IN THE SUPREME COURT OF THE STATE OF NEVADA

VALLEY HEALTH SYSTEM, LLC (doing business as "Centennial Hills Hospital Medical Center"), a foreign limited liability company,
Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA ex rel. THE COUNTY OF CLARK, AND THE HONORABLE JUDGE JERRY A. WIESE II,
Respondent,

and

ESTATE OF REBECCA POWELL, through BRIAN POWELL, as Special Administrator; DARCI CREECY, individually and as Heir; TARYN CREECY, individually and as an Heir; ISAIAH KHOSROF, individually and as an Heir; LLOYD CREECY, individually,

Real Parties In Interest,

and

DR. DIONICE S. JULIANO, M.D., an individual; DR. CONRADO C.D. CONCIO, M.D., an individual; DR. VISHAL S. SHAH, M.D., an individual,
Additional Parties In Interest.

Supreme Court No.:

District Court No.: A-19-788787-C

PETITION FOR WRIT OF MANDAMUS

S. BRENT VOGEL
Nevada Bar No. 6858
ADAM GARTH
Nevada Bar No. 15045
Lewis Brisbois Bisgaard & Smith LLP
6385 South Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Telephone: 702-893-3383
Facsimile: 702-893-3789
Attorneys for Petitioners

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.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court: Lewis Brisbois Bisgaard & Smith LLP; Paul Padda Law, PLLC; John. H. Cotton & Associates

3. If litigant is using a pseudonym, the litigant's true name: N/A

DATED: December 22, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

/s/ Adam Garth

S. BRENT VOGEL, ESQ.
Nevada Bar No. 6858
ADAM GARTH, ESQ.
Nevada Bar No. 15045
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Tel: 702-893-3383

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RELIEF SOUGHT

Petitioner hereby petitions for a writ of mandamus requiring the district court to vacate its order of December 17, 2020, in the case of Estate of Rebecca Powell, et al. v. Valley Health System, LLC, et al, Clark County Case No. A-19-788787-C. The order denied Petitioner an award of summary judgment against the Real Parties in Interest (Plaintiffs) based upon the expiration of the statute of limitations contained in NRS 41A.097 (2)(a) and (c).

This petition is based upon the ground that the district court's order is without legal and factual bases, and Respondent manifestly abused his discretion by denying Petitioner's motion for summary judgment on a case dispositive issue when all admissible evidence demonstrated contrary to Respondent's findings. This petition is also based upon the ground that Petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law.

ROUTING STATEMENT

This matter is presumptively retained by the Nevada Supreme Court pursuant NRAP 17(a)(12). The Petition for Writ of Mandamus ("Petition") raises as a principal issue a question of statewide public importance.

The Petition raises the issues of (1) what constitutes irrefutable evidence of inquiry notice in a professional negligence case for purposes of the commencement of the running of the statute of limitations as defined in NRS 41A.097 and whether such notice may thereafter be tolled, and (2) the obligations of an opponent of a

motion for summary judgment to come forth with admissible evidence to properly oppose said motion when a prima case for summary judgment has been made by the moving party. These issues have been raised throughout this Petition.

ISSUES PRESENTED

1. At what point does a plaintiff receive irrefutable evidence of inquiry notice for purposes of the commencement of the statute of limitations in a professional negligence case and once received, can it be tolled?

2. In opposing a motion for summary judgment, must a party provide admissible evidence?

INTRODUCTION

Petitioner Valley Health System, LLC (doing business as "Centennial Hills Hospital Medical Center") (hereinafter "CHH"), a foreign limited liability company, hereby respectfully petitions this Court for the issuance of a Writ of Mandamus pursuant to Nev. Rev. Stat. § 34.150 et seq., Nev. R. App. P. 21 and Nev. Const. art. VI, § 4, directing Respondent to issue an Order granting Petitioner's Motion for Summary Judgment Based upon the Expiration of the Statute of Limitations due to Respondent's failure to recognize irrefutable evidence of inquiry notice supplied by the Plaintiffs which commenced the running of the statute of limitations, and by extension, the expiration of the statute of limitations 8 months prior to the commencement of this action.

A. Procedural History

Petitioner is a Defendant in a case entitled ESTATE OF REBECCA POWELL, through BRIAN POWELL, as Special Administrator; DARCI CREECY, individually and as Heir; TARYN CREECY, individually and as an Heir; ISAIAH KHOSROF, individually and as an Heir; LLOYD CREECY, individually;, Plaintiffs, vs. VALLEY HEALTH SYSTEM, LLC (doing business as "Centennial Hills Hospital Medical Center"), a foreign limited liability company; UNIVERSAL HEALTH SERVICES, INC., a foreign corporation; DR. DIONICE S. JULIANO, M.D., an individual; DR. CONRADO C.D. CONCIO, M.D., an individual; DR. VISHAL S. SHAH, M.D., an individual; DOES 1-10; and ROES A-Z;, Defendants

(Nevada Eighth Judicial District Court Case No. A-19-788787-C).

The Complaint in this matter was filed February 4, 2019 by Real Parties in Interest ESTATE OF REBECCA POWELL, through BRIAN POWELL, as Special Administrator; DARCI CREECY, individually and as Heir; TARYN CREECY, individually and as an Heir; ISAIAH KHOSROF, individually and as an Heir; LLOYD CREECY, individually (collectively "Plaintiffs"). All Plaintiffs, except Plaintiff Lloyd Creecy, alleged the following causes of action against CHH and the remaining co-defendants in their Complaint: (1) negligence/medical malpractice and (2) wrongful death. Plaintiffs Darci Creecy, Taryn Creecy and Isaiah Khosrof alleged a separate cause of action for negligent infliction of emotional distress against all Defendants, and Plaintiff Lloyd Creecy alleged his own cause of action for negligent infliction of emotional distress against all Defendants.

On September 2, 2020, CHH filed its Motion for Summary Judgment Based Upon the Expiration of the Statute of Limitations. Petitioners' Appendix Vol. I, No. 1, pp. 2-165.

On September 3, 2020, co-defendants filed their joinder in support of CHH's aforesaid Motion. Petitioners' Appendix Vol. I, No. 2, pp. 167-169.

Plaintiffs filed their opposition to CHH's Motion for Summary Judgment on September 16, 2020. Petitioners' Appendix Vol. II, No. 3, pp. 171-270.

On October 21, 2020, CHH filed its reply to Plaintiffs' Opposition to CHH's Motion for Summary Judgment after Respondent continued the originally scheduled

hearing on said motion until October 28, 2020. Petitioners' Appendix Vol. II, No. 4, pp. 272-344.

Co-defendants filed their joinder to CHH's aforesaid reply on October 21, 2020. Petitioners' Appendix Vol. III, No. 5, pp. 346-349.

On October 26, 2020, Respondent sua sponte issued a minute order continuing the hearing on all pending motions for summary judgment, including CHH's Motion, until November 4, 2020. Petitioner's Appendix Vol. III, No. 6, p. 351.

Without conducting the scheduled hearing on November 4, 2020, Respondent issued an order on October 29, 2020 denying CHH's Motion for Summary Judgment, the Notice of Entry of which was served and filed on November 2, 2020. Petitioners' Appendix Vol. III, No. 7, pp. 353-364.

Plaintiffs' claims all derive from an incident which occurred at CHH's hospital on May 11, 2017 when Plaintiffs' decedent, Rebecca Powell, passed away from acute respiratory failure. Ms. Powell was brought to CHH's emergency room on May 3, 2017 following an attempted suicide by prescription drug overdose. Plaintiffs allege Defendants were responsible for administration of Ativan to Ms. Powell during her stay at CHH, and thereafter failed to adequately monitor her, which Plaintiff claim resulted in her acute respiratory failure and the inability to revive her leading to her death. Petitioners' Appendix Vol I, No. 1, pp. 26-49.

Petitioner CHH's Motion for Summary Judgment asked the Respondent District Court to grant summary judgment in its favor because irrefutable evidence

demonstrated that Plaintiffs filed their Complaint eight (8) months after the expiration of the statute of limitations which commenced running twenty (20) months earlier, when Plaintiffs were on inquiry notice of their claims. Petitioners' Appendix Vol. I, No. 1, pp. 2-165 and Vol. II, No. 4, pp. 272-344.

The uncontroverted evidence demonstrated that Plaintiffs initiated two (2) separate State investigations alleging the very misconduct by CHH and its personnel which form the basis of the allegations contained in their Complaint. Plaintiffs' first complaint and request for investigation was initiated with the Nevada Department of Health and Human Services (sometime before May 23, 2017) (Petitioner's Appendix Vol II, No. 4, pp. 298, 327). Plaintiffs' second complaint and investigation request was initiated with the Nevada State Board of Nursing Board on June 11, 2017 Petitioner's Appendix Vol II, No. 4, pp. 298, 325-326).

Moreover, in May, 2017, shortly after Ms. Powell's death, Plaintiffs petitioned the Probate Court and obtained an order permitting them to obtain Ms. Powell's complete CHH medical record (Petitioners' Appendix Vol I., No. 1, pp. 152-155) upon which Plaintiffs' medical expert based his opinions that Defendants were negligent in their care and treatment of Ms. Powell. Petitioners' Appendix Vol. I, No. 1, p. 44, ¶6(B).

B. Respondent's Order Giving Rise to Petition

Respondent incorrectly found that a question of fact existed as whether the Plaintiffs were on inquiry notice of their claims in May and June of 2017 after

requesting and receiving Ms. Powell's medical records and initiating the two State investigations in which they alleged professional negligence against CHH and its personnel. Petitioners' Appendix Vol. III, No. 7, pp. 358-359.

Respondent based its decision on Plaintiffs' counsel's mere representation that the Plaintiffs themselves were confused by a death certificate and coroner's report as to Ms. Powell's cause of death. Petitioners' Appendix Vol. III, No. 7, pp. 358-359.

Plaintiffs submitted not one shred of admissible evidence to contradict their own reports irrefutably demonstrating their inquiry notice. Likewise, Respondent failed to identify one shred of admissible evidence supplied by Plaintiffs to support the presence of a factual issue. Respondent failed to properly consider that once inquiry notice is obtained there is no mechanism for tolling that notice. There is no sworn statement from any Plaintiff nor anyone with personal knowledge asserting that they never received the records, another factor which Respondent ignored.

Petitioners thereafter filed a motion for a stay with Respondent to permit this writ to be submitted. Said motion was scheduled to be heard on November 25, 2020, but the Court below issued a written decision on November 24, 2020 without a hearing, denying the request for a stay, the final order having been signed on December 17, 2020. Petitioners' Appendix Vol. III, No. 8, pp. 366-375.

Respondent manifestly abused its discretion by finding that "Although the Complaints filed by Brian Powell, suggest that Plaintiff may have at least been on

inquiry notice in 2017, the fact that the family was notified shortly after the decedent's death that the cause of death was determined to be a 'suicide,' causes this Court some doubt or concern about what the family knew at that time period" (Petitioners' Appendix, Vol. III, No. 7, p. 358), especially since the finding was not based upon any admissible evidence, but rather Plaintiffs' counsel's personal opinion and argument as to the alleged "confusion" that lacks any evidentiary value whatsoever.

Respondent further manifestly abused its discretion by finding that a State agency report making findings of deficiency was required for Plaintiffs to be on inquiry notice despite the report to said agency by Plaintiffs which alleged the very deficiencies forming the basis for the allegations in Plaintiffs' Complaint. Petitioners' Appendix, Vol. III, No. 7, p. 359.

Petitioner has suffered significant damages and will suffer future significant damages as a result of the actions of the Respondent as it is now forced to proceed to trial under the erroneous ruling. If Respondent had decided the Motion for Summary Judgment in accordance with Nevada law, it would have been completely case dispositive, eliminating the need to proceed with any further discovery and dispensing with the need to incur enormous additional expenses associated with the defense of a case which was dead on arrival.

A Writ of Mandamus is proper to compel the performance of acts by Respondent from the office held by Respondent.

Petitioner has no plain, speedy, or adequate remedy at law to compel the Respondent to perform its duty.

Petitioner's request for a Writ of Mandamus is necessary in order to compel Respondent to comply with the dictates of its office, to prevent further harm and injury to Petitioner and to compensate Petitioner for his damages.

Petitioner requests the issuance of a Writ of Mandamus directing Respondent to issue an Order granting his Motion for Summary Judgment.

This Petition is made and based upon the Affidavit following this Petition, the Petitioner's Appendix filed herewith and the Memorandum of Points and Authorities filed herewith.

STATEMENT OF FACTS

Plaintiffs commenced this action on February 4, 2019 by the filing of the Complaint. Based upon the Complaint and the accompanying medical affidavit, Rebecca Powell overdosed on Benadryl, Cymbalta, and Ambien on May 3, 2017.[1] Plaintiffs' further allege that EMS was called and came to Ms. Powell's aid, discovering her with labored breathing and vomit on her face.[2] Plaintiffs further allege that Ms. Powell was transported to CHH where she was admitted.[3]

Plaintiffs claim on May 10, 2017, Ms. Powell complained of shortness of breath, weakness, and a drowning feeling, and Defendant Vishal Shah, MD, ordered Ativan to be administered via IV push.[4] Plaintiffs assert that on May 11, 2017, Defendant Conrado Concio, MD, ordered two doses of Ativan via IV push.[5]

To assess her complaints, Plaintiffs alleged that a chest CT was ordered, but chest CT was not performed due to Ms. Powell's anxiety, and she was returned to her room.[6] Plaintiffs further alleged that Ms. Powell was placed in a room with a

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[1] Petitioner's Appendix Vol. I, No. 1, p. 26, ¶ 18

[2] Petitioner's Appendix Vol. I, No. 1, p. 26, ¶ 18

[3] Petitioner's Appendix Vol. I, No. 1, p. 26, ¶ 18

[4] Petitioner's Appendix Vol. I, No. 1, p. 27, ¶ 21

[5] Petitioner's Appendix Vol. I, No. 1, pp. 27-28, ¶ 22

[6] Petitioner's Appendix Vol. I, No. 1, pp. 27-28, ¶ 22; see also Petitioner's Appendix Vol. I, No. 1, p. 45

(footnote continued)

camera monitor.[7]

Plaintiffs' expert stated in his affidavit used to support the Complaint that pursuant to the doctor's orders, a dose of Ativan was administered at 03:27.[8] Thereafter, Ms. Powell allegedly suffered acute respiratory failure, which resulted in her death on May 11, 2017.[9]

On May 25, 2017, MRO, a medical records retrieval service responsible for supplying medical records to those requesting same on behalf of CHH, received a request for medical records from Plaintiff Taryn Creecy along with a copy of a court order requiring that Centennial Hills Hospital provide a complete copy of Rebecca Powell's medical chart.[10]

On June 2, 2017, the request for the medical records for Mrs. Powell was processed by MRO personnel.[11] On June 5, 2017, MRO determined that the records for Mrs. Powell were requested by Taryn Creecy, her daughter, that the records were requested to be sent to a post office box, and verified the court order for same.[12] On

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[7] Petitioner's Appendix Vol. I, No. 1, pp. 27-28, ¶ 22

[8] Petitioner's Appendix Vol. I, No. 1, p. 45

[9] Petitioner's Appendix Vol. I, No. 1, pp. 27-28, ¶ 22

[10] *See* Petitioner's Appendix Vol. I, No. 1, pp. 146-161, specifically ¶ 6 on pp. 147-148

[11] Petitioner's Appendix Vol. I, No. 1, p. 148, ¶ 7

[12] Petitioner's Appendix Vol. I, No. 1, p. 148, ¶ 8, and pp. 151-155

(footnote continued)

June 7, 2017, MRO invoiced Ms. Creecy which included all fees associated with the provision of 1165 pages of Mrs. Powell's medical records from CHH. The 1165 pages invoiced represented the entirety of medical records for Mrs. Powell with no exclusions.[13] [14] On June 12, 2017, MRO received payment for the 1165 pages of records and the next day, June 13, 2017, MRO sent out the complete 1165 pages to Ms. Creecy to the address provided on the request.[15]

MRO received the package back from the United States Postal Service due to undeliverability to the addressee on June 23, 2017.[16] MRO contacted Ms. Creecy on June 28, 2017 regarding the returned records, and she advised MRO that the post office box to which she requested the records be sent was in the name of her father, Brian Powell, and that the Post Office likely returned them since she was an unknown recipient at the post office box. She thereafter requested that MRO resend the records to him at that post office box address.[17] On June 29, 2017, MRO re-sent the records addressed to Mr. Powell at the post office box previously provided, and

[13] Petitioner's Appendix Vol. I, No. 1, p. 148, ¶ 9 and p. 157

[14] Petitioner's Appendix Vol. I, No. 1, p. 164-165, ¶ 4

[15] Petitioner's Appendix Vol. I, No. 1, p. 148, ¶ 10 and p. 159

[16] Petitioner's Appendix Vol. I, No. 1, p. 148, ¶ 11 and p. 161

[17] Petitioner's Appendix Vol. I, No. 1, p. 148, ¶ 12

(footnote continued)

MRO never received the records back thereafter.[18]

MRO provided copies of all medical records for Mrs. Powell and no records for this patient were excluded from that packet.[19] [20] CHH's custodian of records stated that she compared the 1165 pages of records supplied in June, 2017 to Ms. Creecy to CHH's electronic medical records system and she verified that the totality of the medical records for Ms. Powell was provided to Ms. Creecy without excluding any records.[21]

Contemporaneously with Plaintiffs' obtaining Ms. Powell's medical records from CHH, Plaintiff Brian Powell personally initiated two investigations with State agencies including the Nevada Department of Health and Human Services ("HHS") and the Nevada State Nursing Board. Plaintiffs failed to disclose Mr. Powell's complaint to HHS, but they did disclose HHS's May 23, 2017 acknowledgement of his complaint alleging patient neglect (presumably the complaint Mr. Powell initiated was prior to May 23, 2017).[22] Mr. Powell's complaint to the Nursing Board dated June 11, 2017 alleges that CHH's nursing staff failed to properly monitor Ms.

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[18] Petitioner's Appendix Vol. I, No. 1, p. 149, ¶ 13

[19] Petitioner's Appendix Vol. I, No. 1, p. 149, ¶ 14

[20] Petitioner's Appendix Vol. I, No. 1, p. 164-165, ¶ 4

[21] Petitioner's Appendix Vol. I, No. 1, p. 164-165, ¶ 4

[22] Petitioner's Appendix Vol. II, No. 4, p. 327

(footnote continued)

Powell, that her care was "abandoned by the nursing staff", and that she passed away as a result of these alleged failures. Moreover, Mr. Powell stated "Now I ask that you advocate for her, investigate, and ensure that this doesn't happen again."[23]

On February 4, 2019, which was one year, eight months, and twenty-four days after Ms. Powell's death, Plaintiffs filed the subject Complaint.[24] Plaintiffs included the Affidavit of Sami Hashim, MD, which sets forth alleged breaches of the standard of care.[25]

NRS 41A.097 (2)(a) and (c) requires that an action based upon professional negligence of a provider of health be commenced the earlier of one year from discovery of the alleged negligence, but no more than three years after alleged negligence. An action which is dismissed and not refiled within the time required by NRS 41A.097 (2)(a) and (c) is time barred as a matter of law.

Plaintiffs' claims sound in professional negligence, which subjects the claims to NRS 41A.097(2)'s one-year statute of limitations requirement. Since Plaintiffs failed to file their Complaint within one-year after they discovered or through the use of reasonable diligence should have discovered the injury, CHH's Motion for Summary Judgment should have been granted by Respondent.

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[23] Petitioner's Appendix Vol. II, No. 4, pp. 325-326

[24] Petitioner's Appendix Vol. I, No. 1, pp. 21-41

[25] Petitioner's Appendix Vol. I, No. 1, pp. 43-49

STATEMENT OF REASONS THE WRIT SHOULD ISSUE

A. Writ of Mandamus Standard

A writ of mandamus is an extraordinary remedy that may be issued to compel an act that the law requires. *Cote H. v. Eighth Judicial Dist. Court,* 175 P.3d 906, 907-08, 124 (Nev. 2008). A writ of mandamus may also issue to control or correct a manifest abuse of discretion. *Id.* . A writ shall issue when there is no plain, speedy and adequate remedy in the ordinary course of law. Nev. Rev. Stat. § 34.170; *Sims v. Eighth Judicial Dist. Court,* 206 P.3d 980, 982 (Nev. 2009). This Court has complete discretion to determine whether a writ will be considered. *Halverson v. Miller,*186 P.3d 893 (Nev. 2008) ("the determination of whether to consider a petition is solely within this court's discretion."); *Sims*, 206 P.3d at 982 ("it is within the discretion of this court to determine whether these petitions will be considered.").

This Court should exercise its discretion to consider and issue a Writ of Mandamus in this case directing Respondent to grant Petitioner's Motion for Summary Judgment. The Respondent manifestly abused its discretion when it denied their Motion. This clear error of law will cause Petitioner to proceed through extensive discovery and the extraordinary expenses associated therewith as well as to trial on a case which was filed well beyond the expiration of the statute of limitations. There is no adequate, speedy remedy available at law to address this continuing injury to Petitioner.

Petitioner is aware that this Court may exercise its discretion to decline to hear

these issues unless they are brought before it on appeal. However, these issues are better addressed at the current time. This issue is appropriate for interlocutory review because it involves (1) an issue, if decided in favor of Petitioner, that is entirely case dispositive, (2) clarifies the standard of irrefutable evidence of inquiry notice articulated in *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 258, 277 P.3d 458, 466 (2012) by assessing evidence in which the Plaintiffs admit to possessing the very notice they now claim to lack, (3) determining whether after acquiring inquiry notice, said notice can be later tolled, and (4) setting the standard on those opposing motions for summary judgment that requires the submission of admissible evidence. Additionally, it addresses a recurring and important issue of the statutory scheme regarding professional negligence as well as pressing public policy issues regarding the protection of medical providers in this state. This Court has repeatedly stated that a writ of mandamus is an appropriate remedy for important issues of law that need clarification or that implicate important public policies. *Lowe Enters. Residential Ptnrs., L.P. v. Eighth Judicial Dist. Court*,118 Nev. 92, 97 (2002) ("We have previously stated that 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."); *Business Comput. Rentals v. State Treasurer*,114 Nev. 63, 67 (1998) ("Additionally, 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.").

Thus, in accordance with the above authorities, Petitioner respectfully requests that this Court choose to accept this Petition for Writ of Mandamus for review.

B. Respondent Manifestly Abused its Discretion by Denying Petitioner's Motion for Summary Judgment Based Upon the Expiration of the Statute of Limitations

NRS 41A.097 (2)(a) and (c) requires that an action based upon professional negligence of a provider of health be commenced the earlier of one year from discovery of the alleged negligence, but no more than three years after alleged negligence.

There is no question that this matter involves a provider of health care as defined by NRS 41A.017. Petitioner, therefore, falls within the protections afforded by NRS Chapter 41A, including the one year discovery rule contained in NRS 41A.097(2)'s statute of limitations.

As expressed in *Massey v. Litton*, 99 Nev. 723, 669 P.2d 248 (1983), the one year discovery period within which a plaintiff has to file an action commences when the plaintiff ". . . knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action." *Id.* at 728, 669 P.2d at 252; *See, also Eamon v. Martin,* 2016 Nev. App. Unpub. LEXIS 137 at 3-4 (Nev. App. Mar. 4, 2016).

"This does not mean that the accrual period begins when the plaintiff

discovers the precise facts pertaining to his legal theory, but only to the general belief that someone's negligence may have caused the injury." (citing *Massey*, 99 Nev. at 728, 669 P.2d at 252). Thus, the plaintiff "discovers" the injury when 'he had facts before him that would have led an ordinarily prudent person **to investigate further** into whether [the] injury may have been caused by someone's negligence.'" *Eamon* at 4 (quoting *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev 246, 252, 277 P.3d 458, 462) (emphasis supplied). "The plaintiff need not be aware of the precise causes of action he or she may ultimately pursue. *Winn*, 128 Nev. at 252-53, 277 P.3d at 462. Rather, **the statute begins to run once the plaintiff knows or should have known facts giving rise to a 'general belief that someone's negligence may have caused his or her injury.**' *Id.*" *Golden v. Forage,* 2017 Nev. App. Unpub. LEXIS 745 at 3 (Nev. App. October 13, 2017) (emphasis supplied).

The date on which the one-year statute of limitation begins to run may be decided as a matter of law where uncontroverted facts establish the accrual date. *See Golden, supra.* at *2 (Nev. App. Oct. 13, 2017) ("The date on which the one-year statute of limitation began to run is ordinarily a question of fact for the jury, and may be decided as a matter of law only where the uncontroverted facts establish the accrual date.") (citing *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 251, 277 P.3d 458, 462 (2012) (recognizing that the district court may determine the accrual date as a matter of law where the accrual date is properly demonstrated)); *see also*

Dignity Health v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark, No. 66084, 2014 WL 4804275, at *2 (Nev. Sept. 24, 2014).

If the Court finds that the plaintiff failed to commence an action against a provider of health care before the expiration of the statute of limitations under NRS 41A.097, the Court may properly dismiss the Complaint pursuant to NRCP 12(b)(5). *See, e.g., Egan v. Adashek,* 2015 Nev. App. Unpub. LEXIS 634, at *2 (Nev. App. Dec. 16, 2015) (affirming district court's dismissal of action under NRCP 12(b)(5) where the plaintiff failed to file within the statute of limitations set forth in NRS 41A.087); *Rodrigues v. Washinsky*, 127 Nev. 1171, 373 P.3d 956 (2011) (affirming district court's decision granting motion to dismiss the plaintiffs' claims for failure to comply with NRS 41A.097); *Domnitz v. Reese*, 126 Nev. 706, 367 P.3d 764 (2010) (affirming district court's decision dismissing plaintiff's claim after finding that plaintiff had been placed on inquiry notice prior to one year before his complaint was filed and that the statute of limitations had expired pursuant to NRS 41A.97(2)).

While this is a motion for summary judgment (unlike a motion to dismiss when the averments in the Complaint need to be taken as true), the standard is more favorable to the moving party since once a prima facie case that no genuine issue of material fact exist, the non-moving party is obligated to come forth with sufficient **and** admissible evidence demonstrating the presence of a material issue of fact. Petitioner presented its prima facie case, and Plaintiffs failed to submit any admissible evidence in opposition which relates to the issue before the Court.

In this case, NRS 41A.097(2)'s one-year statute of limitations began to run on the date of Ms. Powell's death (May 11, 2017). Per the Complaint, most of the individually named Plaintiffs contemporaneously observed the alleged negligence and Ms. Powell's rapid deterioration leading up to her death on May 11, 2017.[26]

Since Plaintiffs allege that they contemporaneously observed the alleged negligence and deterioration of Ms. Powell leading up to her death, the Plaintiffs knew, or should have known, of facts that would put a reasonably person on inquiry notice by May 11, 2017. Plaintiffs were aware of facts that would lead an ordinarily prudent person to investigate the matter further at that time.

In fact, Taryn Creecy specifically requested copies of Ms. Powell's complete medical records from CHH on May 25, 2017, two weeks after Ms. Powell's death.[27] Ms. Creecy went to Probate Court to and obtained a court order directing the production of Ms. Powell's records from CHH.[28] Plaintiffs obtained all of Ms. Powell's medical records as late as June, 2017. The declarations of both Gina Arroyo and Melanie Thompson[29] conclusively establish that Plaintiffs received a

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[26] *See* Petitioner's Appendix Vol. I, No. 1, p. 27, ¶ 20 (died on May 11, 2017); *see also* Petitioner's Appendix Vol. I, No. 1, p. 37 ¶¶ 45-46 and p. 39, ¶¶ 52-53 (allegedly contemporaneously observing Ms. Powell rapidly deteriorate and die).

[27] *See* Petitioner's Appendix Vol. I, No. 1, pp. 146-161

[28] Petitioner's Appendix Vol. I, No. 1, pp. 151-155

[29] Petitioner's Appendix Vol. I, No. 1, pp. 146-165

complete copy of Ms. Powell's medical records from CHH in June, 2017 and Plaintiffs sought them in May, 2017.

In fact, the affidavit of Plaintiffs' expert, Dr. Sami Hashim, states in clear terms the following:

> **Based upon the medical records**, the patient did not and with high probability could not have died from the cause of death stated in the Death Certificate. The patient died as a direct consequence of respiratory failure directly **due to below standard of care violations as indicated by her medical records and reinforced** by the Department of Health and Human Services – Division of Health Quality and Compliance Investigative Report.[30]

(Emphasis supplied).

Dr. Hashim noted that he primarily relied upon the very medical records which Plaintiffs obtained in May/June, 2017, and the HHS Report was only a "reinforcement" of what was contained in the medical records.

Furthermore, as the Nevada Court of Appeals held in *Callahan v. Johnson*, 2018 Nev. App. Unpub. LEXIS 950, 3-5:

> Under Nevada law, the one-year statute of limitations begins to run when the plaintiff "knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action." *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983). Our supreme court has clarified that the plaintiff need not know the "precise legal theories" underlying her claim, so long as the plaintiff has a "general belief that someone's negligence may have caused his or

[30] Petitioner's Appendix Vol. I, No. 1, p. 44, ¶6(B)

> her injury." *Winn*, 128 Nev. at 252-53; 277 P.3d at 462. Thus, at its core the one-year statute of limitation requires the "plaintiff to be aware of the cause of his or her injury." *Libby*, 130 Nev. at 365, 325 P.3d at 1279 (addressing the rule from Massey and Winn). The district court may determine the accrual date as a matter of law if the evidence irrefutably demonstrates that date. *Winn*, 128 Nev. at 253, 277 P.3d at 463.

This case is predicated on Plaintiffs' claim of improper patient monitoring. Plaintiffs' received the complete copy of Ms. Powell's medical records in June, 2017.[31] They went to Probate Court to obtain a Court order to obtain them in May, 2017.[32] Plaintiff Brian Powell specifically wrote a complaint to the Nevada Nursing Board accusing CHH personnel of malpractice and requesting an investigation on June 11, 2017.[33] The Nevada Department of Health and Human Services specifically acknowledged Mr. Powell's separate complaint of patient neglect on May 23, 2017 with a promise to investigate same.[34]

Respondent's finding that Plaintiffs were somehow misled by the death certificate and the coroner's report defies the evidence. Furthermore, Respondent's conclusion that the February 5, 2018 HHS report created an issue of fact as to when

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[31] Petitioner's Appendix Vol. I, No. 1, pp. 146-165

[32] Petitioner's Appendix Vol. I, No. 1, pp. 151-155

[33] Petitioner's Appendix Vol. II, No. 4, pp. 325-326

[34] Petitioner's Appendix Vol. II, No. 4, p. 327

(footnote continued)

Plaintiffs were first on inquiry notice is equally erroneous. Once inquiry notice was received, the clock started running. **Plaintiffs' own documents demonstrate they possessed that very notice as late as June 11, 2017, but other documents show they knew as early as either Mrs. Powell's date of death on May 11, 2017, or on May 23, 2017, when the State acknowledged their complaint of patient neglect.[35] At the latest, they had until June 11, 2018 to file their Complaint. However, it was not filed until almost eight months later**.

In *Green v. Frey*, 2014 Nev. Dist. LEXIS 1401 at 3 (CV12-01530, Washoe County), the decedent's date of death was determined to be sufficient to place the plaintiff on inquiry notice. In this case, the statute of limitations began to run on May 11, 2017, Ms. Powell's date of death. In *Barcelona v. Eighth Judicial Dist. Court*, 448 P.3d 544, this Court, in an unpublished decision, held that death following surgery would lead an ordinarily prudent person to investigate further into possible negligence, especially since their Complaint included a medical affidavit demonstrating that the plaintiffs had sufficient information to make out a malpractice case.

In the instant case, Dr. Hashim's own affidavit stated that he possessed

[35] Interestingly, Plaintiffs failed to disclose the date Mr. Powell filed his complaint with HHS alleging patient neglect and possible malpractice, but clearly it was sent earlier than HHS's May 23, 2017 acknowledgement letter.

(footnote continued)

sufficient information from the CHH medical records themselves, which Plaintiffs had in their possession in May/June, 2017.[36] The statute of limitations began running as late as when they received the CHH records in May/June, 2017. Moreover, Plaintiffs themselves initiated two State investigations concerning the care of Ms. Powell, and alleged in both requests that they suspected negligence. This definitively proves they possessed inquiry notice long before they claim, because they were aware of facts that would lead an ordinarily prudent person to investigate the matter further. Plaintiffs obtained all they needed to investigate the claims immediately after Ms. Powell's death and were in possession of all they needed and admittedly were on inquiry notice as late as June 11, 2017. Plaintiffs did nothing for **20 months after being placed on inquiry notice**, and they failed to timely file their lawsuit.

C. A Party Opposing a Motion for Summary Judgment Must Do So With Admissible Evidence and Declarations By Those With Personal Knowledge of the Facts

As expressed by the California Second District Court of Appeal:

> When a defendant moves for summary judgment, "'its declarations and evidence must either establish a complete defense to plaintiff's action or demonstrate the absence of an essential element of plaintiff's case. If plaintiff does not counter with opposing declarations showing there are triable issues of fact with respect to that defense or an essential element of its case, the summary judgment must be granted.'" (*Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal. App. 3d 1505, 1510–1511 [285 Cal. Rptr. 385],

[36] Petitioners' Appendix Vol. I, No. 1, p. 44, ¶6(B)

> quoting *Gray v. America West Airlines, Inc.* (1989) 209 Cal. App. 3d 76, 81 [256 Cal. Rptr. 877].)

Taylor v. Trimble, 13 Cal. App. 5th 934, 939, 220 Cal. Rptr. 3d 741, 745 (2017).

In the milestone case *Wood v. Safeway, Inc.*,121 Nev. 724, 731 (2005), this Court held that "[t]he substantive law controls which factual disputes are material" to preclude summary judgment, and that "[a] factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* .

When applying the above standard, the pleadings and other proof must be construed in a light most favorable to the nonmoving party. *Id.* at 732. However, the nonmoving parties, in this case, Plaintiffs, "may not rest upon general allegations and conclusions," but shall "by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial." *Id.* at 731-32. The nonmoving party "bears the burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered in the moving party's favor." *Id.* at 732. "The nonmoving party 'is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture.'" *Id.* . But, "the nonmoving party is entitled to have the evidence and all reasonable inferences accepted as true." *LeasePartners Corp. v. Robert L. Brooks Tr. Dated Nov. 12, 1975*,113 Nev. 747, 752 (1997). "Evidence introduced in support of or opposition to a motion for summary judgment must be admissible evidence.

See NRCP 56(e)." *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

Plaintiffs' counsel's opinions and assertions, which were all that was submitted by Plaintiffs (except for an inadmissible copy of the HHS report) should have been disregarded by Respondent, since counsel is not a competent affiant regarding admissible facts at trial on the subject of the relatedness of damages to the case at issue. *See, Schafer v. Manufacturers Bank*, 104 Cal. App. 3d 70, 76 (1980); *see also, Nini v. Culberg*, 183 Cal. App. 2d 657, 661-662 (1960); *Weir v. Snow*, 210 Cal. App. 2d 283, 294-295 (1962). Respondent's denial of the motion was an abuse of discretion because after Petitioner demonstrated a prima facie case for summary judgment, it was incumbent upon Plaintiffs to come forth with their own declarations concerning inquiry notice, and explain why their complaints to the State agencies did not commence the running of the statute of limitations. This they failed to do, thus dooming Plaintiffs' prospects for opposing Petitioner's motion. By Respondent ignoring this glaring deficiency, it was a manifest abuse of discretion. A Writ of Mandamus is the proper remedy to address it.

CONCLUSION

In accordance with the above, Petitioner respectfully requests that this Court grant its Petition for Writ of Mandamus and order the Respondent to grant Petitioners' Motion for Summary Judgment.

Dated this 22nd day of December, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Adam Garth*

S. Brent Vogel
Nevada Bar No. 006858
Adam Garth
Nevada Bar No. 15045
6385 S. Rainbow Boulevard
Suite 600
Las Vegas, Nevada 89118
702.893.3383
Attorneys for Petitioners

AFFIDAVIT OF VERIFICATION IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Adam Garth, Esq., being first duly sworn, deposes and states:

1. I am an attorney of record for Petitioner and make this Affidavit pursuant to Nev. R. App. P. 21(a)(5).
2. The facts and procedural history contained in the foregoing Petition for Writ of Mandamus and the following Memorandum of Points and Authorities are based upon my own personal knowledge as counsel for Petitioner. This Affidavit is not made by Petitioner personally because the salient issues involve procedural developments and legal analysis.
3. The contents of the foregoing Petition for Writ of Mandamus and the following Memorandum of Points and Authorities are true and based upon my personal knowledge, except as to those matters stated on information and belief.
4. All documents contained in the Petitioner's Appendix, filed herewith, are true and correct copies of the pleadings and documents they are represented to be in the Petitioner's Appendix and as cited herein.
5. This Petition complies with Nev. R. App. P. 21(d) and Nev. R. App. P.

32(c)(2).

FURTHER YOUR AFFIANT SAYETH NAUGHT.

ADAM GARTH, ESQ.

Subscribed and sworn before me
This 22nd day of December, 2020.

Notary Public, in and for said County and State

JODI LYNN MORALES
NOTARY PUBLIC
STATE OF NEVADA
APPOINTMENT NO. 20-5266-01
MY APPT. EXPIRES MARCH 13, 2024

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point type

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

Proportionately spaced, has a typeface of 14 points or more, and contains 6,305 words.

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 this 22nd day of December, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ *Adam Garth*

S. BRENT VOGEL
Nevada Bar No. 6858
ADAM GARTH
Nevada Bar No. 15045
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Tel. 702.893.3383
Attorneys for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this 22nd day of December, 2020, I served the forego **PETITION FOR WRIT OF MANDAMUS REGARDING LACK OF EXPERT OR EVIDENTIARY SUPPORT IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT** upon the following parties by placing a true and correct copy thereof in the United States Mail in Las Vegas, Nevada with first class postage fully prepaid:

The Honorable Jerry A. Wiese II
The Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101
Respondent

Aaron Ford
Attorney General
Nevada Department of Justice
100 North Carson Street
Carson City, Nevada 89701
Counsel for Respondent

Paul S. Padda, Esq.
PAUL PADDA LAW, PLLC
4560 S. Decatur Blvd., Suite 300
Las Vegas, NV 89103
Tel: 702.366.1888
Fax: 702.366.1940
psp@paulpaddalaw.com
Attorneys for Plaintiffs/Real Parties in Interest

John H. Cotton, Esq.
Brad Shipley, Esq.
JOHN. H. COTTON & ASSOCIATES
7900 W. Sahara Ave., Suite 200
Las Vegas, NV 89117
Tel: 702.832.5909
Fax: 702.832.5910
jhcotton@jhcottonlaw.com
bshipleyr@jhcottonlaw.com
Attorneys for Additional Parties in Interest Dionice S. Juliano, M.D., Conrado Concio, M.D And Vishal S. Shah, M.D.

/s/ *Roya Rokni*

_____

An employee of LEWIS BRISBOIS BISGAARD & SMITH, LLP