IN THE SUPREME COURT OF THE STATE OF NEVADA

Estate of MARY CURTIS, deceased; LAURA LATRENTA, as Personal Representative of the Estate of MARY CURTIS; and LAURA LATRENTA, individually, Plaintiffs/Appellants,

Appellants,

vs.

ANNABELLE SOCAOCO, NP; IPC HEALTHCARE, INC. aka THE HOSPITALIST COMPANY, INC.; INPATIENT CONSULTANTS OF NEVADA, INC.; IPC HEALTHCARE SERVICES OF NEVADA, INC.; HOSPITALISTS OF NEVADA, INC.,

Respondents.

Supreme Court No. 79116
District Court Case No. A750520

APPELLANTS' REPLY BRIEF

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LEGAL ANALYSIS AND ARGUMENT

Ms. Latrenta argued in her Opening Brief that the trial court erred in deciding to entertain reconsideration of a previously denied motion to dismiss or in the alternative for summary judgment of Ms. Latrenta's Complaint. Ms. Latrenta's position is that insufficient grounds were offered by IPC to warrant reconsideration. IPC's response, purportedly in rebuttal of this position, is no rebuttal at all. IPC attempts to establish the propriety of the trial court's reconsideration (and subsequent granting of the motion to dismiss/for summary judgment), by arguing *ad nauseam* that the trial court had the authority to reconsider its own previous non-final orders. IPC's arguments and citations are directed to this point.

Ms. Latrenta was not contesting the trial court's ***authority***, *i.e.*, jurisdiction. Certainly that court had the jurisdiction to reconsider its non-final orders. Yet, it was an abuse of discretion for it to reconsider the previous order denying the motion to dismiss/for summary judgment, absent an intervening change of law or the facts, or a showing the previous order was clearly erroneous. IPC points to no new facts or law warranting reconsideration, and thus this Court should reverse the trial court on this ground alone.

IPC does not appear to contest that the trial court should have viewed all factual disputes at summary judgment in the light most favorable to the nonmoving party—which the trial court quite self-evidently chose not to do. That is, if a jury

could return a verdict for Ms. Latrenta on the factual disputes, then the trial court at summary judgment was obliged to deny the motion to dismiss/for summary judgment. *Valley Bank of Nevada v. Marble*, 775 P.2d 1278, 1279 (Nev. 1989). Finally, there appears to be no debate from IPC that this Court should review a pre-trial judgment turning on a factual dispute *de novo*. *Winn v. Sunrise Hosp. & Medical Center*, 277 P.3d 458, 459 (Nev. 2012)); *see also Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029 (Nev. 2005) ("This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court. * * * This court has noted that when reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.").

I. IPC points to no evidence showing that Ms. Latrenta was on inquiry notice prior to April 14, 2016.

As an initial matter, IPC's recitation of facts and its argument confuse the issue by alluding to points at which Ms. Latrenta became aware of ***the LCC defendants' negligence***, *i.e.*, the erroneous administration of morphine to Mary Curtis, as if this should pertain to the cause of action against IPC as well. For example, after stating, "Latrenta bluntly admitted she subjectively believed negligence occurred and testified as such" (RAB at 11), IPC then quotes lines from Ms. Latrenta's deposition where she recounted becoming aware ***of the LCC defendants' negligence***. Citing to RESP122-123, IPC goes on to claim that Ms.

Latrenta's Interrogatory Answers demonstrate that pertinent conversations occurred between her and a Dr. Jason Katz and a Nurse Robert Firestone on or before March 11, 2018 (RAB at 10), but the citation simply does not support this claim. Ms. Latrenta's Interrogatory Answer is directed to conversations regarding the morphine error, not to IPC's delayed response. Furthermore, the Interrogatory Answer does not even date the conversation.[1] IPC later argues, "the critical issue is when a plaintiff had access to the facts indicating injury due to ***some act of negligence***. Here, as evidenced below, Appellants (specifically, Laura Latrenta) admittedly had access to those facts * * * before Curtis passed away on March 11, 2016." (RAB at 18 (emphasis altered)) Yet, some act of negligence by some defendant, as the basis for some other claim, is not the test for inquiry notice. Prior to April 14, 2016, Ms. Latrenta was on inquiry notice ***that the LCC defendants*** had committed negligence, and that is it.

Such recitations and arguments of IPC are misleading and smack of desperation. Ms. Latrenta is suing IPC for a delay in responding to the erroneous administration of morphine, not the erroneous administration itself. Ms. Latrenta's notice as to the latter has nothing to do with notice as to the former. "[T]he term 'injury,' as used by NRS 41A.097, mean[s] 'legal injury,' which 'encompasses not

[1] Additionally, for some unknown reason, IPC chose to cite Ms. Latrenta's Complaint against Dr. Saxena as demonstrating evidence of inquiry notice on or before March 11, 2018. (RAB at 10)

only the physical damage but also the negligence causing the damage.'" *Pope v. Gray*, 760 P.2d 763, 765 (Nev. 1988) (quoting *Massey v. Litton*, 669 P.2d 248, 250 (Nev. 1983)).

Moreover, Ms. Latrenta was not put on inquiry notice of Mary Curtis's IPC injury simply because Ms. Latrenta thought her mother should have been sent to the hospital before March 11, 2016. Ms. Latrenta's desire for immediate emergency treatment–a desire which she likely would have had, whether the delay was negligent or not—cannot be the test for inquiry notice. Ms. Latrenta is not a medical professional; she was simply a daughter fighting for her mother's life. The plaintiffs in *Winn v. Sunrise Hospital & Medical Center*, and *Pope v. Gray*, *see infra*, probably all believed that their respective family members ought not to have died, but quite evidently such subjective, non-professional beliefs on the part of plaintiffs do not constitute inquiry notice. Similarly, the mere fact that Ms. Latrenta may have thought her mother should have been sent to the hospital sooner does not constitute notice to her that it was negligence for IPC not to have done so.

Subjective desires and lay opinions aside, IPC has taken the position that either Ms. Latrenta discovered the injury inflicted by IPC on the date of Mary Curtis's death, or Ms. Latrenta should have discovered the injury on that date.

> [A]n action for injury or death against a provider of health care may not be commenced more than 3 years after the date of injury or 1 year after the plaintiff discovers or through the use of

> reasonable diligence should have discovered the injury, whichever occurs first.

NRS 41A.097(2). In effect, IPC argues that Ms. Latrenta was present and witnessed the injury, *i.e.*, she knew at what point her mother was sent to the hospital, and therefore she had notice at least by the date of death.

However, awareness of the passage of time does not translate to awareness that that passage of time actually constitutes a medically-significant delay. Yet IPC goes on to implicitly argue from *Pope v. Gray* that Ms. Latrenta was surely aware prior to Mary Curtis's death that the passage of time was possibly medically-significant, *i.e.*, possibly negligent, thereby putting Ms. Latrenta on inquiry notice. "By implication, *Pope* stands for the proposition that a wrongful death cause of action commences on the date of death if a plaintiff is aware of possible negligence that caused the death prior to (or simultaneous with) the actual death." (RAB at 19-20) *Pope v. Gray* actually dispels such an argument.

In *Pope*, surgeons told the plaintiffs that the surgeons were at a loss as to why the plaintiffs' mother had died immediately following a surgery to remove a bowel obstruction. This might seem a point in time wherefrom a reasonable person would begin inquiry into whether there had been some kind of medical malpractice involved, *i.e.*, possible negligence. But this Court prudently decided that the point at which ***speculation*** might begin was not enough to begin the statute of limitations

running. *Pope v. Gray*, 760 P.2d at 767-768. Indeed, even access to an autopsy report specifying the very injury forming the basis of the eventual claim was not enough to trigger the statute of limitations in *Pope*. Rather, it was only upon the plaintiffs receiving the death certificate specifying the exact same injury as the cause of death, did the statute of limitations begin running. *Id.* at 768. Likewise, the mere fact that Ms. Latrenta, a person with no medical training, could note the passage of time from the day her mother received the wrong medication, does not mean she was on inquiry notice as to negligence.

Furthermore, this Court's precedents establish that it is not reasonable to expect a person to be on inquiry notice, based upon a hospital staff member's off-hand comment that Mary Curtis should have been sent to the hospital sooner. In *Pope*, the plaintiffs were not put on inquiry notice even by the filing of a coroner's report. *Id.* In any event, the trial court erred in concluding that Ms. Latrenta was put on inquiry notice by the comment of an unidentified, non-authoritative hospital staff member to the effect that, "they should have brought her here as soon as this happened." APP0338. The trial court should have viewed this comment in the light most favorable to Ms. Latrenta, *see Wood v. Safeway, Inc.*, *supra*, and the trial court would then have concluded that a jury could find that this off-hand comment did not constitute inquiry notice of a legal injury, but was merely an expression of disdain for the competence of the rehabilitation facility, or puffery for the hospital. *See*

Valley Bank of Nevada v. Marble, 775 P.2d at 1279-1278 (jury entitled to conclude that a trustee had the power to bind the trust as a guarantor of a loan to the trustee's corporation).

Undaunted, IPC persists in characterizing Ms. Latrenta's awareness of the passage of time as the "operative fact." IPC relies upon *Winn v. Sunrise Hosp. & Medical Center*, 277 P.3d 458 (Nev. 2012), to argue that it is the plaintiff's awareness of the "operative fact"—the operative fact in this case according to IPC being the passage of time—that puts a plaintiff on inquiry notice. However, IPC should review how the *Winn* Court actually recited and characterized the operative fact: "[H]e also had access to Dr. Ciccolo's postoperative report that referenced air being present in Sedona's heart at ***inappropriate*** times during the surgery." *Id.* at 463 (emphasis added). "Dr. Ciccolo's report indicated that a 'notable volume of air' was present in Sedona's left ventricle at '***inappropriate*** times during the [surgical] procedure.'" *Id.* at 461 (emphasis added). Thus IPC is simply incorrect when it characterizes "the operative fact in *Winn* which trigged inquiry notice was a mere note in a medical record stating air was in the heart" (RAB at 27); rather the operative fact in *Winn* was that air was in the heart at "***inappropriate*** times during the surgery."

Finally, IPC attempts to analogize Ms. Latrenta's circumstances and this appeal with this Court's decision in *Barcelona v. Eighth Judicial District Court*, 448 P.3d 544 (Nev. 2019). Yet, *Barcelona* is not only distinguishable, it in truth provides

support for Ms. Latrenta's position.[2] In *Barcelona*, the injury and death occurred in November 2015 and the plaintiffs filed a complaint against defendant Summerlin Hospital Medical Center, as well as other defendants, in October 2016. However, the plaintiffs failed to attach a medical expert affidavit regarding the claim against defendant Summerlin, and the trial court dismissed the case against Summerlin on that ground. The court permitted the plaintiffs to continue their case against the other defendants, and the plaintiffs subsequently discovered additional facts against Summerlin. The plaintiffs then amended their complaint to add Summerlin back into the case as a defendant in May 2018.

This Court in *Barcelona* did not, as IPC wishes for it to do here, look to the date of death as providing inquiry notice. Rather this Court, logically-enough, stated that irrefutable inquiry notice as to Summerlin occurred on the date of the first complaint against Summerlin. "[T]he evidence does irrefutably demonstrate that petitioners were on inquiry notice of Barcelona's injury, and that Summerlin Hospital possibly caused that injury, at least as of October 29, 2016, the date they filed their initial complaint." *Id.* at *2. In contrast, in the case on appeal here, both Dr. Saxena ***and*** Nurse Practitioner Socaoco were sued within one year of Ms. Latrenta's Complaint against the LCC defendants. In sum, the lower court erred as

[2] As an unpublished opinion, this case does not represent *stare decisis*. *See* NEV.R.APP.P. 36(c).

a matter of law here, in dismissing this case/granting summary judgment, and must be reversed.

II. The legibility of both the printed and signed name of Nurse Practitioner Socaoco on the post-acute progress note is a point of disputed fact.

IPC makes the following comment in its brief: "Inexplicably, Appellants were able to sue Life Care Defendants within one year in case A-17-750520-C but failed to file case A-17-754013-C until months later and after the one year limitation period expired against Respondents." (RAB at 28 (emphasis omitted)) Yet, the difference in time is hardly "inexplicable," inasmuch as the LCC defendants admitted from the beginning that they had erroneously administered an un-prescribed narcotic to Mary Curtis, and, given the circumstances, the negligence was *res ipsa loquitur*.

On the other hand, it took some time before Ms. Latrenta was on inquiry notice that not sending her mother to the hospital sooner was medically-significant and presented the possibility of negligence. Furthermore, it took quite some time for Ms. Latrenta to discover ***who*** was actually responsible for not sending her mother out. Ms. Latrenta was diligent in attempting to discover all facts that would have established the responsible parties (*see* AOB at 6-7), and notably IPC does not contest these facts. Only on December 6, 2017, when Ms. Latrenta's counsel deposed LCC defendant former Nurse Sansome, did Ms. Latrenta learn for the first

time of the involvement of Nurse Practitioner Socaoco in the injury and death of Mary Curtis. Notably, neither the LCC defendants nor Dr. Saxena had ever previously identified Nurse Practitioner Socaoco as a witness or a person of interest in Mary Curtis's care.

IPC relies upon the fact that Nurse Practitioner Socaoco's name appears in Mary Curtis's medical record (RESP179-182), although in only two places pertinent to the date in question, March 7, 2016 (RESP179; RESP182). Ms. Latrenta would invite this Court to peruse those pages of the medical record where the Socaoco name appears, and determine for itself how legible the name actually is, either in signed or print form; or, in contrast, whether it might be reasonable to believe that "Saxena" was the name recorded. Indeed, even the Coroner—with neutral, third party, eyes—in the coroner's report in this case, read the Progress Notes from the medical chart and believed that Dr. Saxena, rather than identifying a Nurse Practitioner Socaoco, had signed and taken the actions of March 7, 2016. (*See* RESP220)

"The appropriate accrual date for the statute of limitations is a question of law only if the facts are uncontroverted," *Winn*, 277 P.3d at 463. Only if no reasonable jury could have determined that Nurse Practitioner Socaoco's signature or printed name was anything other than legible should the trial court have taken this question away from a jury. This was twice the order of the previous District Judge. It was

error for the trial court to have taken this question away from a jury on the motion for reconsideration.

IPC attempts to distinguish this Court's decision in *Siragusa v. Brown*, 971 P.2d 801 (Nev. 1998), but fails in the attempt. IPC cites, as it did in front of the trial court, to NRS 41A.071 for the proposition that, as Nevada's medical expert affidavit requirement provides for identification by conduct only, *Siragusa*'s teaching has been superseded as to professional negligence and inquiry notice of both the injury and the injurer. As noted in Ms. Latrenta's Opening Brief (*see* AOB at 23-24), there is absolutely nothing in NRS 41A.071 suggesting that the affidavit statute pertains to the statute of limitations and inquiry notice. Indeed, they serve two distinctly different functions. The affidavit requirement is historically and expressly a gatekeeper provision intended to weed out claims lacking any merit. It was not intended to be used to deny diligent and legitimate claimants access to the courts by surreptitiously shortening the applicable statute of limitations. IPC goes on to argue that *Siragusa* was simply a different circumstance, involving an intentional tort rather than negligence. However, *Massey v. Litton* presaged the same teaching as applied to medical negligence.

> [W]e now determine when the patient "discovers" her legal injury.
>
> * * *

> The discovery may be either actual or presumptive, but must be of both ***the fact of damage*** suffered ***and*** the realization that the cause was ***the health care provider***'s negligence.

Massey v. Litton, 669 P.2d 248, 251 (Nev. 1983) (emphasis added). In sum, IPC's attempted distinction of *Siragusa* is without merit. Again, the lower court erred as a matter of law in dismissing this case/granting summary judgment here, and must be reversed.

CONCLUSION

It is Ms. Latrenta's position that the lower court erred in dismissing the Complaint/granting summary judgment in favor of IPC, and this Court should order reinstatement. Appellant prays this Court reverse and, or in the alternative, vacate the lower court's order with directions to send these matters to a jury.

RESPECTFULLY SUBMITTED this 13th day of January, 2020.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 2,857 words.

3. 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), which requires every assertion in the brief 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

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brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 13th day of January, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1)(B), I certify that I am an employee of Kolesar & Leatham and on the 13th day of January, 2020, I submitted the foregoing ***Appellants' Reply Brief*** to the Supreme Court of Nevada's electronic docket for filing and service upon the following:

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