IN THE SUPREME COURT OF THE STATE OF NEVADA

VALLEY HEALTH SYSTEM, LLC, D/B/A CENTENNIAL HILLS HOSPITAL MEDICAL CENTER, A FOREIGN LIMITED LIABILITY COMPANY; DR. DIONICE S. JULIANO, M.D., AN INDIVIDUAL; DR. CONRADO C.D. CONCIO, M.D., AN INDIVIDUAL; AND DR. VISHAL S. SHAH, M.D., AN INDIVIDUAL,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JERRY W. WIESE, DISTRICT JUDGE,

Respondents,

and

ESTATE OF REBECCA POWELL THROUGH BRIAN POWELL, AS SPECIAL ADMINISTRATOR; DARCI CREECY, INDIVIDUALLY AND AS HEIR; TARYN CREECY, INDIVIDUALLY AND AS HEIR; ISAIAH KHOSROF, INDIVIDUALLY AND AS HEIR; LLOYD CREECY, INDIVIDUALLY,

Real Parties in Interest.

Supreme Court No. 82250

PETITION FOR REHEARING BY REAL PARTIES IN INTEREST

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. INTRODUCTION

Real Parties in Interest, Darci Creecy, Taryn Creecy and Isaiah Creecy ("the Creecy Children"),[1] petition this Court pursuant to Nevada Rule of Appellate Procedure ("NRAP") 40 to rehear its October 18, 2021 Order issuing a Writ of Mandamus directing the Eighth Judicial District Court (the Honorable Jerry A. Wiese) to vacate its order denying Petitioner's motion for summary judgment and directing the entry of summary judgment in favor of Petitioners. *See* **Exhibit 1** (Court's Order filed October 18, 2021).

In these appellate proceedings, the Petitioners' argued that the district court erred in denying them summary judgment and by failing to dismiss the Real Parties in Interest's lawsuit based upon statute of limitations grounds. While Petitioners advanced several arguments in support of their position, the Court granted Petitioners' Writ of Mandamus by homing in on, and accepting, the argument that Brian Powell's complaint to the State Board of Nursing constituted "inquiry notice" thereby triggering the one-year limitation period made applicable to medical malpractice claims by Nevada Revised Statute ("NRS") 41A.097. Indeed, in

[1] The Estate of Rebecca Powell is not a party to this Petition. Brian Powell was not an individual plaintiff in the proceedings below except that he served as the Special Administrator of the Estate. Darci, Taryn and Isaiah Creecy are the children of Rebecca Powell. Brian Powell is not their father.

granting Petitioners' Writ of Mandamus, the Court based the entirety of its decision upon its conclusion that "irrefutable evidence demonstrates that the real parties in interest were on inquiry notice by June 11, 2017 at the latest, when real party in interest Brian Powell, special administrator for the estate, filed a complaint with the State Board of Nursing." *See* Exhibit 1, p. 3-4. From this conclusion, the Court foreclosed the Creecy Children's claims by imputing Brian Powell's "inquiry notice" to them and thereby denied their ability to pursue their individual and separate claims against Petitioners. It is axiomatic that the Creecy Children are separate and unique claimants for purposes of NRS 41.085 (distinguishing between heirs and personal representative of an estate).

Based upon the NRAP 40(c)(2) standards, the Creecy Children respectfully request this Court rehear this matter with respect to their claims. The Court overlooked and/or misapprehended a key and crucial fact, namely that there is no evidence, nor has any been provided by Petitioners, that the Creecy Children knew what Brian Powell is alleged to have known on June 11, 2017 (the complaint to the State Board of Nursing does not even mention the Creecy Children let alone indicate they were copied on that correspondence). Additionally, through its ruling, the Court has created a new legal standard in cases of this kind that would impute the inquiry notice of one plaintiff to all other plaintiffs irrespective of any proof demonstrating a special relationship between them.

To avoid a manifest injustice, the Creecy Children respectfully request the Court rehear its October 18, 2021 Order granting the Writ of Mandamus.

II. LEGAL ARGUMENT

A. STANDARD FOR PETITIONS FOR REHEARING.

Pursuant to NRAP 40(c)(2) this Court may consider rehearing in the following circumstances: (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) When the court has overlooked, misapplied, or failed to consider a statute, procedural rule, regulation, or decision directly controlling a dispositive issue in the case. *See, e.g.,* Am. Cas. Co. of Rehearing, Pa. v. Hotel and Rest. Employees and Bartenders Intern. Union Welfare Fund, 113 Nev. 764, 766, 942 P.2d 172, 174 (1997). In this case, the Court should consider the overlooked and/or misapprehended facts and law to grant rehearing.

B. THE COURT OVERLOOKS OR MISAPPREHENDS THAT THERE IS NO RECORD EVIDENCE SUPPORTING THE CONCLUSION THAT THE CREECY CHILDREN WERE ON INQUIRY NOTICE ON THE SAME DAY AS BRIAN POWELL

The Court, while acknowledging that "the accrual date for NRS 41A.097(2)'s one-year period is generally a question for the trier of fact,"[2] erroneously concludes

[2] Exhibit 1, p. 3.

in this case that "irrefutable evidence demonstrates that the real parties in interest were on inquiry notice by June 11, 2017 at the latest, when real party in interest Brian Powell, special administrator for the estate, filed a complaint with the State Board of Nursing." Exhibit 1, pp. 3-4. Respectfully, there is no "irrefutable" record evidence, let alone any evidence, to support this conclusion that the Creecy Children knew what Brian Powell is concluded to have known on June 11, 2017. Indeed, the sole evidence relied upon by the Court to grant the Writ of Mandamus, namely Brian Powell's complaint to the State Board of Nursing, is devoid of any reference to the Creecy Children and is signed only by Brian Powell. *See* II PA 325-326.[3] To characterize this evidence as "irrefutable" in the absence of any record evidence demonstrating that the Creecy Children joined in the complaint or even had knowledge of its contents is simply erroneous.[4] The Court itself characterizes and

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[3] "___ PA ___" refers to the volume and page numbers of Petitioner's Appendix filed on December 22, 2020.

[4] Petitioners have argued that "Plaintiffs' own documents demonstrate they possessed that very notice as late of June 11, 2017, but other documents show they knew as early as either Ms. Powell's date of death on May 11, 2017 or on May 23, 2017 when the State acknowledged their complaint of patient neglect." *See* Petition p. 23. Petitioners use of "they" is not supported by any facts in the record. Both the complaint to the Nursing Board (II PA 325-326) and the letter from the State of Nevada Department of Health and Human Services (II PA 327), including its subsequent findings (II PA 186-198) pertain only to Brian Powell. The Creecy Children are not even referenced in any of those communications. The Court erred by accepting, wholesale, Petitioners' representation suggesting the Creecy Children

limits the complaint to the Nursing Board as "Brian alleged" or "Brian's own allegations" thereby demonstrating that it was only his complaint and not that of the Creecy Children. Similarly, the other complaint by Brian Powell referenced in footnote 3 of the Court's Order was filed solely by him, a fact acknowledged by the Court.

Given that there is no record evidence whatsoever demonstrating that the Creecy Children were aware of the complaints to the Nursing Board or to the State's Department of Health and Human Services, it's simply error to impute Brian Powell's notice to them and thereby bar them from pursuing their individual and separate claims. Brian Powell, as the Court can take note, is a resident of Nevada while the Creecy Children are residents of Ohio and Massachusetts. See II PA 201. Each of the Creecy Children is an individual plaintiff separate and apart from the Estate. II PA 199-219.

There are genuine issues of material fact regarding what the Creecy Children knew and when they knew it. Petitioners have succeeded in improperly conflating the inquiry notice attributable to Brian Powell to the Creecy Children by falsely representing through suggestion that they had knowledge of the Nursing Board

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had knowledge of any of these communications. Cursory review of the documents cited in the Court's Order of October 18, 2021 demonstrates this is clearly erroneous.

complaint. Yet, there is no actual evidence to support this suggestion which the Court has unfortunately adopted as a "fact." Were this matter to be remanded for further discovery or an evidentiary hearing, the allegations in the Complaint would be corroborated including the fact that the Creecy Children do not even live in the same state as Brian Powell. Further, discovery or a hearing would also reveal that the Creecy Children had limited communications with Brian Powell and that, while he was married to their mother Rebecca Powell, he is not their biological father. Further, even though Brian and Rebecca Powell divorced well before she was admitted to the hospital, further discovery or a hearing would reveal they remained on good terms and that his (Brian Powell) complaints to state agencies were motivated by his prior relationship and concern for his former wife whom he considered a friend. These are all issues that need resolution before any conclusion can be reached regarding what the Creecy Children knew for purposes of inquiry notice.

The Court should rehear its Order and limit is ruling to simply the Estate. It should reconsider the Order's application as it pertains to the rights of the Creecy Children. The factual assumptions forming the basis for imputing Brian Powell's notice and knowledge are simply not supported by the evidentiary record before the Court.

C. THE COURT OVERLOOKS OR MISAPPREHENDS THAT THE STATUTE OF LIMITATIONS APPLICABLE TO MEDICAL MALPRACTICE CASES IN NEVADA DOES NOT PERMIT THE IMPUTATION OF NOTICE BY ONE PLAINTIFF TO ANOTHER PLAINTIFF

Under NRS 41A.097(2), an action seeking recovery for injury or death caused by a provider of healthcare cannot be commenced more than 1 year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury. The plain language of the law makes no accommodation for inquiry notice being transferred from one plaintiff to another except in situations where there may be a special relationship such as that between a parent, guardian or legal custodian and a child. *See* NRS 41A.097(4). Notably, none of those factors exist in this case. Thus, in rendering its ruling and imputing Brian Powell's inquiry notice and purported knowledge to the Creecy Children (all of whom were adults – *see* II PA 201) the Court has created a new legal standard that did not otherwise exist under Nevada law. Presumably, this is why Petitioners are eager to have the Court publish its decision.

Counsel for the Creecy Children have attempted to find, but have been unable to locate, any case authority in Nevada for the proposition that, in the absence of a special relationship, one plaintiff's knowledge is automatically imputed to another plaintiff in a medical malpractice case. To permit such a result would be to countenance a regrettable judicial policy in which the loved ones of medical

malpractice victims are punished because someone else (e.g. a friend) who subsequently becomes the Special Administrator for the Estate asked questions somewhere along the way.

Given the complete lack of clarity regarding what the Creecy Children knew in relation to Brian Powell's inquiry notice, it would be regrettable and dangerous to create legal precedent imputing and transferring notice from one party to another without any facts supporting such a result. Under such a policy, an unsuspecting claimant could be foreclosed from pursuing justice because someone else (e.g. a friend), unbeknownst to the claimant, raised questions pertaining to medical care of a decedent/victim in a medical malpractice case. As recognized in another jurisdiction (Florida), knowledge of an injury and that there is a reasonable possibility that the injury was caused by medical malpractice as to trigger the statute of limitations for a civil action may not be imputed to an adult who has no ability to be consciously aware of such injury. *See* Barrier v. JFK Medical Center Ltd. Partnership, 169 So.3d 185 (2015). While the facts of that case involved an incapacitated and medically unconscious person, the issue of transferring inquiry notice to a claimant lacking awareness or figurative consciousness has currency in this matter.

There is nothing in the plain language of NRS 41A.097 that permits imputation of inquiry notice between one party and another in the absence of a

special relationship or evidence that the party to whom notice is being transferred was aware of the possible medical malpractice. The Court's ruling creates a new and ill-advised standard that should concern the Court and cause it to rehear its October 18, 2021 Order.

III. CONCLUSION

For the reasons set forth herein, the Court should rehear its Order that is the subject of this petition. While the Real Parties in Interest are not seeking to have the Court alter its ruling with respect to the Estate, the Creecy Children are respectfully requesting the Court rehear its decision and remand to permit their claims to proceed.

DATED this 5th day of November 2021.

PAUL PADDA LAW, PLLC

By /s/ *Paul S. Padda and Srilata Shah*
Paul S. Padda, Esq.
Nevada Bar No. 10417
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Attorneys for Real Parties in Interest

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition 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 2016 in 14-point Times New Roman font.

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 40 or 40A because, it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 2,336 words; and/or

☒ does not exceed 10 pages.

DATED this 5th day of November 2021.

PAUL PADDA LAW, PLLC

By /s/ Paul S. Padda
Paul S. Padda, Esq.
Nevada Bar No. 10417
Attorneys for Real Parties in Interest

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITION FOR REHEARING BY REAL PARTIES IN INTEREST** was filed electronically with the Supreme Court of Nevada on the 5th day of November 2021. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

S. Brent Vogel, Esq.
Adam Garth, Esq.
John H. Cotton, Esq.
Brad J. Shipley, Esq.

/s/ Diana Escobar
Diana Escobar, an employee of
Paul Padda Law

EXHIBIT 1

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VALLEY HEALTH SYSTEM, LLC, D/B/A CENTENNIAL HILLS HOSPITAL MEDICAL CENTER, A FOREIGN LIMITED LIABILITY COMPANY; DR. DIONICE S. JULIANO, M.D., AN INDIVIDUAL; DR. CONRADO C.D. CONCIO, M.D., AN INDIVIDUAL; AND DR. VISHAL S. SHAH, M.D., AN INDIVIDUAL,
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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,
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No. 82250

FILED

OCT 18 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING PETITION

This is a petition for a writ of mandamus challenging a district court order denying a motion for summary judgment in a professional negligence matter on statute of limitations grounds.

21-29784

Reviewing the summary judgment de novo, *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005), we elect to entertain the petition and grant the requested relief as we conclude the district court manifestly abused its discretion when it denied summary judgment. *All Star Bail Bonds, Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 419, 422, 326 P.3d 1107, 1109 (2014) ("A writ of mandamus is available to compel the performance of an act that the law requires or to control a manifest abuse of discretion." (internal quotation and citation omitted)); *Ash Springs Dev. Corp. v. O'Donnell*, 95 Nev. 846, 847, 603 P.2d 698, 699 (1979) ("Where an action is barred by the statute of limitations no issue of material fact exists and mandamus is a proper remedy to compel entry of summary judgment."). While we generally disfavor petitions for mandamus relief challenging a district court's summary judgment denial, *State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 361-62, 662 P.2d 1338, 1340 (1983), we nonetheless may consider such petitions "where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court [was] obligated to dismiss [the] action." *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997).

Petitioners argue that undisputed evidence demonstrates the real parties in interest were on inquiry notice of their professional negligence, wrongful death, and negligent infliction of emotional distress claims by June 11, 2017, at the latest.[1] Thus, petitioners contend that the

[1]Petitioner Valley Health System filed the instant petition. We permitted Drs. Dionice Juliano, M.D., Conrado Concio, M.D., and Vishal Shah, M.D., to join the petition. However, the district court granted summary judgment in favor of Dr. Juliano. Thus, Dr. Juliano is not a proper

real parties in interest's February 4, 2019, complaint was time-barred under NRS 41A.097(2) (providing that plaintiffs must bring an action for injury or death based on the negligence of a health care provider within three years of the date of injury and within one year of discovering the injury, whichever occurs first).[2] We agree.

The term injury in NRS 41A.097 means "legal injury." *Massey v. Litton*, 99 Nev. 723, 726, 669 P.2d 248, 251 (1983). A plaintiff "discovers his legal injury when he 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. A plaintiff "is put on 'inquiry notice' when he or she should have known of facts that 'would lead an ordinarily prudent person to investigate the matter further.'" *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 252, 277 P.3d 458, 462 (2012) (quoting *Inquiry Notice, Black's Law Dictionary* (9th ed. 2009)). While the accrual date for NRS 41A.097(2)'s one-year period is generally a question for the trier of fact, the district court may decide the accrual date as a matter of law when the evidence is irrefutable. *Winn*, 128 Nev. at 251, 277 P.3d at 462.

Here, irrefutable evidence demonstrates that the real parties in interest were on inquiry notice by June 11, 2017 at the latest, when real

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party to the instant petition and we direct the clerk of this court to remove his name from the case caption.

[2]Petitioners argue, and the real parties in interest do not contest, that the at-issue claims all sound in professional negligence and are thus subject to the limitation period under NRS 41A.097(2). *See Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 642, 403 P.3d 1280, 1284 (2017) ("Allegations of breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for medical malpractice.").

party in interest Brian Powell, special administrator for the estate, filed a complaint with the State Board of Nursing. There, Brian alleged that the decedent, Rebecca Powell, "went into respiratory distress" and her health care providers did not appropriately monitor her, abandoning her care and causing her death. Thus, Brian's own allegations in this Board complaint demonstrate that he had enough information to allege a prima facie claim for professional negligence—that in treating Rebecca, her health care providers failed "to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." NRS 41A.015 (defining professional negligence); *Winn*, 128 Nev. at 252-53; 277 P.3d at 462 (explaining that a "plaintiff's general belief that someone's negligence may have caused his or her injury" triggers inquiry notice).[3] That the real parties in interest received Rebecca's death certificate 17 days later, erroneously listing her cause of death as suicide, does not change this conclusion.[4] Thus, the real parties in interest

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[3]The evidence shows that Brian was likely on inquiry notice even earlier. For example, real parties in interest had observed in real time, following a short period of recovery, the rapid deterioration of Powell's health while in petitioners' care. Additionally, Brian had filed a complaint with the Nevada Department of Health and Human Services (NDHHS) on or before May 23, 2017. Similar to the Nursing Board complaint, this complaint alleged facts, such as the petitioners' failure to upgrade care, sterilize sutures properly, and monitor Powell, that suggest he already believed, and knew of facts to support his belief, that negligent treatment caused Powell's death by the time he made these complaints to NDHHS and the Nursing Board.

[4]The real parties in interest do not adequately address why tolling should apply under NRS 41A.097(3) (providing that the limitation period for a professional negligence claim "is tolled for any period during which the provider of health care has concealed any act, error or omission upon which the action is based"). Even if they did, such an argument would be

had until June 11, 2018, at the latest, to file their professional negligence claim. Therefore, their February 4, 2019 complaint was untimely.

Given that uncontroverted evidence demonstrates that the petitioners are entitled to judgment as a matter of law because the complaint is time-barred under NRS 41A.097(2), *see* NRCP 56(a); *Wood*, 121 Nev. at 729, 121 P.3d at 1029 (recognizing that courts must grant summary judgment when the pleadings and all other evidence on file, viewed in a light most favorable to the nonmoving party, "demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law" (internal quotations omitted)), we hereby

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order denying petitioners' motion for summary judgment and enter summary judgment in favor of petitioners.

Cadish, J.

Cadish

Pickering, J.

Pickering

Herndon, J.

Herndon

unavailing, as the medical records provided were sufficient for their expert witness to conclude that petitioners were negligent in Powell's care. *See Winn*, 128 Nev. at 255, 277 P.3d at 464 (holding that tolling under NRS 41A.097(3) is only appropriate where the intentionally concealed medical records were "material" to the professional negligence claims). Finally, we have not extended the doctrine of equitable tolling to NRS 41A.097(2), and the real parties in interest do not adequately address whether such an application is appropriate under these facts. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (refusing to consider arguments that a party did not cogently argue or support with relevant authority).

cc: Hon. Jerry A. Wiese, District Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
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