Draft JCCR, sending the April 8 Draft JCCR to Heinrich for his review and consideration, or contacting Attorney Stein or Heinrich regarding the status of JCCR. And had Plaintiffs done so and Petitioners failed to respond or refused to sign the JCCR, nothing and no one prevented Plaintiffs from filing an ICCR as required by NRCP 16.1(c)(1)(A). Plaintiffs' counsel asserted in his April 1, 2020 E-mail that if Plaintiffs' counsel did not hear from

⁴⁹ PA 158-160.

⁵⁰ PA 187, PA 182 ¶3, PA 178, ¶3.

Petitioners regarding the JCCR, Plaintiffs would file an ICCR.⁵¹

Failure to file a case conference report was caused solely by Plaintiffs' inaction.

4. Plaintiffs failure to address the *Arnold* factors in their opposition to the motion to dismiss.

The relevant *Arnold* factors for this matter are:

a. The length of the delay.

In *Arnold*, the defendant moved to dismiss the action with prejudice under NRCP 16.1(e)(2). The defendant was served with the summons and complaint on November 24, 2003, making the NRCP 16.1(e)(2) deadline for the plaintiffs to file their case conference report late July 2004. *Arnold v. Kip*, 123 Nev. 410, 412, 168 P.3d 1050, 1051 (2007). Because plaintiffs did not file their case conference report by July 4, 2004, defendants moved to dismiss on August 6, 2004, just one month after plaintiffs missed the 240-day deadline. Plaintiffs quickly served defendants with a case conference report on August 17, 2004, but the district court considered this one month delay fatal.

⁵¹ PA 187.

Here, over 2 years and 7 months has passed since an answer to the FAC was filed and Plaintiffs have failed to file a case conference report. The delay is inexcusable since Plaintiffs have shown no good cause for never filing a case conference report.

b. Plaintiffs alone are responsible for not filing a case conference report.

Plaintiffs offered no facts to support their cavalier assertion that Petitioners induced or caused the delay other than Attorney Stein's forgetting to respond to Plaintiffs' counsel's April 8 e-mail which, again, was never sent to Heinrich for his review and approval.

Plaintiffs' counsel has not communicated with Attorney Stein about the JCCR since April 8, 2020, or Heinrich since April 3, 2020.⁵² Plaintiffs' counsel never followed up on the status of the April 8 Draft JCCR which first circulated well past the 240-day deadline. Plaintiffs lackadaisical attitude alone was responsible for their failure to file a case conference report.⁵³

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⁵² PA 178-179, ¶5; PA 182-183, ¶4.

⁵³ PA 178-179, ¶5; PA 182-183, ¶4.

c. Plaintiffs' delay impeded prosecution of the case.

Because a case conference report was never filed, a scheduling order under NRCP 16(b) and EDCR 1.90(b(3) and EDCR 2.55(b) was never entered. Because no case conference report was filed and no scheduling order entered, Petitioners could not conduct discovery, *See* NRCP 26(a)(prohibiting discovery until a case conference report is filed), and no scheduling order was issued providing deadlines to counsel by which the must join other parties, amend the pleadings, complete discovery, and file pre-trial motions. Further, under EDCR 2.60(a), “[a] case commenced by the filing of a complaint must first have a scheduling order entered before a trial date is set.” (Emphasis added).

d. Plaintiffs did not argue good cause existed for not filing a case conference report.

Under *Arnold*, the alleged lack of prejudice to Petitioners if the case is not dismissed and prejudice to Plaintiffs if the case is dismissed may not be considered by the Court. *Arnold*, 123 Nev. at 416, 168 P.3d at 1053. And other than arguing that failing to file a case conference report was not intentional, Plaintiffs offered no other reason for failing to file a one other than their own dilatoriness.

**V. If the Court Rules Dismissal is not Appropriate,
the Writ of Prohibition Should Be Granted to
Continue the Trial Until a Case Conference
Report is Filed and Scheduling Order Entered.**

The district court erred when it denied Petitioners' alternative motion to continue trial because the trial was set in violation of EDCR 2.60(a) and prejudices Petitioners because they have been denied the opportunity to participate in case management, conduct discovery, and established deadlines to join parties, amend the pleadings, complete discovery, and file pre-trial motions.

"[T]he rules of statutory interpretation apply to Nevada's Rules of Civil Procedure." *Dornbach v. Tenth Judicial Dist. Court of Nev.*, 130 Nev. 305, 310, 324 P.3d 369, 372 (2014) (citing *Webb ex rel. Webb v. Clark Cnty. Sch. Dist.*, 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009)). Rules of statutory construction apply to court rules. *Weddell*, 127 Nev. at 651, 261 P.3d at 1084-85.

Nothing in the language of EDCR 2.60(a) is ambiguous. Under EDCR 2.60(a), "A case commenced by the filing of a complaint ***must*** first have a scheduling order entered before a trial date is set[.]" (Emphasis added). And under EDCR 1.12(g), unless the context or subject matter otherwise requires, "Must" is mandatory[.]" Similarly,

under the rules of construction for the NRCP, the "use of 'shall' is mandatory unless a rule's construction demands a different interpretation to carry out the rule's purpose." *Quinlan v. Camden USA, Inc.* , 126 Nev. 311, 313, 236 P.3d 613, 614 (2010) (citations omitted).

NRCP 16(b), EDCR 1.90(b), and EDCR 2.55(b) require a district court to issue a scheduling order in all cases commenced by filing a complaint.

EDCR 1.90(b) (Civil case flow management)

(1) - (2) []

(3) Scheduling orders. In civil cases, the judge ***shall*** issue a scheduling order pursuant to NRCP 16(b). In addition to the required contents of NRCP 16(b)(3)(A), the scheduling order ***shall*** contain dates for any pretrial conferences, a final pretrial conference and/or calendar call, and the trial or trial stack.

(4) - (6) [].

(Emphasis added).

EDCR 2.55 (Discovery scheduling order)

(a) [].

(b) Except in actions exempted by the trial court as inappropriate, the judge ***shall***, after receiving input from the attorneys for the parties and any unrepresented parties by way of a case conference report and/or a scheduling conference, enter a scheduling order that limits the time:

- (1) To complete discovery obligations;
 - (2) To join other parties and to amend the pleadings;
- and
- (3) To file and hear dispositive motions.
- (c) [].

(Emphasis added).

NRCP 16(b) (Scheduling and Planning)

(1) Scheduling Order. Except in categories of actions exempted by local rule, the court ***must***, after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, case conference, telephone conference, or other suitable means, enter a scheduling order.

(2) Time to Issue. The court ***must*** issue the scheduling order as soon as practicable, but unless the court finds good cause for delay, the court must issue it within 60 days after:

(A) a Rule 16.1 case conference report has been filed; or

(B) the court waives the requirement of a case conference report under Rule 16.1(f).

Because Plaintiffs failed to file a Rule 16.1 case conference report, the district court did not consult Petitioners or allow them the opportunity to provide input concerning case management and the matters required to be included in a scheduling order by NRCP 16(b)(1) and EDCR 2.55(b) and never entered a scheduling order as required by NRCP 16(b), EDCR 1.90(b), and EDCR

2.55(b). Petitioners were denied the right to participate in the scheduling of case management for this case and will be irreparably harmed if required to participate in a trial by ambush on the February 7 stack.

CONCLUSION AND PRAYER

The Court should issue a writ of mandamus directing the district court to grant Petitioners motion to dismiss or, in the alternative, a writ of prohibition prohibiting the trial in this matter until a case conference report is filed, a scheduling order is issued, and the parties have sufficient time to conduct discovery and prepare for trial.

DATED: January 21, 2022

/s/ Michael Stein

Michael Stein (Nevada Bar #4760)
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Attorney for Petitioner Candace Shaffer

/s/ Travis Heinrich

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In Proper Person

VERIFICATION

On January 21, 2022, the affiant, Michael Stein, appeared in person before me, a notary public, who knows the affiant to be the person whose signature appears on this document, who stated:

"I am counsel for Petitioner, I have read the foregoing petition for writ of mandamus or, in the alternative, writ of prohibition and all factual statements in the petition are within the affiant's personal knowledge and true and correct or supported by citations to the appendix accompanying the petition.

The exhibits in the appendix and attached to the concurrently filed Request for Judicial Notice are true and correct copies of the original documents."



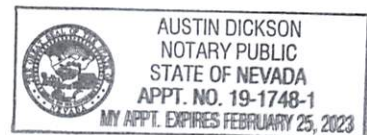
Michael Stein

State of: Nevada
County of: Clark

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this 21st day of January, 2022.



Notary Public in and for the State of Nevada



CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type-face 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 2010 in Century Schoolbook 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 proportionately spaced, has a typeface of 14 points or more, and contains 6,752 words.

3. I certify that I have read this appellate 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: January 21, 2022

/s/ Michael Stein

Michael Stein (Nevada Bar #4760)

522 E. Twain

Las Vegas, Nevada 89169

Attorney for Petitioner Candace Shaffer

No. _____

IN THE SUPREME COURT OF THE STATE OF NEVADA

CANDICE SHAFFER AND TRAVIS HEINRICH,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT, IN AND FOR THE COUNTY OF CLARK,
STATE OF NEVADA, AND THE HONORABLE NADIA KRALL,

Respondents,

and

MARK SHAFFER AND MYVEGAS MAGAZINE,

Real parties in interest.

From the Eighth Judicial District Court, County of Clark, Dept. IV
Dist. Court Case No. A-18-781276-C

**PETITIONERS CANDICE SHAFFER AND TRAVIS HEINRICH'S NOTICE OF
FILING PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE,
WRIT OF PROHIBITION**

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In Proper Person

Under NRAP 21(a)(1), Petitioners Candice Shaffer and Travis Heinrich hereby give notice of the filing of **Petitioners Candice Shaffer's and Travis Heinrich's Notice of Filing Petition for Writ of Mandamus or, in the alternative, Writ of Prohibition** in the Supreme Court of the State of Nevada on January 24, 2022.

DATED: January 24, 2022

/s/ Michael Stein

Michael Stein (Nevada Bar #4760)
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Attorney for Petitioner Candice Shaffer

/s/ Travis Heinrich

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In Proper Person

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. I caused to be served a true and correct copy of the foregoing

**PETITION FOR WRIT OF MANDAMUS OR, IN THE
ALTERNATIVE, WRIT OF PROHIBITION and NOTICE OF
FILING PETITION** by the method indicated:

- ☒ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, as priority mail, in the United States mail at Las Vegas, Nevada addressed as set forth below on January 21, 2022.

Honorable Nadia Krall
Department 4, Eighth Judicial District Court
Regional Justice Center
200 Lewis Ave.
Las Vegas, Nevada 89101

- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case on January 24, 2022.

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Attorney for Real Party in Interest

/s/ Michael Stein
Michael Stein