IN THE SUPREME COURT OF THE STATE OF NEVADA

CANDICE SHAFFER; AND TRAVIS HEINRICH, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NADIA KRALL, DISTRICT JUDGE, Respondents, and MARK SHAFFER; AND MARK ONE MEDIA INC d/b/a MYVEGAS MAGAZINE, Real Parties in Interest.	Case No.: 84118 Eighth Judicial District Court Case No.: A-18-781276-C

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REAL PARTIES IN INTEREST'S ANSWERING BRIEF TO WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that there are no persons or entities described in NRAP 26.1(a) who must be disclosed. MARK SHAFFER is the sole owner of co-Plaintiff MARK ONE MEDIA INC. d/b/a MYVEGAS MAGAZINE.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. ISSUE PRESENTED

This Court granted Candice's[1] motion withdrawing its Writ of Prohibition regarding continuance of the trial date as moot. Therefore, only Candice's first question remains, which Mark counterposes as follows:

1. Is the District Court's denial of Petitioner's motion to dismiss pursuant to NRCP 16.1(e)(2) an abuse of discretion?

II. INTRODUCTION

After four years of delay, the answering Defendants in this matter were staring down a trial for which they were not prepared. Luckily for them, in the confusion and continuances endemic to this particular moment in legal history, Attorney Stein's non-cooperation on the issue of the JCCR paid dividends. No JCCR or ICCR was filed, *ergo* no trial date could be set. Once clarified to the judicial officer that inherited the case, she immediately vacated the trial date and placed the Parties back at square one. But, the district court did not see fit to dismiss the action, favoring it to be heard on the merits.

By that point, counsel had (ostensibly) spent an enormous amount of time and effort on the writ petitions, and evidentially decided to squeeze a little more out of it by not withdrawing the petition for writ of mandamus, which seeks to

[1] The brief refers to the Parties by their first names not out of disrespect but for clarity in complying with NRAP 28(d) because they have the same last name.

have this Court overrule the district court's discretionary order *denying* Candice's motion to dismiss pursuant to NRCP 16.1(e)(2). However on point Candice's writ of prohibition may have been, its associated application for a writ of mandamus for relief from the *denial* of dismissal is without basis, authority, or merit. Rather, the Petition askes that this Court misapply the *Arnold* analysis to impose a different outcome on a question left to the discretion of the district court by statute. This Court should decline.

Rather than apply the framework of analysis that this Court has devised and approved for reviewing the *grant* of motions to dismiss under NRCP 16.1(e)(2), the questions presented here requires only that the Court find that the order of the district court *denying* such motion was in the within the sound discretion of the court and should not be disturbed. Accordingly, the petition for writ of mandamus should be denied.

III. FACTS AND PROCEDURAL HISTORY

"Defendant Candice Shaffer filed her Answer and Counterclaim on August 16, 2019."[2] Plaintiff's filed their Answer to Defendant Candice Shaffer's Counterclaims on August 22, 2019.[3] On March 31, 2020, Plaintiff filed its Motion for Default Judgment against Cassie Youssef.[4] And, On April 1, 2020, the clerk set

[2] PA003.
[3] PA206.
[4] *Id*.

the prove up for May 11, 2020.[5] On May 11, 2020, the court, the Honorable Kerry Earley, "pursuant to Administrative Order 20-01…hereby RESCHEDULES this matter to July 14, 2020 at 9:00am."[6] (EMPHASIS in original). Likewise, the July 14, 2020 prove up was vacated.[7] On September 1, the prove up hearing was noticed again.[8] On January 2, 2021, the matter was reassigned to Judge Nadia Krall.[9] On January 21, 2021, the court *sua sponte* reset the prove up hearing for February 22, 2021.[10] "On February 22, 2021, plaintiffs conducted a prove up hearing in support of their application for default judgment against Cassie Youssef."[11] Michael Stein, Esq. appeared at the default judgment prove up on behalf of Candice Shaffer, cross examined witnesses and took Plaintiff's expert on *voir dire*.[12] Thus, at least in part due to Administrative Order 20-01, the default prove up in this matter was reset for hearing 5 times between May 11, 2020 and the ultimate hearing date on February 22, 2021.

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[5] *Id.*
[6] PA022.
[7] PA206.
[8] PA206.
[9] *Id.*
[10] *Id.*
[11] PA003: 21-22.
[12] AA020.

On May 10, 2021, the matter was inadvertently ordered to be statistically closed.[13] The case was reopened by stipulation on May 19, 2021.[14] At a June 15, 2021 status hearing, the Honorable Michael A. Cherry (C.J. ret.) sitting for Honorable Nadia Krall, again continued the matter.[15]

The Petition also states, 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…."[16] Candice further posits that "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… Plaintiffs could have filed an ICCR…."[17] Clarifying that Mr. Stein's declaration in support of the motion directed to the district court stated that Travis "Heinrich did not attend."[18] While the Petition correctly notes that Heinrich *was* present at the early case conference.[19]

The remaining portions of Candice's factual recitation addresses the alternative request to continue the trial, mooted by the district court's *sua sponte* continuance of the trial, and this Court's March 8, 2022 granting of Candice's

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[13] PA206.
[14] *Id*.
[15] PA207.
[16] Pet. at 23.
[17] Pet. at 23-24.
[18] PA004:14
[19] PA 178; PA 182.

motion to withdraw that portion of its writ application. Thus, such factual recitations are irrelevant to the remaining issue of a defendant's entitlement to dismissal based on the NCRP 16.1(e)(2). Accordingly, Mark will only address those facts relevant to the remaining inquiry.

IV. ARGUMENT

A. Mandamus is not available to control a discretionary act nor one for which the Candice has a plain, speedy, and adequate legal remedy, presumptively an Appeal.

"Whether to entertain a writ of mandamus is within this court's discretion, and the writ will not be issued if the petitioner has a plain, speedy, and adequate legal remedy." *Nalder v. Eighth Judicial Dist. Court of Nev.*, 462 P.3d 677, 681 (Nev. 2020) (citing *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991)). "[W]rit of Mandamus may be denominated as the writ of mandate." NRS 34.150. A writ of mandate may be issued by a superior court "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded" by an inferior tribunal. NRS 34.160. This writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. NRS 34.170.

B. Candice does not carry her burden to show that the district court's discretionary action was arbitrary, capricious, manifestly unreasonable, or the result of partiality.

Mandamus will not lie to control discretionary action, *Gragson v. Toco*, 90 Nev. 131, 520 P.2d 616 (1974), unless discretion is manifestly abused or is exercised arbitrarily or capriciously. *Henderson v. Henderson Auto*, 77 Nev. 118, 359 P.2d 743 (1961). A writ of mandamus is also the proper vehicle to "control an arbitrary or capricious exercise of discretion" as well as a manifest abuse of discretion. *Nalder v. Eighth Judicial Dist. Court of Nev.*, 136 Nev. 200, 201, 462 P.3d 677, 681 (2020). Mandamus is not appropriate, however, to challenge "a discretionary lower court decision [that] results from a mere error in judgment" unless there is a showing the decision was "manifestly unreasonable" or a result of partiality. *Walker v. Second Judicial Dist. Court*, Nev. Adv. Op. 80, 476 P.3d 1194 (2020).

As demonstrated by Candice's formulation of the issued presented, Candice wishes this Court to *presume* the arbitrariness and capriciousness from the failure of Mark to demonstrate or argue the *Arnold* factors. However, Candice did not demonstrate that the *Arnold* factors apply, nor even that the district court did ignore them, as the order is silent as to the factors considered by the district court.

C. *Even where the imposition of a discovery sanction is imposed, the Court will not reverse unless there is a showing of abuse of discretion, notably absent in this matter.*

"Where the discovery sanctions are within the power of the district court, this court will not reverse the particular sanctions imposed absent a showing of abuse of discretion…. Even if we would not have imposed such sanctions in the first instance, we will not substitute our judgment for that of the district court." *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (citing *Kelly Broadcasting v. Sovereign Broadcast*, 96 Nev. 188, 192, 606 P.2d 1089, 1092 (1980). In addition, "[T]his court will affirm the order of the district court if it reached the correct result, albeit for different reasons." *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987).

The decision to dismiss an action without prejudice for a plaintiff's failure to comply with the timing requirements of NRCP 16.1(e)(2) remains within the district court's discretion. NRCP 16.1(e)(2) was adopted to promote the prosecution of litigation within adequate timelines, and it permits sanctions to ensure compliance with specific deadlines. See *Dougan v. Gustaveson,* 108 Nev. 517, 523, 835 P.2d 795, 799 (1992).

"This court has not explicitly articulated the standard under which we will review orders granting motions to dismiss under NRCP 16.1(e)(2). However, in evaluating sanctions imposed under NRCP 16(f) for pretrial conference

noncompliance, we have indicated that those sanctions are within the district court's discretion." *City of Sparks v. District Court*, 112 Nev. 952, 955, 920 P.2d 1014, 1016 (1996). NRCP 16.1(e)(2), like NRCP 16(f), provides that the district court "may" sanction noncompliance with the rule and therefore leaves the matter to the district court's discretion. *Cf. Tarango v. SIIS*, 117 Nev. 444, 451 n.20, 25 P.2d 175, 180 n.20 (2001) (noting that, when used in a statute, "may" is permissive unless the statute demands a different interpretation to carry out the Legislature's intent); *see also* SCR 2(9) (providing that, " 'may' is permissive"). Accordingly, we review the district court's order *granting* a motion to dismiss under NRCP 16.1(e)(2) for an abuse of discretion." *Arnold v. Kip*, 123 Nev. 410, 414, 168 P.3d 1050, 1052 (2007) (*emphasis* added). The burden of proof to show the capriciousness is on the applicant. *Gragson v. Toco*, 90 Nev. 131, 133, 520 P.2d 616, 617 (1974) (*citing Whitesides v. Council of City of Cheyenne*, 319 P.2d 520 (Wyo. 1957) and *State ex rel. Grimes v. Board of Commissioners*, 53 Nev. 364, 1 P.2d 570 (1931)).

D. Arnold *concerns the inverse ruling and so does not inform the Court's deliberation with respect to the inverse question.*

Candice's reliance on *Arnold* is unavailing because this Court's review of the grant of dismissal, as opposed to the denial of dismissal are two different inquiries. The question presented in *Arnold* was "whether a defendant must demonstrate prejudice in a motion to dismiss an action under NRCP 16.1(e)(2) for the

plaintiffs' failure to timely file a case conference report." 123 Nev. at 411-412. *Arnold* held that "a defendant who moves for dismissal because a plaintiff has failed to timely file a case conference report under NRCP16.1(e)(2) does not need to demonstrate prejudice and the district court does not need to determine whether the defendant has suffered prejudice because of the delay." *Id*. at 412.

Candice argues that she "sought to enforce NRCP 16.1(e)(2) by moving to dismiss the complaint."[20] And complains the "Plaintiffs failed to address the factors for dismissal under NRCP 16.1(e)(2) described [in] *Arnold v. Kip*…"[21] And "presented no evidence of *good cause for the delay*."[22] But these factors relate to Candice's burden, not Mark's. The Petition makes no attempt to analogize or synthesize these considerations; Candice just attempts to apply the factors granting dismissal to the inverse analysis of a denial of dismissal. There is no support in *Arnold*, or any other case cited by the Petition for that matter, that the review of the two inquiries is or should be identical.

Finally, Candice argues that the denial of Candice's Motion to Dismiss was an "arbitrary and capricious exercise of discretion because it was not supported by evidence, and unsupported by the established rules of law governing dismissal,"

[20] Pet. at 2.
[21] *Id*.
[22] *Id*.

(Assumedly meaning the factors analyzed in review of a grant of dismissal, as specified in *Arnold*).

Petitioners are wrong in the facts, which display three judicial officers (one of whom was the Honorable Michael A. Cherry, C.J. (ret.)) all found good cause to continue the proceedings on 5 different occasions *sua sponte*. And Petitioners are wrong in the law, which they posit from the holding of *Arnold*, that the review of the two outcomes are necessary identical and must work both ways. They are not.

E. Candice, as a counterclaimant, bears the same responsibilities as Mark with respect to procedure and so had equal obligation to procure and file the JCCR or ICCR.

As a further consideration, "[a] counterclaim is, in reality, an entirely separate and distinct cause of action, and a counterclaimant has a burden equal to that of the original plaintiff." *Great W. Land & Cattle Corp. v. Sixth Judicial Dist. Court*, 86 Nev. 282, 284, 467 P.2d 1019, 1021 (1970) (approving *Tinnerman Prods., Inc. v. George K. Garrett Co*., 22 F.R.D. 56 (E.D. Pa. 1958).

Thus, Candice's finger pointing to Marks' failings are as much counterclaimant's failings as well. As a point of distinction, *Arnold* did not deal with the burdens of NRCP 16.1 upon a counterclaimant, as therein, the defendant doctor had not asserted counterclaims and was merely a defendant, not also a counterclaimant.

Instead, the Petition recounts that counterclaimant *did* ignore the request regarding the JCCR. And suggests instead that Mark had the obligation to "follow up" regarding it.[23] However, as a counterclaimant, Candice had a reciprocal obligation to ensure the completion and filing of the JCCR, or at the least, its own ICCR. It didn't.

V. CONCLUSION

Candice's novel assertion of error is incorrect. The district court's discretion to deny Candice's Motion to Dismiss pursuant to NCRP 16.1(e)(2) is written into the statutory language and the Petition's urged analytic only applies the other way. The District Court's decision could have been supported by any of the considerations stated herein, and thus, this Court should not find that the denial of a motion to dismiss was the product of an arbitrary and capricious acts especially where Candice intends this Court to *presume* rather than demonstrate arbitrariness or capriciousness. Moreover, the legal framework urged by Candice is inapposite to the legal question actually presented, which was the inverse of situation facing the *Arnold* Court. Thus, the petition should be denied and no writ should issue.

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[23] Pet. at 9

Dated this 11th day of March, 2022.

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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 in 14-point font Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) and NRAP 28.1(e)(1)–(2) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a Times New Roman typeface of 14 points or more, and contains 3,424 words; or

[X] Does not exceed 15 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(3)(1), which requires every assertion in the brief regarding matters in the record to be support 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 even that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 11th day of March, 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1), I certify that I am an employee of RAICH LAW PLLC and that on March 11, 2022 I caused to be served via First Class mail with a courtesy copy sent via email a true copy of the **REAL PARTIES IN INTEREST'S ANSWERING BRIEF TO WRIT OF MANDAMUS** by mailing a copy First Class mail to the District Court and submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case, as follows:

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