

No. 84118

IN THE SUPREME COURT OF THE STATE OF NEVADA

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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.*

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

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REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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## INTRODUCTION

Plaintiffs do not deny that they *failed* to timely hold a case conference, *failed* to circulate a timely draft Joint Case Conference Report (“JCCR”), *never filed* a JCCR or independent case conference report (“ICCR”) before the Petition was filed, *failed* to show good cause for not timely holding an early case conference or timely filing a case conference report, and addressed none of the *Arnold* factors in their opposition to Defendants’ Motion to Dismiss to support a reasoned decision and exercise of discretion to deny Defendants’ motion to dismiss.<sup>1</sup> Instead, Plaintiffs argue that (1) the *Arnold* factors are only applicable when a court considers granting a motion to dismiss and (2) discretion does not require the application of law and reason.

This Court should reject Plaintiffs’ argument because it turns NRCPC 16.1(e)(1) (Untimely Case Conference) and NRCPC 16.1(e)(2) (Untimely Case Conference Report) on its head. In *Arnold v. Kip*, 123 Nev. 410, 168 P.3d 1050 (2007), this Court outlined several factors a district

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<sup>1</sup> Plaintiffs acknowledge in their Answering Brief that they failed to demonstrate or argue the *Arnold* factors. (Answering Brief, p. 6).

court should consider in exercising its discretion *whether or not* an action should be dismissed for failure to timely file a case conference report.

The district court's order denying Defendants' Motion to Dismiss was an arbitrary and capricious exercise of discretion because it was unsupported by the evidence, unsupported by the established rules of law governing dismissal of a motion under NRCP 16.1(e)(1) and (2), and unsupported by law and reason. Although NRCP 16.1(e) provides the court with discretion to dismiss a case, discretion requires the application of law and reason otherwise the legal concept of discretion is akin to unfettered whimsy, choice, or worst, a coin toss leading to disparate results amongst similarly situated parties.

Here, Plaintiffs did not merely miss the deadlines to hold an early case conference and file a case conference report by a few days or months, Plaintiffs missed the deadline to hold a case conference by over two months and *never* filed a case conference report before this Petition was filed. *See e.g., Dignity Health v. Eighth Judicial Dist. Court of Nev.*, 2015 Nev. Unpub. LEXIS 799, 131 Nev. 1272 (2015 (Unpublished Disposition) (District Court did not abuse discretion for

not dismissing an action when Plaintiff held an early case conference *only 18 days after* NRCP 16.1(b)(1) deadline).

## ARGUMENT

### I. THE WRIT OF MANDAMUS SHOULD ISSUE.

This Court has indicated it will consider petitions denying motions to dismiss when either (1) no factual dispute exists and the district court must dismiss an action under clear authority under a statute or rule, or (2) 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. v. Second Judicial Dist. Court*, 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008).

#### A. **No factual dispute exists that no good reason, under the *Arnold* factors, was provided by Plaintiffs or considered by the district court to support a decision not to dismiss the action.**

Plaintiffs admit that they neither demonstrated nor argued there exists mitigating facts when applying the *Arnold* factors to justify their dilatoriness in this case.<sup>2</sup> Further, Plaintiffs do not dispute that no facts were presented to the district court supporting a reasoned

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<sup>2</sup> Answering Brief, p. 6.

decision and exercise of discretion to deny Defendants' motion to dismiss.

Instead, Plaintiffs merely argue that Defendants "did not demonstrate that the *Arnold* factors apply, nor even that the district court did ignore them," but acknowledge that the order was devoid of any mention of the *Arnold* factors.<sup>3</sup> Plaintiffs conclude that the district court's discretionary act was not arbitrary, capricious, manifestly unreasonable, or the result of partiality.<sup>4</sup>

**1. A district court must consider the *Arnold* factors when exercising its discretion whether to grant or deny a motion to dismiss under NRCP 16.1(e)(2).**

That a district court must apply the *Arnold* factors when deciding whether or not to dismiss an action for failure to file a timely case conference report is undisputed. *Arnold v. Kip*, 123 Nev. 410, 415-16, 168 P.3d 1050, 1053 (2007) (In *Arnold*, the Nevada Supreme Court announced a non-exhaustive list of factors for a district court to consider before dismissing a case under NRCP 16.1(e)(2). Some factors for the district court to consider include "the length of the delay,

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<sup>3</sup> Answering Brief, p. 6.

<sup>4</sup> Answering Brief, p. 6.

whether the defendant induced or caused the delay, [and] whether the delay has otherwise impeded the timely prosecution of the case."); *see also Gholson v. Siegel Suites*, 2014 Nev. Unpub. LEXIS 1209, 130 Nev. 1181 (2014) (Unpublished Disposition) (“In exercising its discretion [to dismiss an action under NRC 16.1(e)(2)], the district court should consider factors related to the rule's purpose of promoting the timely prosecution of litigation.”), *Collins v. Nev. Dep't of Corr.*, No. 59593, 2013 Nev. Unpub. LEXIS 382, at \*2 (Mar. 15, 2013) (Unpublished Disposition) (citing *Arnold v. Kip*, 123 Nev. 410, 415-16, 168 P.3d 1050, 1053) (“A review of the district court's order is necessary to determine whether a district court considered the required factors in determining that dismissal was warranted and therefore whether there was an abuse of discretion.”), and *Schroeder v. Glyman*, No. 58603, 2013 Nev. Unpub. LEXIS 323, at \*2 (Unpublished Disposition) (Mar. 14, 2013) (“In making a decision under NRC 16.1(e)(2) to grant or deny a motion to dismiss for failure to file a case conference, the district court must weigh the appropriate factors, including the length of the delay, the effect of the delay on the timely prosecution of the case, and the lack of good cause to excuse the delay.”).

**2. The District Court did not consider the *Arnold* factors because Plaintiffs failed to address the *Arnold* factors in their opposition brief and the Minute Order and Final Order lacks any analysis showing the exercise of reason.**

Plaintiffs err when they assert that the Defendants “did not demonstrate . . . that the district court did ignore [the *Arnold* factors], as the order is silent as to the factors considered by the district court.”<sup>5</sup>

The evidence is undisputed that the district court did not consider the *Arnold* factors or whether good cause existed for Plaintiffs’ failures to timely hold an early case conference or timely file a case conference report — Plaintiffs failed to address the *Arnold* factors in their opposition to Defendants’ motion to dismiss.<sup>6</sup> Similarly, the district court neither analyzed nor referenced the *Arnold* factors in the Minute Order Denying Candice Shaffer’s Motion to Dismiss or Continue Trial or the final Order Denying Candice Shaffer’s Motion to Dismiss or Continue Trial.<sup>7</sup> Instead, the district denied Plaintiffs’ motion to

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<sup>5</sup> Answering Brief, p. 6.

<sup>6</sup> PA118-29

<sup>7</sup> PA192-93, PA 194-204.

dismiss because “NRCP 1 and NRCP 1.10<sup>8</sup> [sic] state that the procedures in District Court shall be administered to secure the efficient, just, and inexpensive determination in every action and proceeding.”

**B. This Writ of Mandamus addresses an important issue of law needing clarification and consideration of sound judicial economy because this Court has not previously addressed the propriety of a district court’s *denial* of a motion to dismiss for failure to file a timely case conference report.**

While consideration of a writ petition is within this court's sole discretion, *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991), this court may address the merits of a petition that presents important issues needing clarification. *Mineral Cnty. v. State, Dep't of Conservation & Natural Res.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001). Because the propriety of a district court's denial of a motion to dismiss for failure to file a case conference report

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<sup>8</sup> The district meant EDCR 1.10 (“**Scope, construction and implementation of rules.** 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.”)

constitutes an important legal issue requiring clarification of whether the *Arnold* factors apply and an appeal is not an adequate and speedy legal remedy given the early stages of litigation and policies of judicial administration.

As the parties suggest, this petition raises an important legal issue needing clarification, involving public policy, of which this court's review would promote sound judicial economy and administration.<sup>9</sup> *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008). 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.*

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<sup>9</sup> Plaintiffs argue that a defendant, and not the plaintiff, has the burden of proving the absence of evidence to establish that the *Arnold* factors weigh in favor of not granting a motion to dismiss notwithstanding a plaintiffs' failure to comply with NRCP 16.1(e)(2).

*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).

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**II. Because the District Court's Order Denying Plaintiffs' Motion to Dismiss was unsupported by evidence, failed to address the *Arnold* factors or any other mitigating factor, and lacked reason, it was an arbitrary and capricious exercise of discretion.**

This Court has explained,

Judicial discretion means sound discretion guided by fixed legal principles. It must not be arbitrary nor capricious, but must be regulated upon legal grounds, -- grounds that will make it judicial. It must be compelled by conscience, and not by humor. So that when a judge properly exercises his judicial discretion he will decide and act according to the rules of equity, and so as to advance the ends of justice.

*Goodman v. Goodman*, 68 Nev. 484, 489, 236 P.2d 305, 307 (1951)

(citation omitted).

[E]ven within the area of discretion where the court's discernment is not to be bound by hard and fast rules, its exercise of discretion in the process of discernment may be *guided* by such applicable legal principles as may have become recognized as proper in determining the course of justice. A clear ignoring by the court of such established guides, without apparent justification, may constitute abuse of discretion.

*Goodman v. Goodman*, 68 Nev. 484, 489, 236 P.2d 305, 307 (1951).

A district court's "discretionary power is subject only to the test of reasonableness, [which] requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice

of the judge nor in an inconsistent manner." *Imperial Credit Corp. v. Eighth Judicial Dist. Court of Nev.*, 130 Nev. 558, 563, 331 P.3d 862, 866 (2014)(citations omitted). Discretion is *improperly exercised* when the judicial action is arbitrary, fanciful, or unreasonable," or "where no reasonable [person] would take the view adopted by the trial court. *Id.* at 422-23 (quotations omitted); *see also Goodman v. Goodman*, 68 Nev. 484, 487, 236 P.2d 305, 306 (1951) (noting, in examining the exercise of judicial discretion, that a "court cannot act oppressively or arbitrarily under pretense of exercising discretion. Such arbitrary or oppressive action under color of exercising discretion is called abuse of discretion." (internal citations 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)). A manifest abuse of discretion is "[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *State v. Eighth Judicial Dist. Court of Nev.*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011)(citations omitted).

Notwithstanding Plaintiffs' failure to hold a timely early case conference, failure to file a timely case conference report, and failure to offer any mitigating factors that the District Court could consider under the *Arnold* factors as good cause for not doing so, the District Court denied Defendants' Motion to Dismiss citing only NRCP 1<sup>10</sup> and EDCR 1.10<sup>11</sup> as the basis for denying Defendants' motion to dismiss.<sup>12</sup> And Plaintiffs argue that it was Defendants' burden to establish

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<sup>10</sup> "These rules govern the procedure in all civil actions and proceedings in the district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

<sup>11</sup> "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."

<sup>12</sup> PA 192-204.

Plaintiffs did not have good cause for failing to timely hold an early case conference or timely file a case conference report.<sup>13</sup>

First, Defendants did address the *Arnold* factors in their motion to dismiss illustrating that each factor weighed heavily in favor of dismissal.<sup>14</sup> Second, Plaintiffs did not address the *Arnold* factors in their opposition.<sup>15</sup> Third, the District Court did not analyze the *Arnold* factors in the Minute Order or filed Order.<sup>16</sup> Without analyzing these factors, or considering other possible mitigating factors, the District Court's decision not to grant the motion to dismiss was whimsical, arbitrary, and capricious because there was no factual or legal basis not to do so. Fourth, there is no need to remand the matter to the Court to do so, because Plaintiffs acknowledge that they did not address the *Arnold* factors conceding no mitigating factors would satisfy the *Arnold* factors.

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<sup>13</sup> Answering Brief, p. 9.

<sup>14</sup> PA011-12

<sup>15</sup> PA118-29, PA172-73

<sup>16</sup> PA192-193, PA194-204

And the District Court’s mere recital of NRCP 1 and EDCR 1.10 in its orders is a non sequitur. These rules apply to *all* civil cases before the district courts in the Eighth Judicial District. Application of these rules, without more, is insufficient to deny a motion to dismiss under NRCP 16.1(e)(1) and (2) and offers no legal reasoning. Further, permitting NRCP 1 and EDCR 1.10 to serve as “new” *Arnold* factors would effectively eviscerate NRCP 16.1(e)(1) and (2).

**III. PLAINTIFFS’ ARGUMENT THAT APPLICATION OF THE *ARNOLD* FACTORS ONLY APPLIES TO THE GRANT OF DISMISSAL DEFIES LOGIC.**

Plaintiffs argue “this Court’s review of the grant of dismissal, as opposed to the denial of dismissal are two different inquiries,” and conclude that the *Arnold* factors relate to [Defendants’] burden, not [Plaintiffs].<sup>17</sup> Plaintiffs offer no legal citation for this novel proposition which turns NRCP 16.1(e)(2) on its head.

In *Arnold v. Kip*, this Court ruled that generally, the party moving for dismissal under NRCP 16.1(e)(2) need not show prejudice, and the district court need not consider whether the delay in filing the case

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<sup>17</sup> Answering Brief, pp. 8-9.

conference report resulted in prejudice to the defendant. The Court recognized that without such a ruling, plaintiffs would have been able to exceed the deadline for filing a case conference report whenever the defendant could not show prejudice. The court also set forth a “factors test” under which the district court could use its discretion to determine whether to dismiss an action without prejudice for plaintiff’s failure to comply with NRCP 16.1(e)(2). Using these factors to decide that an action should not be dismissed or that an action should be dismissed is a distinction without a difference. These factors guide a court in applying its discretion to grant or deny a motion filed by a defendant under NRCP 16.1(e)(2) as one decision is the mirror image of the other.

**IV. PLAINTIFFS’ ARGUMENT THAT DEFENDANTS HAD THE BURDEN OF TIMELY FILING A CASE CONFERENCE REPORT IS WITHOUT MERIT.**

Plaintiffs argue that because Candice Shaffer filed a counterclaim, she must file a case conference report.<sup>18</sup> Travis Heinrich did not file a counterclaim. Regardless, NRCP 16.1(c)(1)(A) requires the parties to file either a JCCR or an ICCR if the parties cannot agree on the content of a

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<sup>18</sup> Answering Brief, p. 10.

joint report. However, NRCP 16.1(e)(2) controls dismissal. While NRCP 16.1(c)(1)(A) requires the "parties" to file either a JCCR or an ICCR, NRCP 16.1(e)(2) permits a district court the discretion to dismiss a case *if the plaintiff does not file a case conference report.*

### **CONCLUSION AND PRAYER**

The Court should issue a writ of mandamus directing the district court to grant Petitioners motion to dismiss.

DATED: April 8, 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 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 3,013 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: April 8, 2022

/s/ Michael Stein

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## 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. On April 8, 2022, I caused to be served a true and correct copy of the foregoing **Reply In Support Of Petition For Writ Of Mandamus** 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.

Honorable Nadia Krall  
Department 4, Eighth Judicial District Court  
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- 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.

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