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.: 82250

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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Pursuant to permission granted in this Court's order of March 9, 2021, Petitioner hereby submits the following Reply in support of the Petition for writ of mandamus.

ARGUMENT

The opposition by the Real Parties in Interest (hereinafter "Plaintiffs") is predicated on several false assertions and a blatant attempt to distract from the evidence submitted before Respondent in the district court below. The main issues presented to this Court are:

(1) whether Plaintiff's counsel's personal conclusions, unsupported by either a declaration or affidavit of any person with personal knowledge of the facts, provided a sufficient basis for Respondent to deny Petitioner's motion for summary judgment;

(2) whether Plaintiffs' specific request for an investigation of the circumstances surrounding the decedent's death to two State agencies coupled with Plaintiffs' specific request for and receipt of the entirety of decedent's medical records constituted irrefutable evidence of inquiry notice which commenced the running of the statute of limitations; and

(3) once inquiry notice is received, may the statute of limitations be tolled for the period of time which Plaintiffs' counsel contends Plaintiffs were "confused", or do Plaintiffs themselves need to provide evidence of such

"confusion."

I. Respondent Erred In Considering Plaintiffs' Counsel's Personal Opinions and Conclusions and Inadmissible Evidence In Opposition

NRCP Rule 56 states in pertinent part that:

> (c)Procedures.
>
> > (1)Supporting Factual Positions. **A party asserting that a fact** cannot be or **is genuinely disputed must support the assertion by**:
> >
> > > (A) **citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials**; or
> > >
> > > (B) **showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact**.
> >
> > (2)Objection That a Fact Is Not Supported by Admissible Evidence. **A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence**.
> >
> > (3)Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.
> >
> > (4)Affidavits or Declarations. **An affidavit or declaration used to support or oppose a motion must be made on personal knowledge,**

> **set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated**.
>
> * * *
>
> (e) Failing to Properly Support or Address a Fact. **If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact** as required by Rule 56(c), **the court may**:
>
> > (1) give an opportunity to properly support or address the fact;
> >
> > (2) **consider the fact undisputed for purposes of the motion**;
> >
> > (3) **grant summary judgment if the motion and supporting materials-including the facts considered undisputed-show that the movant is entitled to it**; or
> >
> > (4) issue any other appropriate order.

(Emphasis supplied).

Plaintiffs' entire opposition to the instant writ petition, their position in the court below, and Respondent's findings of fact[1] are each predicated on Plaintiffs' attorney's own false and conclusory statements that the Plaintiffs were confused by the combination of the death certificate, the HHS report, and

[1] Petitioner's Appendix, pp. 357-359.

(footnote continued)

meetings with hospital personnel sufficient to create an issue of fact pertaining to precisely when Plaintiffs' had inquiry notice in this case and whether such notice could be tolled.[2]

Respondent, however, failed to acknowledge that there was no evidence submitted by Plaintiffs whatsoever which demonstrated any confusion at all, a manifest abuse of discretion. In fact, the "confusion" argument is a complete "red herring" stirred by Plaintiffs' counsel in what turns out was a successful effort in the court below to defeat summary judgment in which irrefutable evidence of inquiry notice was established by Petitioner. Plaintiffs' failed to submit any affidavit or declaration of anyone with personal knowledge of the facts which demonstrated the presence of any confusion, in direct defiance of the standards articulated in NRCP Rule 56(c) & (e). *See, Villescas v. CNA Ins. Cos.,* 109 Nev. 1075, 1078, 864 P.2d 288, 290 (1993).

This Court specifically articulated that the obligations imposed by NRCP 56(e) require that affidavits alleging specific facts based upon the affiant's personal knowledge with an affirmative showing of competency to testify as to those facts be submitted with respect to summary judgment motions. *See, Saka v. Sahara-Nevada Corp.*, 92 Nev. 703, 705, 558 P.2d 535, 536 (1976).

[2] Plaintiffs' Opposition Brief, pp. 6-7, 13-14, 25-27; See also Petitioner's Appendix, Vol. II, pp. 183, 185-198, 267-270, 311-324

Conclusory statements contained in opposition to motions for summary judgment do not create issues of fact supporting denial of said motions. *See, Bond v. Stardust, Inc.*, 92 Nev. 47, 50, 410 P.2d 472, 473 (1966). Affidavits or other admissible evidence needs to specifically demonstrate a genuine material issue of fact to warrant denial of said motion when a prima facie case for summary judgment is made by the moving party. *See, Garvey v. Clark County*, 91 Nev. 127, 130, 532 P.2d 269, 271 (1975); *Bird v. Casa Royale W.*, 97 Nev. 67, 70-71, 624 P.2d 17, 18-19 (1981). Evidence submitted in opposition, just like initially by the moving party, must be **admissible** evidence. *See, Collins v. Union Fed. S&L Ass'n*, 99 Nev 284, 302, 662 P.2d 610, 621 (1983); *Hickman v. Meadow Wood Reno*, 96 Nev. 782, 783, 617 P.2d 871, 872 (1980); *Elizabeth E. v. ADT Sec. Sys. W.*, 108 Nev. 889, 892, 839 P.2d 1308, 1310 (1992).

What occurred in this case is that Plaintiffs submitted no evidence to rebut Petitioner's irrefutable evidence of inquiry notice. Plaintiffs' only submissions were reports and responses to interrogatories which have absolutely no context for the position for which they were advanced. Plaintiffs' counsel's conclusory opinions, unsubstantiated by his own clients, are insufficient to have created an issue of fact, and Respondent's acceptance of those unsubstantiated opinions by denying summary judgment is precisely what this Court is being asked to review.

In a further manifest abuse of discretion, Respondent gave credence to

Plaintiffs' assertion that Petitioner provided no evidence that the medical records requested by Plaintiffs were ever received.[3] Such a manifest abuse of discretion is highlighted by Respondent's complete disregard for NRS 47.250(13) in which a rebuttable presumption is created "[t]hat a letter duly directed and mailed was received in the regular course of the mail." In fact, Petitioner submitted the declarations of two witnesses with personal knowledge of the facts outlining their procedures for handling incoming medical records requests, the specifics of how such procedures were implemented in this case, and that the medical records here were mailed to the Plaintiffs twice, all within one month of decedent's death.[4]

Petitioner demonstrated to Respondent and to Plaintiffs' counsel that the medical records which had been requested were transmitted to Plaintiffs. Moreover, Plaintiffs' expert's declaration attached to the Complaint indicates that he reviewed the medical records supplied by Petitioner in order to arrive at his opinions.[5] Plaintiffs would have had to have received the medical records from Petitioner prior to commencing their lawsuit since NRCP 16.1 disclosures were not available pre-suit. However, both Plaintiffs' counsel and Respondent

[3] Petitioner's Appendix, Vol. III, p. 357, lines 23-24.

[4] Petitioner's Appendix, Vol. I, pp. 146-165.

[5] Petitioner's Appendix, Vol. I, pp. 44-47.

somehow want everyone to believe that it was incumbent upon Petitioner to definitively demonstrate Plaintiffs actually received the medical records. Petitioner more than fulfilled its obligation to demonstrate that the medical records were mailed. NRS 47.250(13) imposes an obligation on the party challenging receipt to overcome the presumption of receipt when proof of mailing is demonstrated. Respondent turned that obligation 180 degrees and imposed the obligation upon Petitioner when it remained in Plaintiffs' hands to disprove. Plaintiffs again provided no affidavit or declaration by anyone with personal knowledge to assert that they never received the records, and the evidence submitted not only demonstrates the records were mailed, but they had to have been received for Plaintiffs' expert to have evaluated them pre-suit. All of these alleged factual issues adopted by Respondent and promoted by Plaintiffs demonstrate a clear abuse of discretion since burdens imposed upon Plaintiffs were shifted to Petitioner and obligations required of Plaintiffs were completely overlooked. Factual assertions by Plaintiffs' counsel without any evidence to substantiate them were considered and adopted by Respondent as justification for denying Petitioner's motion for summary judgment.

II. Inquiry Notice Was Established By Plaintiffs' Medical Records Request and Further Supported By Plaintiffs' Specific Request for State Investigations In Which Plaintiffs Alleged Medical Negligence

Confusion is not the standard by which inquiry notice is even measured. Respondent chose to create an entirely new standard to avoid granting summary

judgment in what must be one of the clearest cases of inquiry notice on record, since Plaintiffs themselves definitively suspected alleged malpractice and successfully launched two State investigations, at their request, stating their suspicion of negligence merely one month after decedent's death, and further requested and obtained a complete copy of decedent's hospital records with which they were free to obtain an expert evaluation and opinion.[6]

This Court 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

[6] Petitioner's Appendix, Vol. I, pp. 148 ¶ 10; 159; 149 ¶ 13; Vol. II, pp. 325-327.

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)[7].

The evidence in this case demonstrates that the Plaintiffs "discovered" the injury when they had facts which led them to investigate further whether the alleged injuries were caused by someone's negligence. That is the precise definition of inquiry notice. Here, Respondent completely overlooked the irrefutable evidence that Plaintiffs launched two State investigations with allegations of negligence on the part of Petitioner.[8] One report dated June 11, 2017, in Mr. Powell's own handwriting, states in pertinent part:

> **She should have been supervised at all times and monitored by nursing staff. It is clear that if Ms. Powell went into respiratory distress as described by physician Shaw, that a rapid response should have been called immediately. She was not monitored appropriately, and it appear her care abandoned by nursing staff. As a result of this Ms. Powell passed away from lack of sufficient care from those assigned**

[7] Per N.R.A.P. 36(c)(2), on or after January 1, 2016, an unpublished decision may be cited for its persuasive value, if any. Supreme Court Rule 123 prohibiting citation to unpublished decisions was repealed on November 12, 2015.

[8] Petitioner's Appendix, Vol. II, pp. 325-327.

(footnote continued)

> **to ensure her well being . . . Now I ask that you advocate for her, investigate and ensure that this doesn't happen again.**[9]

While Plaintiffs failed to provide their complaint to the State Department of Health and Human Services, that Department's acknowledgement letter dated May 23, 2017 states in pertinent part:

> **This letter is an acknowledgement that the Bureau of Health Care Quality and Compliance has received your complaint concerning Centennial Hills Hospital Medical Center.**
>
> **Thank you for bringing to our attention your specific issues and concerns regarding this facility. Your concerns related to Patient Neglect will be investigated** during an unannounced onsite visit at the facility by an investigator.[10]

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*

[9] Petitioner's Appendix, Vol. II, p. 325 (emphasis supplied).

[10] Petitioner's Appendix, Vol. II, p. 327 (emphasis supplied).

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)).

The uncontroverted facts noted above, one in Plaintiff's own handwriting, and the other acknowledging a complaint by Plaintiffs of patient neglect by Petitioner, alleges medical negligence against a nurse employed by Petitioner. Said Plaintiff specifically requested an investigation by the Nevada State Nursing Board on these specific facts and further requested that HHS conduct its own investigation of allegations of neglect. Plaintiffs specifically communicated their belief of negligence and went a step further by initiating investigations of the alleged

negligence. The uncontroverted evidence supplied by Plaintiffs themselves demonstrates the very inquiry notice this Court articulated. Respondent nevertheless ignored the evidence and adopted uncorroborated assertions by Plaintiffs' counsel that Plaintiffs were confused.

Additionally, Respondent appears to have invented a new tolling provision to the inquiry notice discovery principle established by this Court. As previously stated, Respondent adopted Plaintiffs' counsel's assertion that the Plaintiffs were confused by materials received after obtaining medical records and initiating the two State investigations as to decedent's cause of death, and therefore denied summary judgment. Respondent effectively stated that while there was clear evidence of inquiry notice at three separate points, i.e. (1) Plaintiffs' request for the medical records, (2) State Nursing Board Complaint, and (3) HHS Complaint, all of which occurred within a month of decedent's death in May, 2017, Respondent adopted the HHS final report in February, 2018 as the operative date for commencing the running of the statute of limitations because only then did Respondent find that Plaintiffs had definitive evidence of negligence. Petitioner's counsel has searched the entirety of Nevada law and found no case which holds that Plaintiffs' counsel's manufactured and unsubstantiated claim of confusion from subsequently received records tolls a plaintiff's inquiry notice. There was no confusion here. Plaintiffs provided no sworn testimony to that effect. Plaintiffs' counsel's opinions regarding same lack any evidentiary value. All evidence, including that which Plaintiffs themselves

supplied, demonstrated that they suspected negligence almost immediately after decedent's death but did not initiate a lawsuit until eight months beyond the statute of limitations and 20 months from having first suspected negligence and sought an investigation on the very issue which is the subject of this action. This Court has made it abundantly clear that inquiry notice is judged from the perspective of an ordinary person, and when such person first suspected negligence which would cause such a person to investigate further. Plaintiffs' own handwriting demonstrates those very suspicions long before Respondent found or which Plaintiffs claim. The evidence demonstrate the lawsuit was filed too late, and to have found otherwise was a gross abuse of discretion by Respondent.

Finally, Plaintiffs' assertion that Petitioner is requesting this Court to substitute its judgment for that of Respondent is accurate. If that was not the case, there would be no need for appellate courts. The very purpose of an appellate court is to review the record from the lower court to assess whether an error was made, and if necessary, substitute its judgment for that of the lower court. For Plaintiffs' counsel to suggest otherwise defeats the very purpose for which this Court was established.

CONCLUSION

In accordance with the above and the Petition itself and accompanying Appendix thereto, 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 13th day of April, 2021.

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By */s/ Adam Garth*

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CERTIFICATE OF COMPLIANCE

1. Pursuant to NRAP 21(e), I hereby certify that this reply complies with the formatting requirements of NRAP 32(a)(9) and the formatting requirements of NRAP 32(a), including the fact that this petition has been prepared in a proportionately spaced typeface using Microsoft Word in 14 point Times New Roman type style.

2. I further certify that this reply complies with the word count limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 3,455 words.

DATED this 13th day of April, 2021.

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CERTIFICATE OF MAILING

I hereby certify that on this 13th day of April, 2021, I served the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS** 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:

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