

CASE NO. _____
IN THE SUPREME COURT FOR THE STATE OF NEVADA

**PHILLIP J. FAGAN, JR. an individual and as Trustee of the PHILLIP
J. FAGAN, FR. 2001 TRUST**

Petitioner,

vs.

**THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR, THE COUNTY OF CLARK, AND THE
HONORABLE ERIKA BALLOU, DISTRICT JUDGE**

Respondent,

and

AAL-JAY, INC., a Nevada corporation

Real Party in Interest.

EMERGENCY PETITION UNDER NRAP 27(e)

**PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE,
WRIT OF PROHIBITION UNDER 21(a)(6)**

RELIEF REQUESTED WITHIN 14 DAYS

Petition from the Eighth Judicial District Court, Clark County, Nevada
District Court Case No. A-21-832379-C, the Hon. Erika Ballou

BLACK & WADHAMS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

- Phillip J. Fagan, Jr., is an individual residing in Clark County, Nevada.
- The Phillip J. Fagan, Jr., 2001 Trust, is a Nevada revocable trust.

Phillip J. Fagan, Jr., as an individual and as trustee of the Phillip J. Fagan, Jr., 2001 Trust, was represented in the District Court and in this Court by Christopher V. Yergensen, Esq., Allison R. Schimdt, Esq., Rusty Graf, Esq. and Tisha Black, Esq. of the law firm of Black & Wadhams.

DATED: March 28, 2024

BLACK & WADHAMS

/s/ Allison R. Schimdt
Allison R. Schimdt (10743)
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Las Vegas, Nevada 89135
Attorneys for Petitioner

ROUTING STATEMENT

This matter is not included in the matters presumptively retained by the Nevada Supreme Court under NRAP 17(a), nor does it fall under any of the matters presumptively heard by the Court of Appeals. This Petition may therefore be heard by either the Nevada Supreme Court, or the Court of Appeals.

Defendants note that this Appeal raises, as a primary issue, what appears to be an issue of first impression related to the interpretation of the mandatory provisions of NRS 16.023(3)(a)

NRAP 27(e) CERTIFICATE

and

**AFFIDAVIT OF ALLISON R. SCHMIDT, ESQ. IN SUPPORT OF
PETITIONER'S EMERGENCY PETITION FOR WRIT OF MANDAMUS
AND/OR PROHIBITION**

STATE OF NEVADA, COUNTY OF CLARK:

1. I, Allison R. Schmidt, am an attorney licensed to practice in the State of Nevada and I am an attorney with the law firm of Black & Wadhams, Attorneys for Petitioners Phillip J. Fagan, Jr., an individual and as trustee of the Phillip J. Fagan, Jr., 2001 Trust, in support of this Petition for Writ of Mandamus, or in the alternative, Writ of Prohibition under NRAP 21(a)(6), filed as an Emergency Motion under NRAP 27(e).

2. The telephone numbers and office address of the attorneys for the Real Party in Interest is listed as follows:

- Ogonna Brown, Esq., the law firm of Lewis Roca, 3993 Howard Hughes Parkway, Suite 600, Las Vegas, Nevada 89169, (702) 474-2622, obrown@lewisroca.com.

3. Counsel for Real Party in Interest was served with this Petition via electronic service as identified on the proof of service in this document. Prior to filing this Petition and Motion, my office contacted, by telephone, the clerk of the

Supreme Court, the Clerk of the Eighth Judicial District Court of the State of Nevada, and Real Party in Interest's attorney to notify them that Petitioners were filing the instant Petition for Writ of Mandamus, or in the alternative, Writ of Prohibition under NRAP 21(a)(6), filed as an Emergency Motion under NRAP 27(e). Additionally, we will serve a file-stamped copy of the Writ via the Eighth Judicial District Court's filing and service system on March 28, 2024.

4. Emergency relief is needed for two reasons. First, the Lower Court Granted Petitioner's Motion for Preferential Trial Setting, but then failed to set the trial within 120 days, as mandated by statute, and instead set the trial in the ordinary course. An expedited trial is needed because Petitioner is 79 years old, and in infirm health, following a fall down an escalator. Under NRS 16.025, Plaintiff is entitled to a trial on or before June 10, 2024.

5. Additionally, Petitioner filed counterclaims against Christiano DeCarlo and Lail Leonard, which have a 3-4 year statute of limitation, relating to events that took place in late 2020 and early 2021. The Lower Court impermissibly dismissed the claims pursuant to NRCP 4(e)(2), with prejudice, which has prevented Defendants from rifling the claims, and other claims that would now be barred by claim preclusion because of the improper dismissal. The statute of limitations on many of the claims will expire in the absence of expedited relief.

8. Thus, Plaintiff will suffer irreparable harm in the absence of relief within 30 days in the following ways:

a. Denial of the Rights Afforded by NRS 16.025, when the Court has already ruled that Dr. Fagan, as a result of his advanced age and precarious health is entitled to a preferential trial setting.

b. The expiration of the Statute of Limitations on counterclaims that cannot be refiled until relief issues from this court.

c. The Court has acted in excess of its jurisdiction in ruling on claims that it had no jurisdiction on, and there is no plain, adequate, and speedy remedy at law.

9. Dr. Fagan also continues to be denied access to his home, and has not had such access for the 3 years this action has been pending. The home has now burned down while Plaintiff occupied it.

10. The relief sought in this Writ Petition is not available by the District Court.

11. I certify that I have read this Petition and, to the best of my knowledge, information and belief, this Petition complies with the form requirements of Rule 21(d) and is not frivolous or interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the costs of litigation.

12. I further certify that this brief complies with all Nevada Rules of Appellate Procedure, including the requirements of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

13. I certify that I provided notice of my intent to file this petition by e-mail to Ogonna Brown prior to its filing, and included a copy of the forthcoming petition.

I declare, under penalty of perjury the foregoing is true and correct.

DATED this 28th day of March, 2024

/s/ Allison R. Schmidt
Allison R. Schmidt, Esq.

I. PETITION

COMES NOW, Phillip J. Fagan, Jr., as an individual and Trustee of the Phillip J. Fagan, Jr., 2001 Trust (hereinafter, “Petitioner”) by and through his counsel of record, Black & Wadhams, and petitions this Court for a Writ of Mandamus or, in the alternative, Writ of Prohibition under NRAP 21(a) for the following relief:

- (1) An Order Directing the lower court to firmly set trial in this matter on or before June 10, 2023;
- (2) An Order directing the lower court to vacate its improper order dismissing the counterclaims against Christiano De Carlo and Lail Leonard with prejudice; and

DATED: March 28, 2024

BLACK & WADHAMS

/s/ Allison R. Schmidt
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Attorneys for Petitioners

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IV. MEMORANDUM OF POINTS AND AUTHORITIES

A. INTRODUCTION

This case primarily deals with the meaning of “shall” – which this court has stated that "'shall' is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature." *S.N.E.A. v. Daines*, 108 Nev. 15, 19, 824 P.2d 276, 278 (1992). Additionally, Black's Law Dictionary defines "shall" as meaning "imperative or mandatory. . . . inconsistent with a concept of discretion." Black's Law Dictionary, 1375 (6th ed. 1990).

Once it is determined that a litigant is entitled to a preferential trial setting under NRS 16.025, the statute mandates that a trial be set within 120 days. Here, that means the Trial should be set no later than June 10, 2024. The statute recognizes that, in the case of the elderly or frail, justice delayed is truly justice denied. Should a writ not issue, there is a high likelihood that Dr. Fagan will not live to see justice in this case – the Case has been pending for three years and there has been no discovery, and no substantive judgments of any kind.

Next, immediate writ relief is required because Dr. Fagan wishes to pursue claims against Christiano De Carlo and Lail Leonard for fraud, trespass, nuisance, waste, and unjust enrichment/quasi contract relating to events that took place in late 2020 and early 2021. Because the lower court improperly dismissed claims that were no longer pending before it with prejudice, dispute NRCP 4(e)(2)'s clear mandate

that claims be dismissed without prejudice, Fagan has not been able to refile the claims, and the 3-4 year statutes of limitation are dangerously close to passing.

B. RELIEF SOUGHT

Pursuant to the Nev. Const. Art. 6 § 4, NRS 34.320 or NRS 34.160 and NRAP 21, Petitioners request that this Court issue a Writ of Mandamus and/or Writ of Prohibition instructing Respondent, the Eighth Judicial Court of the State of Nevada and the Honorable Judge Erika Ballou to:

- (1) An Order Directing the lower court to firmly set trial in this matter on or before June 10, 2023;
- (2) An Order directing the lower court to vacate its improper order dismissing the counterclaims against Christiano De Carlo and Lail Leonard with prejudice; and

C. ISSUES PRESENTED

Issue One: Whether Dr. Fagan will be irreparably harmed where the lower court has determined that, as a result of his advanced age and infirm health, he is entitled to a preferential trial setting pursuant to NES 16.025, but failed to set the trial within 120 days, and instead set it in the ordinary course.

Issue Two: Whether the District Court lacked jurisdiction to dismiss claims that had already been dismissed voluntarily pursuant to NRCP 41.

Issue Three: Whether the District Court erred in dismissing Defendants' counterclaims pursuant to NRCP 4(e)(2) with prejudice when the Rule mandates that dismissal be without prejudice.

D. STATEMENT OF PERTINENT FACTS

This case arises from a dispute over a residential home located in the Lake Las Vegas community at 1 Grand Anacapri, Henderson, Nevada (the "Property"). Petitioner has owned the Property since 2006. AA000001].

a. Facts Germane to the Dismissal Issue

On April 6, 2021, AAL-JAY filed its Complaint. [*See* Appellant's Appendix "AA", at AA000001] On May 3, 2021, AAL-JAY filed its First Amended Complaint. [AA000020]. On May 18, 2021, Fagan filed his Answer to the Amended Complaint and Counterclaims against Christiano DeCarlo and Lail Leonard. [AA000082]. Leonard and DeCarlo were not existing parties to the case, so, in order for the Court to establish jurisdiction over them, Fagan should have facilitated the issuance of summons as to Leonard and DeCarlo, and effectuated service of process pursuant to NRCP 4. This was not done.

Approximately 15 months later, while the case was on a litigation stay demanded by counsel for Plaintiff¹, Counsel for AAL-JAY filed a motion to dismiss

¹ [AA000125, stating ("It was the Court's understanding this matter would be stayed until a decision was made on appeal.")]

on behalf of Leonard and DeCarlo, seeking to dismiss the claims asserted by Defendants against Leonard and DeCarlo for failure to serve within the 120-day time frame set forth in NRCP 4(e). [AA000130]. Importantly, the Motion does not seek dismissal “with prejudice” nor does the motion even contain the word “prejudice.” [Id.]

Fagan’s counsel reviewed the docket and the work that had previously been done on the case and ascertained that the claims had not been served, and believed dismissal was proper. Therefore, Counsel for Defendants filed a notice of voluntary dismissal of the Claims on October 7, 2022, dismissing the claims without prejudice. [AA000135].

On Friday, October 14, 2022, the Law Clerk from Department 24 reached out to Allison Schmidt, Esq. – one of the attorneys for Defendants and indicated that it appeared the Motion to Dismiss was now moot, and asked that Defendants obtain a stipulation that also agreed to vacate the hearing, so that the hearing could be taken off calendar. [AA00138]. A stipulation was immediately prepared in accordance with the directives of the clerk and sent to counsel for Plaintiff for approval. [Id.]. The email with the stipulation, and a subsequent follow-up email went unresponded to. [Id.]

With the hearing still appearing on calendar for October 18, 2022 at 9:00a.m., the parties both attended the scheduled hearing. [AA000139]. Before taking any

argument, the judge noted that a voluntary dismissal of the claims had been filed but that it appeared there was a disagreement as to whether or not the dismissal should be with or without prejudice. [AA000140, Transcript, at 2:16-17]. Counsel for Fagan was stunned by this remark because (1) The Motion filed by AAL-JAY did not request dismissal with prejudice; (2) NRCP 4(e)(2) clearly mandates that dismissals based on a failure to serve be without prejudice; and (3) if the Court lacked jurisdiction over the third parties (Leonard and DeCarlo) absent proper service, the Court would additionally lack jurisdiction to enter a judgment on the merits on the claims asserted against DeCarlo and Leonard. [AA000141-000142, Transcript at 3:15-4:8].

In her initial remarks, the judge made the clearly erroneous observation that she believed dismissal should be with prejudice. [AA000140, Transcript at 2:18-2:19]. Counsel for Decarlo/Leonard/AAL-JAY, Ogonna Brown, an experienced litigator, oddly agreed to the erroneous statement:

THE COURT: Right. But it didn't look like they agreed to whether it was with or without prejudice. But it appeared to me that without proper service it'd have to be -- **it has to be with prejudice** because it's long after the 120 days.

MS. BROWN: **That's precisely right**, Your Honor. As we set forth in our motion to dismiss for insufficient service, the time to serve, 120 days, expired on September 15th, 2021.

[AA000140, Transcript at 2:16-22 (emphasis added)]. When first permitted to speak, counsel for Defendants directed the Court attention to the mandatory language of NRCP 4(e)(2):

MS. SCHMIDT: Your Honor, the rule on this is clear. It's NRCP 4(e)(2). The rule says that if service isn't made within the 120 days the Court must dismiss without prejudice. So, I'm confused as to where they're even getting with prejudice. And it makes sense because on the one the hand when you say you've not been served, you're specially appearing essentially in saying the Court doesn't have jurisdiction over these claims. But to ask for a what amounts to a judgement on the merits which is with prejudice would be invoking the Court's jurisdiction.

So, if you look at NRCP 4(e)(2) which is the exact situation were in here, it -- it says, you know, it's black letter law without -- it must be without prejudice. And that's why we didn't oppose because, You know, I looked back, it hadn't been served. And so we try to obviate those hearings by filing the voluntary dismissal which we filed about 10 days ago or 11 days ago. And I also sent stipulations to Ms. Brown at the suggestion of the law clerk and heard nothing back on that. So this is all kind of a surprise to me and, I guess, kind of an affront to the rules of civil procedure to ask for something that's contradicted by the rule itself.

[AA000141-000142, Transcript at 3:15-4:8]. The judge indicated she had not read that rule, as she had been looking at "NRCP 4(1)" -- which appears to be a misstatement because there is no NRCP 4(1). [*Id.* at 4:9]. The judge then read rule 4(e)(2) while the parties waited, and noted the mandatory language of 4(e)(2): "It does say -- Ms. Brown, **it does say without prejudice.**" [*Id.* at 4:12 (emphasis added)]. Counsel for AAL-JAY/DeCarlo/Leonard also noted the mandatory

language: “MS. BROWN: Your Honor, I’m seeing that.” [*Id.* at 4:14]. Ms. Brown then proceeded to argue that the Court should violate the Rule. [*Id.*]

Despite reciting the mandatory language of the rule, and the fact that the Motion never requested dismissal with prejudice, the judge indicated that she was going to disregard the mandatory language of the rule and dismiss with prejudice:

THE COURT: But, Ms. Schmidt, here’s where I am. Ms. Schmidt, I’m going to dismiss it with prejudice. Take it up to the Court of Appeals or the Supreme Court

[*Id.* at 6:2-4.] The Court did, in its written Order, violate the mandatory provisions of NRCP 4(e), and acted in excess of its jurisdiction. [AA000146-000147].

b. Facts Germane to the Preferential Trial Setting Issue

On November 23, 2022, with the case having been pending for more than 18 months, and with the court disallowing any discovery from taking place, Fagan filed a Motion to Preferential Trial Setting. [AA000155]. At the time that Motion was filed, Fagan was 78 years old. [AA000157]. Fagan was also in failing cardiac health. [AA000161-000162].

On February 1, 2023, the Court denied Fagan’s Motion without so much as a hearing. [AA000163]. The Court incorrectly stated that Fagan had sought a stay of discovery pending appeal², when, in reality, it was AAL-JAY that sought the stay of discovery, in response to Defendant’s efforts to issue a subpoena to First American

² [AA00164 – Stating that “Defendants were granted a stay of Discovery.”].

Title Company. [AA000125.]. The Court's Order does not state why Fagan is not entitled to a preferential setting based on his advanced age (78 years old at the time) and failing health. [AA000163-000164]. It states only that the "facts presented" do not "reasonably justify. . . the trial dates to be moved." [AA00164].

On December 27, 2023, Fagan filed a renewed motion for preferential trial setting, following a fall down an escalator that exacerbated his already poor health. [AA000168]. Fagan was now nearly 80 years old, with a number of cardiac issues. [AA000169, AA000174-000175; AA000178-000179]. Again, the court held no hearing on the Motion, but instead issued a minute order³. The resulting Order stated that Fagan was now entitled to a preferential trial setting under 16.025, based on his failing health and advanced age. [AA000215, "The Court agrees that a Preferential Trial Setting is necessary at this time, therefor, the Motion is GRANTED as to this issue."] However, instead of setting the trial within 120 days, as mandated by the Statute, the Court set a trial date more than 9 months out, stating that "given the nature of this case, the Court does not find 120 days sufficient to conduct the necessary discovery." [AA000215].

Despite claiming that substantial discovery needed to be conducted in the case, the Court issued a scheduling order on March 5, 2024 which stated that the case's

³ It should be noted that the lower court stopped allowing the parties to have hearings in this matter following the October 18, 2022 hearing on the Motion to Dismiss.

original discovery deadlines were still in effect – all of which expired while the case was on a mandatory stay of discovery sought and obtained by AAL-JAY. [AA000220, stating “All discovery deadlines, deadlines for filing dispositive motions and motions to amend the pleadings or add parties are controlled by the previously issued Scheduling Order...”]. In sum, Fagan, at 79 years of age, has been stripped of possession of his home for over 3 years while waiting for a trial on a case where absolutely zero discovery has been allowed, and where zero discovery apparently will be allowed. [*Id.*].

E. STANDARD OF REVIEW

The Nevada Supreme Court has original jurisdiction to issue writs of prohibition and mandamus. Nev. Const. Art. 6 § 4. "A writ of prohibition 'serves to stop a district court from carrying on its judicial functions when it is acting outside its jurisdiction.'" *Stephens Media v. Dist. Ct.*, 125 Nev. 849, 857, 221 P.3d 1240, 1246 (2009) (*quoting Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 498, 125 Nev. 495, 215 P.3d 705, 707 (2009)); *see also* NRS 34.320. "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.'" *Williams v. Dist. Ct.*, 127 Nev.____,____, 262 P.3d 360, (Adv. Op. No. 45, July 28, 2011) (*quoting International Game Tech. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 124 Nev. 193, 179 P.3d 556, 558 (2007)); *see also* NRS 34.160.

Similarly, “where an important issue of law needs clarification and public policy is served by this court’s invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be justified.” *Mineral County v. State, Dep’t of Conserv.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2011) (internal citations omitted).

Writ relief is warranted where the Petitioners do not have a plain, speedy, and adequate remedy at law. *Millen v. District Court*, 122 Nev. 1245, 1250-1251 (2006). Special factors favoring writ relief include status of underlying pleadings, types of issues raised by the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented. *D.R. Horton v. District Court*, 123 Nev. 468, 474-75 (2007). An appellate court generally will address only legal issues presented in a writ petition. *See Poulos v. Eighth Jud. Dist. Ct.*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982). “[T]he standard” in the determination of whether to entertain a writ petition is “[t]he interests of judicial economy.” *Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1355, 950 P.2d 280, 281 (1997). When the parties raise only legal issues on appeal from a district court order, the Court reviews the matter de novo. *St. James Village, Inc. v. Cunningham*, 125 Nev. 211, 216 (2009).

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F. ARGUMENT

a. The Lower Court Acted Outside its Jurisdiction in Dismissing the Previously-Dismissed Claims with Prejudice.

This Court has previously held that the notice of dismissal under NRCP 41(a)(1)(i) "closes the file. There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court." *Federal Sav. and Loan Ins. Corp. v. Moss*, 88 Nev. 256, 495 P.2d 616 (1972). Fagan's voluntary dismissal of the counterclaims stripped the district court of jurisdiction over the matter. *See Jeep Corp. V. Nev. Second Judicial Dist. Court*, 98 Nev. 440, 444, 652 P.2d 1183, 1186 (1982)

When the District Court inexplicably continued forth with the hearing, and dismissed the already-voluntarily-dismissed claims "with prejudice," it acted outside of its jurisdiction. Now, Defendants are unable to re-file the claims (or any claims that would be barred by preclusion) because of the lower court's improper dismissal. Thus, immediate writ relief is warranted. *See Young v. Nev. Title Co.*, 103 Nev. 436, 442, 744 P.2d 902, 905 (1987) (noting that a "court does not have jurisdiction to enter judgment for or against one who is not a party to the action"); *see also Canarelli v. Eighth Judicial Dist. Court*, 136 Nev. 247, 250, 464 P.3d 114, 119 (2020) ("When the district court acts without or in excess of its jurisdiction, a writ of prohibition may

issue to curb the extrajurisdictional act.") (*quoting Toll v. Wilson*, 135 Nev. 430, 432, 453 P.3d 1215, 1217 (2019)).

Even if the notice of dismissal were not filed, a writ should issue requiring the lower court to vacate its order. Traditional writ relief is also available where (1) the petitioner can show a legal right to have the act done which is sought by the writ: (2) the act which is to be enforced is that which it is the plain legal duty of the respondent to perform, without discretion on his part either to do or refuse; (3) the writ will be availing as a remedy, and that the petitioner has no other plain, speedy, and adequate remedy. *Walker v. Second Judicial Dist. Court*, 136 Nev. Adv. Rep. 80, 476 P.3d 1194, 1196 (2020). Here, the mandatory provisions of NRCP 4(e)(2), which the lower court is not at liberty to disregard, state that dismissal for failure to serve within the 120-day time frame must be "without prejudice." If the claims were still pending before the Court at the time of the hearing, which they were not, Fagan was entitled to have the Court enter dismissal without prejudice. A writ would remedy this error, and the Defendant has no plain, speedy and adequate remedy at law, because by the time an appeal is taken following the current November trial, assuming the appeal takes 18 months to conclude, all statutes of limitations on the claims for unjust enrichment, quasi contract, breach of lease, nuisance/waste, etc. will have expired, and Plaintiff will be unable to assert his claims.

b. Writ Relief Should Issue to Correct the Lower Court’s Disregard of the Mandatory Provisions of NRS 16.025.

Courts in the State of California, interpreting a similar statute to Nevada’s preferential trial setting statute have held that a disregard for the rights afforded by the statute entitles the aggrieved party to writ relief.

A consistent line of precedent has arisen from writ proceedings involving the provisions of [the preferential trial statute⁴] and superior courts have “no discretion to avoid the command of section 36[] in the interest of efficient management of the court's docket as a whole.” (*Miller v. Superior Court* (1990) 221 Cal.App.3d 1200, 1204 [270 Cal. Rptr. 766] (*Miller*).) Having granted trial setting preference, respondent superior court was required to set trial within 120 days. As petitioner's entitlement to relief is obvious, peremptory writ relief is warranted.

Pabla v. Superior Court, 90 Cal. App. 5th 599, 601, 307 Cal. Rptr. 3d 2 (2023)

Nevada law permits Courts to order an expedited trial. NRS 16.025. The purpose of NRS 16.025 is set forth in the legislative history from 1987:

Assemblyman Bill Kissam, Assembly District No. 4, reviewed the bill, saying that the original intent of the bill was to address a problem senior citizens had in obtaining a timely date for trial on a civil action. The bill drafters had also added language relating to a party suffering from a terminal illness also receiving preferential settings.

⁴ CA Code of Civil Procedure Sec. 36(a).

See Minutes of the Nevada State Legislature Assembly Committee on Judiciary, May 20, 1987. Assemblyman Kissam went on to explain his reasoning for proposing the law:

Mr. Kissam said, "The history behind my bill is it was brought to my attention by a senior citizen who knew of the California method of doing this very same thing for the last two years...there were attorneys on the Assembly Judiciary committee who felt the judge should have the latitude to provide for senior citizens who are over 70 if they have a disability or illness...any continuances requested during these preferential setting of these trials could only be for 120 days...**I respectfully request you to consider this bill in that the senior citizens will be greatly impacted by this because what is happening now with continuances and delayed court settings...the seniors are dying.**"

See Minutes of the Senate Committee on Judiciary, June 3, 1987. California, which has a substantially similar preferential trial setting law has discussed the public policy considerations behind preferential trial settings as well. In one case, the Court noted that the legislative history comments "reflect the purpose of subdivision (a) to safeguard to litigants beyond a specified age against the legislatively acknowledged risk that death or incapacity might deprive them of the opportunity to have their case effectively tried and the opportunity to recover their just measure of damages or appropriate redress." *Rice v. Superior Court*, 136 Cal. App. 3d 81, 88-89, 185 Cal. Rptr. 853, 856-57 (1982). Another California Court has noted that "[t]he express legislative mandate for trial preference is a substantive public policy concern which

supersedes any balancing considerations.” *Ebers v. Parks*, 2022 Cal. Super. LEXIS 101607, *3.

The lower Court’s purported concerns about the parties ability to complete discovery in 120 days do not vary the mandatory provisions of NRS 16.025. Specifically, the statute directs that the Court must set a trial within 120 day, once it determined a litigant is eligible for preference. *See* NRS 16.025. Courts in California agree that the Court’s docket and discovery matters may not be taken into consideration on a motion for preferential trial setting:

Defendants make several arguments about the difficulty of preparing for trial on an expedited basis, how the shortened timeframe violates due process, and even that their demurrer hasn't been heard yet. **[The Preferential Trial Setting Statute] was enacted with full knowledge that the discovery process and summary judgment timelines would be affected.** Nothing in [The Preferential Trial Setting Statute] permits these issues to be weighed by the Court when granting a preferential trial date.

Hansen v. San Demente Villas by the Sea, 2019 Cal. Super. LEXIS 28755, *10 (emphasis added).

Defendant Dr. Fagan, at 79 years of age is 6 years older than the life expectancy for a male in the United States. *See* <https://www.cdc.gov/nchs/fastats/life-expectancy.htm>. AAL-JAY’s primary witness and President, Lail Leonard, is 83 years old, and four years older than the average life expectancy for females in the U.S. *Id.* The other integral witness to this

case, Richard Scott, Esq. passed away in 2022 while Dr. Fagan awaited his day in Court. [AA000213]. Once the lower court determined Dr. Fagan was eligible for an expedited trial under NRS 16.025, the court did not have discretion to disregard the 120-day mandate. The reason why his Motion for Preference was granted is the same reason why writ relief must issue – there is no plain, adequate or speedy remedy at law to compel the lower court to comply with the mandatory provisions of the statute. Should Dr. Fagan be required to wait until the conclusion of the trial in November to file an appeal, the appeal will be rendered moot, and the enduring concern, which is supported by the declaration of Dr. Fagan’s cardiologist, is that Dr. Fagan may not be alive to see justice done.

G. CONCLUSION

Based on the foregoing, Petitioners seek a writ commanding the lower court to vacate its order dismissing the Counterclaims with prejudice, and a writ commanding the lower court to set this matter for trial on or before June 10, 2024.

H. CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition for writ relief 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 opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this petition for writ relief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and 5702 words.

FINALLY, I CERTIFY that I have read this petition for writ relief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition for writ relief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition for writ relief regarding matters in the record to be supported by a reference to the page 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 answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: March 28, 2024

BLACK & WADHAMS

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of March, 2024, I served via the Eighth Judicial District Court's electronic filing and service system ("Odyssey") and via e-mail a true and correct copy of the foregoing EMERGENCY PETITION FOR WRIT RELIEF, postage prepaid and addressed to:

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