IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.

JOSEPH A. GUTIERREZ, Esq., STEVEN G. KNAUSS, Esq., JASON R. MAIER, Esq., and MAIER GUTIERREZ & ASSOCIATES,

Petitioners

vs.

The Eighth Judicial District Court of the State of Nevada,
and the Honorable Susan Johnson,

Respondents,

and

RENE SHERIDAN,
An individual,

Real Parties in Interest

PETITION FOR WRIT OF MANDAMUS

Submitted By:
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RULE 26.1 CORPORATE DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities as described in Nev. R. App. P. 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.

Maier Gutierrez & Associates.

Maier Gutierrez & Associates has been represented by the following attorneys and law firms in the action below:

Joseph P. Garin and Jonathan K. Wong of Lipson Neilson P.C.

Dated: February 23, 2024 LIPSON NEILSON P.C.

/s/ Jonathan Wong

By: _____

JOSEPH P. GARIN, ESQ.
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JURISDICTIONAL STATEMENT

This writ petition seeks to appeal a non-final order. This Court has subject matter jurisdiction to hear a petition for writ of mandamus pursuant to Nev. Const. art. 6, § 4 and NRAP 21(a). This petition is timely filed because there has been no undue delay before filing this petition after the decision by the Eighth Judicial District Court on December 14, 2023, and the entry of the same on January 15, 2024. Additionally, the transcript of the December 14, 2023 hearing was not received until January 24, 2024. Compare with *Nevada v. Eighth Judicial Dist. Court of State*, 116 Nev. 127, 135, 994 P.2d 692 (2000) (finding that laches barred petition for writ of mandamus filed 11 months after lower court decision).

Dated: February 23, 2024 LIPSON NEILSON P.C.

/s/ Jonathan Wong

By: _____

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ROUTING STATEMENT

The Nevada Supreme Court should retain this writ petition because the principal issues that it raises are questions of statewide public importance. NRAP 17(a)(12). Moreover, this Court has previously heard and ruled on identical legal issues, namely what is required by the damages computation requirement under NRCP 16.1(a)(1)(A)(iv). Consequently, this Court is in the best position to address the issues in the instant Writ Petition. This matter does not involve an issue presumptively assigned to the Court of Appeals. See NRAP 17(b).

NRAP 21(a)(5) VERIFICATION

I am the lead attorney for Petitioners Joseph Gutierrez, Esq., Jason Maier, Esq., Steven Knauss, Esq., and Maier Gutierrez & Associates in Clark County District Court Case No. A-21-838187-C. I am informed and believe the facts stated in this Petition are true to the best of the information available to me. I declare under penalty of perjury that the foregoing is true and correct, per NRS 53.045.

Dated: February 23, 2024

LIPSON NEILSON P.C.

/s/ Jonathan Wong

By: _____

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ISSUES PRESENTED FOR REVIEW

1) Whether the District Court erred in denying Petitioners' request for summary judgment where Plaintiff's damages disclosures failed to comply with the damages computation requirement of NRCP 16.1(a)(1)(A)(iv), thereby cementing her inability to establish damages as a matter of law.
2) Whether the District Court erred in ruling that Petitioners were required to first seek to compel Plaintiff to provide a damages computation as a prerequisite to seeking exclusion of damages evidence as a sanction under NRCP 37(c)(1), thereby absolving Plaintiff of this obligation.
3) Whether the District Court erred in denying Petitioners' request for summary judgment based on insufficient expert support, where the District Court previously ordered that Plaintiff's case would need expert support to survive summary judgment, found at a subsequent hearing that Plaintiff's expert reports contained only conclusory opinions, and subsequent Rule 56(d) discovery produced nothing to change that finding.

RELIEF REQUESTED

Petitioner submits this petition pursuant to NRAP 21, NRS 34.160, and NRS 34.170. This Petition requests the Supreme Court to issue a writ of mandamus directing the District Court to grant 1) its Motion for Summary Judgment Based On Plaintiff's Failure To Provide Damages Computation, Or Alternatively, For Rule 37 Sanctions (hereinafter, the "Damages Motion"); and 2) its Motion for Summary Judgment filed on August 22, 2023 (hereinafter, the "Experts MSJ"). Both Motions were heard and denied by the Court on December 14, 2023.[1]

Such ruling was issued despite this Court's explanation and holding that the computation requirement of NRCP 16.1(a)(1)(A)(iv) "anticipates both a computation of the total amount sought for each category of special damages and the provision of documents to support these claimed damages." *Walters v. Meeks*, No. 53856, 2011 Nev. Unpub. LEXIS 1633, at *3 (Sep. 29, 2011); despite nothing in the plain text of NRCP 16.1(a) and NRCP 37 requiring a motion to compel as a prerequisite to seeking sanctions for failure to disclose a damages computation; despite persuasive authority holding that Rule 37 sanctions are "automatic" and "self-executing"; and despite persuasive authority providing that an expert's

[1] The Experts MSJ was initially heard on October 5, 2023, but was continued to December 14, 2023 pursuant to an oral request for Rule 56(d) relief by Plaintiff at the hearing.

conclusory opinions are insufficient to overcome summary judgment (and the District Court's own finding that Plaintiff's expert reports were conclusory).

A writ of mandamus may be issued by the Nevada Supreme Court to compel the performance of an act which the law requires as a duty resulting from an office, trust or station. *International Game Tech. v. Second Judicial Dist. Ct.*, 124 Nev. 193, 179 P.3d 556 (2008); NRS 34.160. Although this Court generally declines to consider writ petitions challenging district court orders denying motions to dismiss, it will consider such petitions in some instances if no factual dispute exists, and the district court was obligated to dismiss the action pursuant to clear authority. *Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010); *International Game Tech.*, 124 Nev. at 197-98; *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997) ("this court will continue to exercise its discretion with respect to certain petitions where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action.")

Petitioners submit there was a manifest abuse of discretion and/or clearly erroneous ruling. The factual basis supporting this Petition are not disputed and the applicable legal standards mandate dismissal. It would be patently unfair for Petitioners to endure trial when Respondent failed to make the required disclosure despite ample opportunity and guidance from the Court. Petitioners submit they

have met the burden to demonstrate that this Court should considered and grant the relief requested.

Therefore, Petitioners respectfully request that this Court grant the requested writ and order the Eighth Judicial District Court to grant Petitioners Judgment on the Pleadings, or Alternatively, Summary Judgment.

Dated: February 23, 2024 LIPSON NEILSON P.C.

/s/ Jonathan Wong

By: _____

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INTRODUCTION

This case is a legal malpractice action brought by Plaintiff Rene Sheridan ("Plaintiff") against Petitioners Joseph Gutierrez, Jason Maier, Steven Knauss, and Maier Gutierrez & Associates. Plaintiff's sole cause of action for legal malpractice is predicated on two main acts of Petitioners that took place in *Sheridan v. Goff et al*, case no. A-17-756902-B (the "Underlying Case"): 1) attaching as an exhibit to an opposing brief an unredacted e-mail between Petitioners and opposing counsel that discussed settlement amounts; and 2) Petitioners asserting an attorneys' lien against Plaintiff after she terminated their services. Based on these acts, Plaintiff claims that she suffered damage to her professional reputation/future career prospects, damage to her personal and business credit rating, and loss of investment funding.

Despite the claim of damages exceeding $3,000,000.00, the Plaintiff failed to provide a computation of damages as required by NRCP 16.1(a)(1). As this case progressed, Plaintiff did not produce any documentation to substantiate the $3,000,000 in alleged damages. Plaintiff never identified any lost investors nor delineate any specific project supporting the claimed damages. Additionally, evidence was never provided by Plaintiff's to support the contention of historical success in attracting investors or generating profitable projects. No documents were produced to establish there were ever any negotiations, proposed agreements, or

communications with the purportedly lost investors. There was no evidence provided to demonstrate the value of the unidentified lost projects or to establish a clear link between the claimed damages and the conduct of the Defendants. None of this is disputed.

As critical deadlines in the instant case passed, two bases for disposal of Plaintiff's complaint became ripe, and Petitioners filed dispositive motions based on each. First, on August 22, 2023, Petitioners filed a Motion for Summary Judgment on the grounds that Plaintiff's expert reports were too flimsy and conclusory to overcome summary judgment (the "Experts MSJ"). APP0025 – 0038. At hearing, the District Court stated that the reports indeed appeared to be merely conclusory, and in fact included such a finding in a formal order, but granted Plaintiff Rule 56(d) relief pursuant to an oral request she made at the hearing to depose Knauss and Gutierrez, with the parties to return at a later date for additional argument on the matter.

Second, on November 9, 2023, approximately one month after discovery had closed, Petitioners filed a Motion for Summary Judgment or Alternatively Rule 37 Sanctions (the "Damages Motion"). APP0366 – 0414. The Damages MSJ sought summary judgment on the grounds that Plaintiff was unable to establish damages as a matter of law due to her failure to provide a damages computation, and could therefore not prevail on her malpractice claim. The Damages Motion also sought to

preclude Plaintiff from introducing evidence of damages at trial as a sanction under NRCP 37.

Both this motion and the continued hearing for the Experts MSJ were set for hearing on December 14, 2023. At the hearing, the District Court, Hon. Susan Johnson presiding, denied both motions. The Damages Motion was denied as to both summary judgment and exclusion of damages evidence, and the Experts MSJ was also denied. APP0465 – 0469.

The denial of these motions was done despite authority from this Court on the requirements of a proper damages computation and expert opinions, a plethora of persuasive authority supporting dismissal of cases that fail to meet these requirements, and the District Court's own finding that Plaintiffs' expert reports were merely conclusory. Under the clear language of the rules and case law, the trial court was required to grant Petitioners' Damages Motion and Experts MSJ. Due process applies in favor of Petitioners/Defendants. The denial of the motion when facts are undisputed and the law is clear is contrary to Petitioners' due process rights. Accordingly, Petitioners respectfully posit that the District Court erred in denying Petitioner's Motions, and request that this Court issue appropriate writ relief to remedy the District Court's action.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Factual Background:

In the Underlying Case, Plaintiff retained Petitioners to represent her after her prior counsel withdrew from the case. Thereafter, one of the defendants, Rudolf Sedlak, successfully filed a motion to be dismissed from the case for lack of personal jurisdiction. Plaintiff appealed this ruling, and the Nevada Supreme Court referred the appeal to the Supreme Court Settlement Program. The parties negotiated a global settlement and agreed on a set of material terms, which were agreed upon and signed by all parties, including Plaintiff. APP0042 – 0043.

At some point thereafter, Plaintiff decided she no longer wanted to settle – at least not on the material terms previously agreed upon and signed by all parties – and would not agree to a settlement agreement based on those terms, causing Goff's counsel to ultimately file a motion to enforce settlement on October 16, 2018 (the "Motion to Enforce"). APP0045 – 0057. Defendants filed a Limited Opposition to the Motion to Enforce on October 24, 2018 (the "Limited Opposition"). APP0059 – 0100.

The Limited Opposition, including exhibits, was 42 pages, and on page 41 of the document, an e-mail between Defendants and Kristin Gallagher (counsel for the underlying defendants) containing a reference to the settlement amount was inadvertently left unredacted when the document was filed. APP0099. Defendants

realized this mistake by October 28, 2018, and Gutierrez informed Plaintiff about the same as well as his plan to have the Limited Opposition sealed or stricken, as well as Gallagher's reply brief that also included the unredacted e-mail. APP0102.

At the October 29, 2018 hearing on the Motion to Enforce, Plaintiff terminated Defendants, and Gutierrez made an oral motion to withdraw, which the Court granted. APP0110 – 0111. During the hearing, Gallagher advised that she did not view the unredacted e-mail as a breach of the confidentiality clause, and expressed a willingness to have the filings redacted as needed to remedy the issue. APP0106 – 0108. Due to Plaintiff terminating Defendants, the Court continued the hearing to December 3, 2018, to allow Plaintiff time to find new counsel. On December 3, 2018, the Court heard the continued Motion to Enforce, wherein the Limited Opposition and Gallagher's Reply were sealed. Plaintiff did not have new counsel. APP0117 – APP0133.

On December 6, 2018, the Court published a minute order granting the Motion to Enforce, stating that "the issue before the Court is not whether an agreement was reached, but whether Plaintiffs should follow through with the same," and that "Plaintiffs[‘] obstinance in following through has been unreasonable." APP0135. In addition to noting Plaintiff's unreasonableness in refusing to follow through with the settlement, the Court also sanctioned her in the amount of $2,500.00 for necessitating the Motion to Enforce. *Id.*

Plaintiff thereafter unsuccessfully appealed the ruling, and the Nevada Supreme Court issued an Order of Affirmance on March 18, 2020 (the "Order of Affirmance"). The Order of Affirmance contained dicta that noted "[w]e further disagree with Sheridan's argument that she was excused from any obligation under the settlement due to a breach of the agreement" because "Sheridan's own counsel breached that provision" and "[t]he appropriate relief for any harm caused by that breach, therefore, is a malpractice action against Sheridan's former counsel, not for the district court to invalidate the settlement agreement." APP0137 – 0142.

In a December 29, 2021 order affirming the district court's award of fees and costs in the course of the instant action, the Nevada Court of Appeals clarified that this language in the Order of Affirmance should not be misconstrued as a finding that Defendants committed actionable malpractice, and that "contrary to Sheridan's arguments on appeal, the supreme court's statement in the prior matter cannot provide a reasonable basis for a complaint that otherwise failed to sufficiently plead all essential elements of her claims." APP0144 – 0147.

Procedural History:

On August 31, 2020, Plaintiff filed a Complaint in Washoe County against Defendants, asserting causes of action for 1) Professional Negligence, 2) Breach of Contract; 3) Quasi-Contract/Equitable Contract/Detrimental Reliance; 4) Breach of the Implied Covenant of Good Faith and Fair Dealing; 5) Vicarious Liability; and 6)

Fraud. The case was opened under case number CV20-01353 and assigned to Department 10. On December 4, 2020, Defendants filed a Motion to Dismiss the Complaint under NRCP 12(b)(5). The Washoe Court granted the Motion to Dismiss in part, granting it as to Plaintiff's claims for Fraud and Vicarious Liability. APP0149 – 0153.

On March 19, 2021, Defendants filed a Motion to Transfer Venue back to Clark County, which the Washoe Court granted on July 12, 2021. Following transfer of the case back to Clark County, Petitioners filed a Motion to Dismiss on July 27, 2021, arguing that pursuant to *Stalk v. Mushkin*, 199 P.3d 838 (2009), Plaintiff's remaining causes of action all arose from the attorney-client relationship and were thus displaced by her claim for professional negligence (the "MTD"). The MTD also sought dismissal of the professional negligence claim for failure to state a claim.

After a series of setbacks and department transfers, the MTD was finally heard by the District Court on August 4, 2022. The MTD was granted as to all causes of action except for professional negligence. The District Court noted that "although it is not dismissing Plaintiff's Professional Negligence cause of action at this time, expert testimony will be required to support this cause of action, as the alleged malpractice here is not 'so obvious that it may be determined by the court as a matter of law or is within the ordinary knowledge and experience of laymen.'" APP0023.

On July 10, 2023, Plaintiff disclosed her Initial Expert Disclosures, wherein she designated four experts: 1) Matthew Fortado, Esq.; 2) Patrick Cannon; 3) Steven Istock; and 4) Bennett J. Wasserman, Esq. APP0159 – 0196. On August 11, 2023, the Rebuttal Experts deadline passed, and Plaintiff did not produce any rebuttal expert reports. Defendants produced a rebuttal report by Rob Bare in response to the initial report of Matthew Fortado.

On August 22, 2023, Defendants filed a Motion for Summary Judgment (the "Experts MSJ") on the basis that Plaintiffs' expert reports were insufficient to overcome summary judgment because they contained nothing but speculative, conclusory opinions. Plaintiff filed an untimely opposition on September 7, 2023. At the hearing on the Experts MSJ, the District Court stated that Plaintiffs' two expert reports appeared to contain mere conclusory opinions, but upon an oral request by Plaintiff at the hearing, the District Court granted Plaintiff Rule 56(d) to take the depositions of Knauss and Gutierrez and supplement her reports thereon, and continued the hearing to December 14, 2023. APP0382 – 0386.

Discovery closed on October 13, 2023. On November 9, 2023, Defendants filed a hybrid motion seeking summary judgment and/or Rule 37 sanctions (in the form of preclusion of damages evidence) based on Plaintiffs' failure to provide a damages computation as required under NRCP 16.1(a)(1) (the "Damages Motion"). The Damages Motion was set for hearing on December 14, 2023.

Gutierrez's deposition proceeded on December 4, 2023, and Knauss' deposition proceeded on December 7, 2023. On December 14, 2023, the District Court heard argument on both the Damages Motion and the Experts MSJ.[2] The District Court ultimately denied both motions. On the Damages Motion, the District Court found that Rule 37 sanctions were not available because Defendants did not first seek to compel a damages computation from Plaintiff, and that Defendants were not entitled to judgment as a matter of law as to damages. APP0465 – 0469, APP0506. On the Experts MSJ, the District Court simply stated without further explanation that it was a "close one" but that it was going to deny this motion as well. APP0510. On January 12, 2024, an order memorializing the ruling was filed. APP0465 – 0469.

Respectfully, the District Court's ruling contravenes the plain text of NRCP 16.1(e)(3) and NRCP 37, as well as precedent providing that Rule 37 is an "automatic" and "self-executing" sanction designed to "provide a strong inducement for disclosure of material." The ruling also contravenes precedent providing that an expert's conclusory opinions are insufficient to overcome summary judgment.

[2] The District Court also heard and ruled on two of Plaintiff's pending motions that day, but they are not at issue for purposes of this Writ Petition.

STANDARD 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). "Whether to consider a writ of mandamus is within this Court's discretion." *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

This Court has considered a writ petition challenging orders denying dismissal or summary judgment where "considerations of sound judicial economy and administration militate[] in favor of granting such petitions," or where "an important issue of law requires clarification." *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344 –1345, 950 P.2d 280, 281 (1997).

Review of a writ petition seeking extraordinary relief is also warranted where a statute sets out clear authority on an issue, but the Nevada district courts have inconsistently applied the statute. See *Wheble v. Eighth Judicial Dist. Court,* 128 Nev. 119, 122, 272 P.3d 134, 136 (2012) (entertaining a writ petition when district courts might contradictorily interpret and apply a statute).

"Statutory interpretation is a question of law that we review de novo, even in the context of a writ petition." *Int'l Game Tech*., 124 Nev. at 198, 179 P.3d at 559.

ARGUMENT

A. Petitioners Do Not Have a Plain, Speedy, and Adequate Remedy

This Court has original jurisdiction to issue writs of mandamus. Nev. Const., art. 6, §4. Mandamus may be granted where the party seeking extraordinary writ relief demonstrates that: (1) an eventual appeal does not afford "a plain, speedy and adequate remedy in the ordinary course of law," and (2) mandamus is needed either to compel the performance of an act that the law requires or to control the district court's manifest abuse of discretion. NRS 34.160; NRS 34.170; *Tallman v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 71, 359 P.3d 113, 118 (2015).

The issuance of an extraordinary writ is within this Court's discretion. See *State ex rel. Dep't Transp. V. Thompson*, 99 Nev. 358, 662 P.2d 1338 (1983). The primary standard in the determination of whether to entertain a writ petition is the interests of judicial economy and sound administration. *Id.* In addition, this Court exercises its original jurisdiction in cases of urgency or strong necessity, and when an important issue of law needs clarification. See *Nalder v. Eighth Judicial Dist. Court*, 136 Nev. Adv. Rep. 24, 462 P.3d 677, 681-82 (2020). All of these factors favor consideration of this writ petition now. See *International Game Technology, Inc. v. Dist. Ct*., 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (cases may warrant extraordinary consideration even where an eventual appeal is available wherever this

Court's review would promote sound judicial economy and administration).

The District Court's Order entered January 15, 2024 denied Petitioners' Motions despite the plain text of NRCP 16.1 and NRCP 37, as well as clear and established precedent, under which the Motions should have been granted. Petitioners are not afforded a sufficient remedy through the appellate process following a final order because Petitioners would, in such a scenario, be forced to continue defending and proceed through trial on claims that are not viable by law. This would not only significantly burden Petitioners, but also needlessly strain judicial resources and contravene the interests of sound judicial economy and administration.

Other interests militating in favor of consideration of this writ petition now are the avoidance of inconsistent outcomes, and conformity with the intent behind NRCP 37. In contrast, the only potential detriment of writ review is the immediate expenditure of resources involved in resolving the writ petition. Weighing the foregoing benefits and detriments of writ review here, it is clear that an eventual appeal will not provide a plain, speedy, or adequate remedy.

B. The District Court Erred by Not Granting Summary Judgment in Petitioners' Favor Where Plaintiff was Unable to Establish Damages as a Matter of Law Due to Her Failure to Provide a Damages Computation

This Court "review[s] a district court's grant of summary judgment de novo.

Republic Silver State Disposal, Inc. v. Cash, 478 P.3d 362, 364 (Nev. 2020). NRCP 16.1(a)(1)(A)(iv) imposes upon Plaintiff an obligation to "without awaiting a discovery request, provide to [Defendants]: … a computation of each category of damages claimed by [Plaintiff]." A written discovery request is not needed. *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 261, 396 P.3d 783, 785 (2017). "Computation" does not mean simply "listing the broad types of damages", but requires detail sufficient to "enable the defendants to understand the contours of their potential exposure and make informed decisions regarding settlement and discovery." *Calvert v. Ellis*, 2015 WL 631284, at *2 (D. Nev. Feb. 12, 2015) (internal citations omitted). See also *Walters v. Meeks*, 2011 Nev. Unpub. LEXIS 1633, at *2 (Sep. 29, 2011) (Rule 16.1 requires "more than providing—without any explanation— undifferentiated financial statements; it requires a 'computation,' supported by documents.") (internal citations omitted).

In their Damages Motion, Petitioners demonstrated that Plaintiffs' Rule 16.1 damages disclosures – which vaguely alleged a figure "in excess of $3 million" for negligence and "unethical actions" of Petitioners – failed entirely to satisfy the computation requirement, and that because discovery had long since closed, Plaintiff was unable to supplement her disclosures to remedy this deficiency. Based thereon, Plaintiff could not as a matter of law establish the element of damages necessary for her malpractice claim, and Defendants were therefore entitled to summary judgment

as a matter of law. Moreover, Plaintiff herself admitted in her Opposition brief that she "did not provide a formal NRCP 16.1 computation of damages."

Furthermore, this Court previously established that "[w]here the loss of anticipated profit is claimed as an element of damages, the business claimed to have been interrupted must be an established one and it must be shown that it has been successfully conducted for such a length of time and has such a trade established that the profits therefrom are reasonably ascertainable. The rule against recovery of uncertain damages generally is directed against uncertainty as to the existence of cause of damage rather than as to measure or extent." *Knier v. Azores Construction Co*., 78 Nev. 20 (1962). Here, Plaintiff's damages are based on the loss of anticipate profit in that she claims Defendants' conduct caused her to lose investment funding and work on projects. As such, she was required pursuant to *Knier* to provide discovery proving the certainty of her damages, which she failed to do.

Nowhere during the course of the roughly hour-long hearing did the District Court find that Plaintiff's damages disclosures contained a sufficient "computation," or even that the meager documents disclosed by Plaintiff in discovery contained sufficient information by which Defendants themselves to readily compute Plaintiff's damages. Nor did the District Court find that Plaintiff satisfied her burden under *Knier*.

Plaintiff obfuscated the issues by arguing about what she would potentially be

able to establish at trial regarding her damages via witnesses in her Rule 16.1 disclosures. APP0470 – 0475. Looking forward at what a plaintiff may or may not be able to establish at trial is wholly irrelevant in evaluating the sufficiency of a NRCP 16.1(a) damages computation. Rather, the relevant inquiry only looks backward on the sufficiency of what the plaintiff has provided throughout the course of discovery. See, e.g. *Walters*, 2011 Nev. Unpub. LEXIS 1633, at *2 (Sep. 29, 2011) (finding that the plaintiffs failed to comply with the computation requirement and noting that they "provided individual documents, but never provided respondent with a document containing calculations computing the total damages claimed for each category of special damages"); see also *Calvert v. Ellis*, 2015 WL 631284, at *2 (finding that the plaintiff failed to satisfy the computation requirement based on the content of her discovery disclosures).

By affording weight to irrelevant considerations raised by Plaintiff rather than focusing solely on the inadequacy of Plaintiff's bare-bones damages disclosures in evaluating whether Plaintiff satisfied the computation requirement, the District Court erred. Petitioners respectfully request a writ directing the District Court to find that Plaintiff failed to provide a damages computation mandated by NRCP 16.1(a)(1), and to enter summary judgment in their favor based thereon because without the damages computation, Plaintiff cannot establish the damages element of her legal malpractice claim.

C. The District Court Erred in Holding that Petitioners Were Required to First File a Motion to Compel a Damages Computation, Because Exclusion of Damages Evidence Under NRCP 37 is an Automatic Sanction

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. *Young v. Johnny Ribeiro Bldg*., 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

The next issue on which the District Court erred is in ruling that Petitioners were required to first seek to compel Plaintiff to disclose a computation of her damages in order to make her failure to provide a damages computation subject to sanctions under NRCP 37. This ruling both absolved Plaintiff of her affirmative obligation under NRCP 16.1(a)(1) to provide a damages computation, and ignored the plain text of NRCP 37 indicating that the sanctions are automatic.

It is indisputable that Plaintiff had an affirmative obligation under NRCP 16.1(a)(1)(A)(iv) to produce a "computation of each category of damages claimed"; Petitioners were not required to first seek discovery of the same. See NRCP 16.1(a)(1)(A)(iv) (stating that a party "must, without awaiting a discovery request," provide this information). If Petitioners were not required to seek discovery of Plaintiff's damages computation, it stands to reason that they were not required to file a motion to compel prior to seeking sanctions for Plaintiff's failure to provide

the computation. Imposing such a requirement would effectively shift the burden to Petitioners to obtain Plaintiff's damages computation, and absolve Plaintiff of her obligation to affirmatively provide the same.

This Court has previously found that absolving a plaintiff of this obligation constitutes error of law. See *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 265, 396 P.3d 783, 787 (2017) ("Thus, to the extent that the district court absolved respondents of their obligation under NRCP 16.1(a)(1)(C) to provide a computation of Christian's future medical expenses based on *FCH1* or a general understanding amongst Nevada practitioners, doing so was an error of law."). The federal equivalent of NRCP 16.1 has been interpreted similarly. See, e.g., *Jackson v. UA Theatre Circuit, Inc*., 278 F.R.D. 586, 593 (D. Nev. 2011) (Discussing a plaintiff's damages computation obligation and stating that "[t]he plaintiff cannot shift to the defendant the burden of attempting to determine the amount of the plaintiff's alleged damages.").

Nowhere in the plain text of NRCP 37 is there a mandate that a party first seek to compel a plaintiff's damages computation before sanctions may attach. NRCP 37(a)(3)(A) provides that "[i]f a party fails to make a disclosure required by Rule 16.1(a), 16.2(d), or 16.205(d), any other party **may** move to compel disclosure and for appropriate sanctions." NRCP 37(a)(3)(A) (emphasis added). This indicates that, while Petitioners *could* have filed a motion to compel the damages computation,

they were not *required* to. See *WPH Architecture, Inc. v. Vegas VP, Ltd. P'ship*, 131 Nev. 884, 890, 360 P.3d 1145, 1149 (2015) ("In statutes, 'may' is permissive and 'shall' is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature.") (internal citations omitted). On the other hand, NRCP 37(c)(1) leaves no room for discretion in excluding evidence as a sanction:

> **(1) Failure to Disclose or Supplement.** If a party fails to provide information or identify a witness as required by Rule 16.1(a)(1), 16.2(d) or (e), 16.205(d) or (e), or 26(e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
> . . .

See NRCP 37(c)(1) (emphasis added). Under this provision, whenever a party fails to provide a required disclosure, that party is automatically barred from using such evidence at trial. Exclusion of the evidence is the base sanction under the statute, and there is no room for discretion; indeed, a motion is not even required for imposition of this base sanction. The legislature could have worded the statute to require a discovery motion or other prerequisite to prohibit the use of undisclosed evidence, but they did not.

Cases interpreting the federal equivalent have confirmed the automatic nature of this sanction. See, e.g. *Hoffman v. Constr. Protective Servs*., 541 F.3d 1175, 1180 (9th Cir. 2008) (stating that Rule 37 is "a self-executing, automatic sanction to

provide a strong inducement for disclosure of material."); see also *Yeti by Molly, Ltd. v. Deckers Outdoor Corp*., 259 F.3d 1101, 1106 (9th Cir. 2001) (stating that Rule 37(c)(1) "clearly contemplates stricter adherence to discovery requirements, and harsher sanctions for breaches of this rule," and that "[t]he Advisory Committee Notes describe it as a 'self-executing,' 'automatic' sanction to 'provide[]a strong inducement for disclosure of material.'").

The only caveat to this automatic sanction is where the failure to disclose "was substantially justified or is harmless." NRCP 37(c)(1). Such circumstances do not exist here. Plaintiff had nearly one year in discovery in which to disclose a damages computation and the supporting documents regarding her alleged loss of investment funds and business, yet did not do so. Nor was the failure to disclose "harmless," because allowing Plaintiff to supplement at this late stage of litigation to provide a damages computation and supporting documents would require re-opening discovery, continuing trial, and having the District Court issue a new scheduling order. *Hoffman*, 541 F.3d at 1180. ("Later disclosure of damages would have most likely required the court to create a new briefing schedule and perhaps re-open discovery, rather than simply set a trial date. Such modifications to the court's and the parties' schedules supports a finding that the failure to disclose was not harmless.").

Accordingly, the District Court erred in refusing to preclude Plaintiff from

introducing evidence of damages for want of a motion to compel, rather than imposing the same as an automatic sanction as contemplated by NRCP 37.

D. The District Court's Own Prior Finding That Plaintiffs' Expert Reports Were Conclusory Required Entry of Summary Judgment in Petitioners' Favor

Finally, the District Court erred by not granting summary judgment in Petitioners' favor on the basis of Plaintiff having inadequate expert support for her malpractice claim.

Earlier in the case, the District Court admonished Plaintiff that she would need expert support to survive summary judgment. APP0023. In the October 14, 2023 Order on Petitioners' Experts MSJ, the District Court made an express finding that Plaintiff's expert reports appeared to be merely conclusory. APP0383. Though Gutierrez and Knauss were both subsequently deposed pursuant to the District Court's granting Rule 56(d) relief, nothing emerged that would have changed the District Court's initial analysis. Plaintiff did not supplement her expert report based on their testimony, nor did she make any showing at the hearing that new information was discovered during their depositions, without which her malpractice expert was unable to fully complete his analysis.

While the matter has not been directly addressed by this Court, precedent interpreting the FRCP equivalent of NRCP 16.1 recognizes the inadequacy of conclusory expert reports. For instance, in *Great Am. Ins. Co. v. Vegas Constr. Co*.,

2007 U.S. Dist. LEXIS 60709, (D. Nev. Aug. 15, 2007), the court ruled that an expert report "must not be sketchy, vague or preliminary in nature." *Id* at *8. "Expert reports must include 'how' and 'why' the expert reached a particular result, not merely the expert's conclusory opinions . . . [because] . . . an expert who supplies only an ultimate conclusion with no analysis supplies nothing of value to the judicial process." *Id.* (brackets in original). "[A]n expert's report that does nothing to substantiate this opinion is worthless, and therefore inadmissible." *Id.* "An expert's 'conclusory allegations' do not defeat summary judgment where the record clearly rebuts the inference the expert suggests." *Harris v. Gates*, 1998 U.S. App. LEXIS 10663, at *8 (9th Cir. May 26, 1998).

Given this precedent as well as the District Court's own finding that Plaintiff's expert reports were conclusory, coupled with Plaintiff's failure to demonstrate that the depositions of Gutierrez and Knauss provided her with new information by which her expert could remedy the deficiencies in his report, the District Court should have granted summary judgment in Petitioners' favor on Plaintiff's malpractice claim, and erred in not doing so.

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CONCLUSION AND RELIEF REQUESTED

This Court should grant this Petition and issue a Writ of Mandamus that directs the District Court Judge to grant Petitioners' Damages Motion and Experts MSJ.

Dated: February 23, 2024 LIPSON NEILSON P.C.

/s/ Jonathan Wong

By: _____

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CERTIFICATE OF COMPLIANCE WITH NRAP 32(a)(4) – (6)

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:

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3. Finally, I hereby 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: February 23, 2024

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CERTIFICATE OF SERVICE

Pursuant to N.R.A.P 25(b), I certify that I am an employee of LIPSON NEILSON P.C., and that on this 23rd day of February, 2024, I served a true and correct copy of the foregoing **PETITION FOR WRIT OF MANDAMUS** via the Court's EFLEX system and by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada to the addressees listed below:

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