

IN THE SUPREME COURT OF THE STATE OF NEVADA

MINH NGUYEN, M.D.

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA
ex rel. THE COUNTY OF CLARK, AND
THE HONORABLE JUDGE MONICA
TRUILLO,

Respondent,

and

PATRICIA ANN ADAMS, individually,
in her capacity as Trustee of THE
STEWART FAMILY TRUST dated
January 31, 2007, in her capacity as
Special Administrator of the ESTATE OF
CONNIE STEWART and in her capacity
as Special Administrator of the ESTATE
OF GARY STEWART; GARY LINCK
STEWART, JR., an individual; MARY
KAY FALLON, an individual;
ELIZABETH A HODGE, an individual,

and

Emil Morneault, RPH,

Real Parties In Interest.

Supreme Court No.:

District Court No. ~~200811411~~
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PETITION FOR WRIT OF MANDAMUS

S. BRENT VOGEL

Nevada Bar No. 006858

ERIN E. JORDAN

Nevada Bar No. 010018

Lewis Brisbois Bisgaard & Smith LLP

6385 South Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

Telephone: 702-893-3383

Attorneys for Petitioner

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PETITION FOR WRIT OF MANDAMUS

Petitioner Minh Nguyen, M.D., hereby respectfully petitions this Court for the issuance of a Writ of Mandamus pursuant to NRS 34.150 et seq., NRAP 21 and Nev. Const. Art. VI, § 4.

Petitioner respectfully petitions this Court for a Writ of Mandamus directing Respondent to issue an Order granting Defendant Minh Nguyen's, M.D.'s Motion to Dismiss filed on April 2, 2021. This Petition is brought on the following grounds:

1. Petitioner Minh Nguyen, M.D. is a Defendant in a case currently entitled PATRICIA ANN ADAMS, individually, in her capacity as Trustee of THE STEWART FAMILY TRUST dated January 31, 2007, in her capacity as Special Administrator of the ESTATE OF CONNIE STEWART and in her capacity as Special Administrator of the ESTATE OF GARY STEWART; GARY LINCK STEWART, JR., an individual; MARY KAY FALLON, an individual; ELIZABETH A HODGE, an individual, Plaintiffs, vs. MINH NGUYEN, M.D. AND EMIL MORNEAULT, RPH; and DOES 1-5 and ROE ENTITIES 1-5, Defendants.
2. Plaintiff filed a Complaint in this matter on February 28, 2020. Petitioner's Appendix, No. 1, pp. 2-9. The only Plaintiff was Connie Stewart, an individual.
3. In the February 28, 2020 Complaint, Connie Stewart individually filed a claim

for “professional negligence/ negligence/ wrongful death/ vulnerable and older person.” *Id.*

4. In the February 28, 2020 Complaint, Connie Stewart individually alleged that she was entitled to heir damages under Nevada’s wrongful death statute. “The Defendants caused Connie Stewart to suffer loss of probable support, companionship, society, comfort and consortium and costs and attorney’s fees because of her beloved husband Gary Stewart’s wrongful death (NRS 41.085).” *Id.*
5. The February 28, 2020 Complaint did not contain either an Estate Plaintiff or alleged any damages allowable to Estates under the wrongful death statute. *Id.*
6. Defendant Dr. Morneault filed an Answer to the Complaint on June 24, 2020. Petitioner’s Appendix, No. 2, pp. 11-17.
7. Petitioner filed a Suggestion of Death on June 24, 2020 after learning of Connie Stewart’s death. Petitioner’s Appendix, No. 3, pp. 19-22.
8. The parties stipulated to the substitution of the Special Administrator of Connie Stewart’s Estate as Plaintiff to pursue to her individual heir wrongful death claim regarding Gary Stewart’s Death. The Stipulation was filed on November 25, 2020. Petitioner’s Appendix, No. 4, pp. 24-31. The Stipulation did not add a wrongful death Estate claim arising out of the death of Gary Stewart. *Id.*
9. Petitioner filed a Partial Motion to Dismiss seeking dismissal of Plaintiff’s NRS

41.1395 (elder abuse) claim for failure to state a claim on December 9, 2020. Petitioner's Appendix, No. 5, pp. 33-39.

10. Plaintiff the Estate of Connie Stewart filed a Motion for Leave to Amend Complaint on December 21, 2020. Petitioner's Appendix, No. 6, pp. 41-63. Plaintiff sought to add four additional individual heir claims as well as a never-before brought Estate claim arising out of the death of Gary Stewart. The proposed new individual parties were Gary Linck Stewart, Jr., Patricia Ann Adams, Mary Kay Fallon and Elizabeth Hodge. Plaintiff also sought to bring a claim by the Estate of Gary Stewart and a claim by The Stewart Family Trust. *Id.*

11. Plaintiff the Estate of Connie Stewart filed an Opposition to Petitioner's Partial Motion to Dismiss regarding elder abuse on December 23, 2020. Petitioner's Appendix, No. 7, pp. 65-78.

12. Petitioner filed an Opposition to Plaintiff's Motion for Leave to Amend Complaint on January 4, 2021. Petitioner's Appendix, No. 8, pp. 80-97. Petitioner explained that the four new heir claims and the new Estate claim were barred by the statute of limitations in NRS 41A.097 and that The Stewart Family Trust was an improper party pursuant to NRS 41.085. *Id.*

13. Defendant Dr. Morneault also filed an Opposition to Plaintiff's Motion for Leave to Amend on January 4, 2021. Petitioner's Appendix, No. 9, pp. 99-108.

14. Petitioner filed a Reply in Support of his Motion to Dismiss Plaintiff's NRS 41.1395 (elder abuse) claim on January 5, 2021. Petitioner's Appendix, No. 10, pp. 110-119.
15. The Court denied Dr. Nguyen's Partial Motion to Dismiss regarding elder abuse on January 19, 2021. Petitioner's Appendix, No. 11, p. 121.
16. Plaintiff the Estate of Connie Stewart filed a Reply in Support of Motion for Leave to Amend to add the six new parties on January 25, 2021. Petitioner's Appendix, No. 12, pp. 123-132.
17. Petitioner filed his Answer to Complaint on January 27, 2021. Petitioner's Appendix, No. 13, pp. 134-139.
18. The Respondent granted Plaintiff the Estate of Connie Stewart's Motion for Leave on February 4, 2021. Petitioner's Appendix, No. 14, p. 141.
19. The Order denying Petitioner's Partial Motion to Dismiss regarding elder abuse was entered on February 11, 2021. Petitioner's Appendix, No. 15, pp. 143-153.
20. Plaintiffs filed their First Amended Complaint on March 19, 2021. Petitioner's Appendix, No. 16, pp. 155-166.
21. The Order granting Plaintiffs' Motion for Leave to Amend was entered on April 1, 2021. Petitioner's Appendix, No. 17, pp. 168-176.
22. Defendant Dr. Morneault filed a Motion to Dismiss Plaintiff's First Amended Complaint on April 2, 2021. Petitioner's Appendix, No. 18, pp. 178-188.

23. Petitioner filed a Motion to Dismiss Plaintiff's First Amended Complaint on April 2, 2021. Petitioner's Appendix, No. 19, pp. 190-198. Petitioner again explained that the newly added parties' claims were barred by the statute of limitations. *Id.*
24. Plaintiff filed an Opposition to Dr. Morneault's Motion to Dismiss Plaintiff's First Amended Complaint on April 19, 2021. Petitioner's Appendix, No. 20, pp. 200-211.
25. Plaintiff filed an Opposition to Dr. Nguyen's Motion to Dismiss Plaintiff's First Amended Complaint on April 19, 2021. Petitioner's Appendix, No. 21, pp. 213-240.
26. Dr. Morneault filed a Reply in Support of his Motion to Dismiss Plaintiffs' First Amended Complaint on April 26, 2021. Petitioner's Appendix, No. 22, pp. 242-250.
27. Petitioner filed a Joinder to Dr. Morneault's Reply in Support of Motion to Dismiss Plaintiff's First Amended Complaint on April 27, 2021. Petitioner's Appendix, No. 23, pp. 252-254.
28. Petitioner filed a Reply in Support of his Motion to Dismiss First Amended Complaint on April 27, 2021. Petitioner's Appendix, No. 24, pp. 256-262.
29. The Respondent held oral argument regarding Dr. Nguyen's Motion to Dismiss on May 11, 2021. Petitioner's Appendix, No. 25, pp. 264-276. The Court took

the matter under advisement following oral argument by counsel for the Plaintiffs and counsel for Respondent Dr. Nguyen.

30. Respondent denied Petitioner's Motion to Dismiss Plaintiffs' First Amended Complaint on May 25, 2021. Petitioner's Appendix, No. 26, p. 278. This decision is the subject of this Petition for Writ of Mandamus.

31. The Order denying Petitioner's Motion to Dismiss Plaintiffs' First Amended Complaint was filed on July 20, 2021. Petitioner's Appendix, No. 27, pp. 280-288. This Order memorializes the decision that is the subject of this Petition for Writ of Mandamus.

32. Respondent manifestly abused its discretion by denying Petitioner Dr. Nguyen Motion to Dismiss Plaintiffs' First Amended Complaint and adding six new parties in violation of the NRS 41A.097 statute of limitations.

33. Respondent manifestly abused its discretion by finding that the claims by the six new parties satisfied the one year statute of limitations set forth in NRS 41A.097.

34. Petitioner has suffered significant damages and will suffer future significant damages as a result of the actions of the Respondent as he is now forced to defend this case and proceed to trial against seven Defendants though the statute of limitations expired for six of the seven Defendants.

35. A Writ of Mandamus is proper to compel the performance of acts by

Respondent from the office held by Respondent.

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

37. 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.

38. Petitioner requests the issuance of a Writ of Mandamus directing Respondent to issue an Order granting his Motion to Dismiss First Amended Complaint.

39. 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 below.

WHEREFORE, Petitioner requests that this Court issue a Writ of Mandamus compelling the Respondent to issue an Order granting Petitioner Dr. Nguyen's Motion to Dismiss Plaintiffs' First Amended Complaint.

Dated this 17th day of September, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

Bv /s/ Erin E. Jordan
S. Brent Vogel
Nevada Bar No. 006858
Erin E. Jordan
Nevada Bar No. 010018
6385 S. Rainbow Boulevard
Suite 600
Las Vegas, Nevada 89118
Attorneys for Petitioner

ROUTING STATEMENT

CASE TO BE RETAINED BY THE SUPREME COURT

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 issue of whether the statute of limitations contained in NRS 41A.097 applies to wrongful death Plaintiffs who chose not to initially file claims and do so only after the death of one of the other wrongful death Plaintiffs.

These issues are of statewide public importance because they implicate the State of Nevada’s policy regarding the protection of providers of healthcare.

Dated this 17th day of September, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

Bv /s/ Erin E. Jordan
S. Brent Vogel
Nevada Bar No. 006858
Erin E. Jordan
Nevada Bar No. 010018
6385 S. Rainbow Boulevard
Suite 600
Las Vegas, Nevada 89118
Attorneys for Petitioner

**AFFIDAVIT OF VERIFICATION IN SUPPORT OF PETITION FOR WRIT
OF MANDAMUS**

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Erin E. Jordan, Esq., being first duly sworn, deposes and states:

1. I am an attorney of record for Petitioner and make this Affidavit pursuant to NRAP 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 NRAP 21(d) and NRAP 32(c)(2).

FURTHER YOUR AFFIANT SAYETH NAUGHT.

/s/ *Erin E. Jordan*

ERIN E. JORDAN, ESQ.

No notarization required pursuant to NRS 53.045

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

I. STATEMENT OF FACTS

This is a professional negligence case that arises out of medical care and treatment Defendants provided to decedent Gary Stewart between February 13-21, 2019. Plaintiff alleges that Defendants breached the standard of care when they failed to properly order Mr. Stewart's seizure medications. Plaintiff alleges that Mr. Stewart developed a condition caused status epilepticus due to the improper prescription of seizure medications, and that he died as a result on March 5, 2019. Petitioner's Appendix, No. 1, pp. 2-9.

This wrongful death action was first filed by decedent Gary Stewart's surviving wife, Connie Stewart on February 28, 2020, shortly before the statute of limitations expired on March 5, 2020. Petitioner's Appendix, No. 1, pp. 2-9. Connie Stewart filed an individual heir wrongful death claim only. *Id.* A wrongful death claim was not brought on behalf of Gary Stewart's Estate and none of Mr. Stewart's four children filed heir claims. *Id.*

When Mrs. Stewart passed away and the Plaintiff was substituted by stipulation, the new Plaintiff was Patricia Adams on behalf of Connie Stewart's Estate. The caption was changed by agreement of all the parties. The stipulation did not allow for the addition of new claims or parties. Petitioner's Appendix, No.

4, pp. 24-31. Thus, prior to the Motion that is the subject of this Petition for Writ of Mandamus, the case contained only Connie Stewart's individual heir wrongful death claim brought as a survival claim. *Id.*

Plaintiff the Estate of Connie Stewart filed a Motion for Leave to Amend Complaint on December 21, 2020. Petitioner's Appendix, No. 6, pp. 41-63. Plaintiff's Motion for Leave asked the Respondent to add six additional Plaintiffs whose claims were barred by NRS 41.085, as well as the statute of limitations. Petitioner's Appendix, No. 6, pp. 41-63. After the Respondent granted the Plaintiffs' Motion, Plaintiffs filed their First Amended Complaint, adding the six additional parties. The First Amended Complaint was filed on March 19, 2021, over a year after the statute of limitations had expired. Petitioner's Appendix, No. 16, pp. 155-166. The Petitioner filed a Motion to Dismiss as the claims were barred by the statute of limitations and the Family Trust is an improper party.

The Respondent denied Petitioner's Motion to Dismiss Plaintiffs' First Amended Complaint, which is the subject of this Petition for Writ of Mandamus. Petitioner's Appendix, Nos. 25-27, pp. 264-288.

II. ISSUES PRESENTED

- a. Whether Respondent Manifestly Abused its Discretion by Denying Dr. Nguyen's Motion to Dismiss Plaintiffs' First Amended Complaint.**
- b. Whether Respondent Manifestly Abused its Discretion by Finding that the Four New Heir Plaintiffs' Claims Were Filed Within the**

One Year Statute of Limitations.

- c. Whether Respondent Manifestly Abused its Discretion by Finding that the New Claim by the Estate of Gary Stewart Was Filed Within the One Year Statute of Limitations.**
- d. Whether Respondent Manifestly Abused its Discretion by Finding that The Stewart Family Trust Could Bring a Wrongful Death Claim.**

III. STATEMENT OF REASONS THE WRIT SHOULD ISSUE

a. Writ of Mandamus Standard

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. *Int'l Game Tech, Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197 (2008). Whether to consider a writ of mandamus is within the Court's sound discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677 (1991). 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. NRS 34.170; *Sims v. Eighth Judicial Dist. Court*, 206 P.3d 980, 982 (Nev. 2009).

In this case, Dr. Nguyen does not have a plain, speedy, and adequate remedy in the ordinary course of the law and writ relief is appropriate. This case is in the very earliest stages and improperly adding six parties to the case will change the entire course of litigation for this matter. *Humphries v. Eighth Judicial Dist. Court*

of *State*, 129 Nev. 788, 791 (2013). The Court in *Humphries* explained why there was no plain, speedy and adequate remedy in the ordinary course of the law when such an error is made early in the proceedings.

In this case, Humphries and Rocha do not have a plain, speedy, and adequate remedy in the ordinary course of the law. This case is in the early stages of litigation, and the district court's order forces Humphries and Rocha to join Ferrell and assert causes of action against him, despite the running of the statute of limitations, or have their action dismissed.

Id. The *Humphries* Court relied upon an earlier decision that addressed the same issue. *Lund v. Eighth Judicial Dist. Court*, 127 Nev. 358, 363 (2011) (“Indeed, when, as here, legal error leads the district court to decline to exercise discretion that it indisputably has regarding prospective additional parties, mandamus may lie, in the discretion of this court, to avert further avoidable error.”).

Here, the error by the Respondent will echo throughout this case if not resolved at this point. Instead of one heir claim there will be five, and instead of no Estate claim, an Estate and a Family Trust will both be parties to this case. The scope of discovery will be broadened tremendously for these parties, even though their claims are barred by the statute of limitations.

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."); *Bus. 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.").

The proper application of NRS 41A.097 arises repeatedly in professional negligence litigation. The denial of a Motion to Dismiss is appropriately reviewed via an interlocutory Petition for Writ of Mandamus in these circumstances. *Buckwalter v. Eighth Judicial Dist. Court*, 234 P.3d 920 (Nev. 2010) ("Normally, this court will not entertain a writ petition challenging the denial of a motion to dismiss but we may do so where, as here, the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law.").

This Court should exercise its discretion to consider and issue a Writ of Mandamus in this case directing Respondent to grant Dr. Nguyen's Motion to Dismiss Plaintiffs' First Amended Complaint. The Respondent manifestly abused its discretion when it denied this Motion. This clear error of law will cause Defendant to defend the claims of seven Plaintiffs for years if it is not corrected at this time. There is no adequate, speedy remedy available at law to address this

continuing injury to Petitioner.

Thus, in accordance with the above authorities, Petitioner respectfully requests that this Court choose to accept this Petition for Writ of Mandamus regarding the denial of Dr. Nguyen's Motion to Dismiss Plaintiffs' First Amended Complaint.

b. Respondent Manifestly Abused its Discretion by Denying Dr. Nguyen's Motion to Dismiss.

The subject of this Petition is the Respondent's denial of Dr. Nguyen's Motion to Dismiss Plaintiffs' First Amended Complaint. Defendant brought his Motion to Dismiss pursuant to NRCP 12(b)(5). A Defendant may bring a motion seeking dismissal for failure to state a claim pursuant to NRCP 12(b)(5) when the Plaintiff has failed "to state a claim upon which relief can be granted." A Plaintiff's claim must be dismissed if plaintiff is entitled to no relief under any set of facts which could be proved in support of the claim. *Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev. 163 (1965); *Edgar v. Wagner*, 101 Nev. 226, (1985). This Court should review the District Court's legal conclusions *de novo* when analyzing its denial of Dr. Nguyen's Motion to Dismiss. *Zohar v. Zbiegien*, 334 P.3d 402 (Nev. 2014).

Dr. Nguyen brought his Motion to Dismiss on four bases: 1) Plaintiffs claims were for professional negligence wrongful death; 2) The new heir claims were barred by the one year statute of limitations; 3) The new Estate claim was

barred by the one year statute of limitations; and 4) The Stewart Family Trust was an improper party.

Respondent incorrectly denied Dr. Nguyen's Motion to Dismiss even though there was no set of facts set forth by the Plaintiffs, even if assumed to be true, that could entitle the Plaintiffs to relief because the new Plaintiffs' claims are barred by the statute of limitations. This was clearly erroneous and a manifest abuse of discretion. A Writ of Mandamus is the proper remedy for this manifest abuse of discretion.

c. Respondent Manifestly Abused its Discretion by Finding that the Four New Heir Plaintiffs' Claims Were Filed Within the One Year Statute of Limitations.

When a person is injured based upon the alleged professional negligence of a provider of health care, NRS 41A.097(2) states the following:

... an 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 ...

Wrongful death claims accrue on the date of death. *Gilloon v. Humana, Inc.*, 100 Nev. 518, 519-20 (1984) ("In an action for wrongful death, the injury contemplated by Nev. Rev. Stat. § 41A.097 is the death of the malpractice victim and the ... period of limitation begins to run from the time of death or the discovery thereof."). The individual Plaintiffs' wrongful death claims accrued on the date of Gary Stewart's death. Thus, their wrongful death actions accrued on March 5,

2019. Petitioner's Appendix, No. 16, ¶ 20, pp. 155-166. Thus, the individual heir claims filed by Patricia Adams, Gary Stewart, Jr., Mary Fallon and Elizabeth Hodge on March 19, 2021 were filed over a year after the statute of limitations had expired.

These new Plaintiffs attempted to plead around the statute of limitations in the First Amended Complaint and alleged that they had a plain negligence claim pursuant to the *Curtis* case. *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 466 P.3d 1263 (Nev. 2020). The *Curtis* case does not change the analysis of the statute of limitations. The *Curtis* case allowed for a simple negligence claim in the limited circumstance where one patient's medication was administered to another patient, not to the alleged incorrect prescription of medication. *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 466 P.3d 1263 (Nev. 2020). The administration of one prescription to the incorrect patient is fundamentally different than a physician using his education, training and experience to prescribe or order medications, which necessarily includes medical diagnosis and judgment. The claim against Dr. Nguyen is for professional negligence wrongful death, despite Plaintiffs' attempt to dodge the statute of limitations by arguing otherwise.

There can be no question that the Plaintiffs' claims are for professional negligence. A claim is a professional negligence claim that is subject to NRS 41A.097 if it is related to medical diagnosis, judgment, or treatment. *Deboer v.*

Senior Bridges of Sparks Family Hospital, Inc., 282 P.3d 727 (Nev. 2012). (“Savage’s complaint was grounded in ordinary negligence, as it was not related to medical diagnosis, judgment, or treatment. As such, the district court erred in branding Savage’s complaint as a medical malpractice claim.”). Here, Plaintiffs allege that Dr. Nguyen fell below the standard of care by prescribing the incorrect seizure medication regime for him. Petitioner’s Appendix, No. 16, ¶¶ 35-39, pp. 155-166.

A claim for professional negligence is a claim that a “provider of healthcare” has breached the standard of care causing injury to a patient. NRS 41A.015.

NRS 41A.015 “Professional negligence” defined. “Professional negligence” means the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care.

(emphasis added). A “provider of healthcare” includes physicians such as Defendant Dr. Nguyen. NRS 41A.017.

NRS 41A.017 “Provider of health care” defined. [Effective January 1, 2020.] “Provider of health care” means a physician licensed pursuant to chapter 630 or 633 of NRS, physician assistant, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, holder of a license or a limited license issued under the provisions of chapter 653 of NRS, medical laboratory director or technician, licensed dietitian or a licensed hospital, clinic, surgery center, physicians’ professional corporation or group practice that employs any such person and its employees.

(emphasis added). Thus, a claim that a physician (Dr. Nguyen) failed to use the reasonable care, skill or knowledge ordinarily used under the similar circumstances, is a claim for professional negligence.

Although the Plaintiffs have attempted to avoid the provisions of NRS Chapter 41A by including other claims in their Amended Complaint, the claim available to them is professional negligence causing wrongful death alone. It is the substance of the allegations in a Complaint that determine the nature of the claims therein, rather than any label or lack thereof included by the Plaintiff.

Allegations of breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for medical malpractice. ... By extension, if the jury can only evaluate the plaintiff's claims after presentation of the standards of care by a medical expert, then it is a medical malpractice claim. ... If, on the other hand, the reasonableness of the health care provider's actions can be evaluated by jurors on the basis of their common knowledge and experience, then the claim is likely based in ordinary negligence.

...

The distinction between medical malpractice and negligence may be subtle in some cases, and parties may incorrectly invoke language that designates a claim as either medical malpractice or ordinary negligence, when the opposite is in fact true. ... Given the subtle distinction, a single set of circumstances may sound in both ordinary negligence and medical malpractice, and an inartful complaint will likely use terms that invoke both causes of action, particularly where, as here, the plaintiff is proceeding pro se in district court. Therefore, we must look to the gravamen or "substantial point or essence" of each claim rather than its form to see whether each individual claim is for medical malpractice or ordinary negligence.

Szymborski v. Spring Mt. Treatment Ctr., 403 P.3d 1280, 1284-85 (Nev. 2017).

Plaintiffs' allegations show that their claim is that Dr. Nguyen failed to use

the reasonable care, skill or knowledge ordinarily used under the similar circumstances such that their claims are for professional negligence. Petitioner's Appendix, No. 16, ¶ 46, pp. 155-166 (Defendants' conduct fell below the standard of care, they were professionally negligent, and their conduct caused Decedent and Plaintiffs' mental and physical pain and suffering, emotional distress, disfigurement and wrongful death."). Additionally, Plaintiffs' allege that Defendants' actions constituted simple negligence, with the same factual predicate. The same acts by a physician cannot be both professional negligence and negligence. Petitioner's Appendix, No. 16, ¶ 42-45 pp. 155-166. Perhaps most importantly, the Plaintiffs admit that their claim is for professional negligence wrongful death by attaching a NRS 41A.071 affidavit to the Amended Complaint. *Id.*, pp. 155-166.

All of these issues were raised in the briefing papers submitted to the Respondent and oral argument regarding Dr. Nguyen's Motion to Dismiss First Amended Complaint. Petitioner's Appendix, No. 25, pp. 264-276. Counsel for Dr. Nguyen explained that the claims were for professional negligence, so that the one year statute of limitations applied.

4 Obviously, Dr. Nguyen is a doctor and so the act of
5 prescribing medication and choosing which medication to prescribe, is
6 medical diagnosis and treatment and judgment. And one of the reasons
7 that we know that for sure in this case, regarding Dr. Nguyen, is that
8 plaintiffs attached a Medical Malpractice Affidavit into their Complaint, as
9 required by NRS 4101(a). And their expert says that Dr. Nguyen,
10 repeatedly, says that Dr Nguyen breached the standard of care. That is
11 the standard for a professional negligence claim. So plaintiffs
12 themselves have pled this claim as a professional negligence claim.

Id., p. 8. Counsel for Dr. Nguyen also explained that adding the six additional Plaintiffs greatly increased the potential exposure of Dr. Nguyen. *Id.*, pp. 8-9.

13 Additionally, the additional heirs, here, I think we're adding an
14 estate and we're adding five or four additional heirs. That does expose
15 us to significantly expanded liability or potential liability in this case,
16 because without the estate of Gary Stewart, as a plaintiff, who was not
17 properly included when this case was originally filed, they're not allowed
18 to recover medical bills.

19 And allowing the estate to come in time-barred significantly
20 exposes us to additional potential damages by now allowing for the
21 additional element of medical bills.

22 And an additional element that we have expanded potential
23 damages against Dr. Nguyen, who is the physician, provider of
24 healthcare, under the statute, is that each heir is entitled to their grief or
25 sorrow, their loss of probable support, their own individual damages. So

Id.

1 | now these are multiplied by five. That is a significant additional
2 | exposure, which means that in our opinion that these claims should not
3 | relate back and the decision, the strategic decision, I know the attorney
4 | who originally filed this case and he often doesn't file estate claims
5 | because he doesn't like to deal with medical liens, he doesn't like to deal
6 | with the medical bills. And this is a claim that they made a strategic
7 | decision to file only on behalf of one heir and not file on behalf of the
8 | estate. And that strategic decision shouldn't be changed to the
9 | detriment of the plaintiffs now that we are well beyond the statute of
10 | limitations.

Id. Lastly, counsel reiterated that the Plaintiffs' own expert characterized the actions of Dr. Nguyen as professional negligence. *Id.*, p. 9. The Court declined to rule the day of oral argument. *Id.*, p. 12.

12 | THE COURT: Thank you.
13 | Okay, well the Court was prepared to rule, but I'm going to
14 | have to issue a minute order, because I want to look up a couple of
15 | things that you all brought up. Actually, I prefer to bring you back next
16 | week then do a minute order. Sorry, we're going to just add -- we're
17 | going to add you to next week for decision.

Id.

Unfortunately, despite the above authorities, the Respondent issued a Minute Order two weeks later and ruled that "it was too early to tell whether the claims sound in professional negligence," and as a result denied Dr. Nguyen's Motion to Dismiss Plaintiffs' First Amended Complaint. Petitioner's Appendix, No. 26, p. 278.

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- COURT FINDS the date of death was 3/5/19; the receipt of medical records from Encompass was received on 7/25/19; the date they asked for opine on the cause of death was 2/28/20. COURT FURTHER FINDS that the Complaint was sufficiently plead, the wrongful death claim was timely filed, and was too early to tell whether the claims sound in professional negligence. Finally, Adams was listed individually as a Plaintiff in the wrongful death claim not as a trustee, therefore, ORDERED, motion DENIED. Mr. Hayes to prepare the order and provide it to opposing counsel for approval before submitting to chambers.

The Minute Order suggests that the Respondent Court relied, in whole or in part, on the date the medical records were received and the date Plaintiff requested the expert to draft an opinion. This is incorrect, as wrongful death cases nearly always accrue on the day of death, in this case, March 5, 2019. However, the Respondent Court's reliance upon the receipt of the medical records and date of opinion for cause of death indicates that the claims are for professional negligence, rather than general negligence. Those dates are inapplicable in this case as there was no claim of concealment, but it does inform us regarding the Respondent Court's analysis. Despite that, the Respondent Court ruled that it was too early to tell whether the claims sound in professional negligence, misconstruing the *Curtis* case.

The Order memorializing the denial of Dr. Nguyen's Motion to Amend First Amended Complaint also memorialized this incorrect analysis. Petitioner's Appendix, No. 27, pp. 280-288. This ruling was clearly erroneous pursuant to the above authorities. Respondent manifestly abused its discretion when it found the new heir Plaintiffs filed their claims against Dr. Nguyen within the one year statute of limitations contained in NRS 41A.097. A Writ of Mandamus is the proper remedy for this manifest abuse of discretion.

d. Respondent Manifestly Abused its Discretion by Finding that the New Claim by the Estate of Gary Stewart Was Filed Within the One Year Statute of Limitations.

The same analysis that applies to the four new wrongful death heir claims applies to the newly-filed wrongful death on behalf of the Estate of Gary Stewart. The Plaintiffs did not file an Estate claim as allowed by the wrongful death statute when they first filed the individual heir claim on behalf of Connie Stewart on February 28, 2020. In fact, Plaintiffs did not file a claim for the Estate of Gary Stewart until March 19, 2021, which was over two years after Gary Stewart's death. The statute of limitations accrued on the date of death, March 5, 2019, as explained above. Thus, the one year statute of limitations expired on March 5, 2020, and the claims brought by the Estate of Gary Stewart are barred by the statute of limitations contained in NRS 41A.097.

Contrary to the above authorities, the Respondent denied Petitioner's Motion to Dismiss Plaintiffs' First Amended Complaint. This ruling was clearly erroneous pursuant to the above authority. Respondent manifestly abused its discretion when it found the Plaintiff Estate filed its new claim against Dr. Nguyen within the one year statute of limitations contained in NRS 41A.097. A Writ of Mandamus is the proper remedy for this manifest abuse of discretion.

e. Respondent Manifestly Abused its Discretion by Finding that the The Stewart Family Trust Could Bring a Wrongful Death Claim.

Wrongful death is a statutory claim and Nevada's wrongful death sets forth

the only parties that may bring a wrongful death claim. NRS 41.085(2) (“When the death of any person, whether or not a minor, is caused by the wrongful act or neglect of another, the **heirs of the decedent** and the **personal representatives of the decedent** may each maintain an action for damages against the person who caused the death.”) (emphasis added). Thus, the Family Trust is not a proper party to this case pursuant to NRS 41.085, and all claims by the Family Trust should be dismissed.

Contrary to the above authorities, the Respondent Court denied Petitioner’s Motion to Dismiss Plaintiffs’ First Amended Complaint. The Respondent Court explained this ruling only by stating that “Adams was listed individually as a Plaintiff in the wrongful death claim, not as a trustee,” which is incorrect. Petitioner’s Appendix No. 26, p. 278. The Caption on the First Amended Complaint lists the Trustee as follows: “PATRICIA ANN ADAMS, individually, in her capacity as Trustee of THE STEWART FAMILY TRUST dated January 31, 2007.” Petitioner’s Appendix, No. 16, pp. 155-166. The Plaintiffs also described the Trust as a separate Plaintiff. *Id.*, ¶ 7.

7. On or about June 9, 2020, PATRICIA ANN ADAMS and GARY LINCK STEWART, JR. accepted the successor trusteeship of THE STEWART FAMILY TRUST dated January 31, 2007 (“Trust”). The Plaintiff Trust, at all times relevant herein, is domiciled in Clark County, Nevada. PATRICIA ANN ADAMS is vested with exclusive authority to act on behalf of the Trust.

Id.

The denial of Dr. Nguyen's Motion to Dismiss Plaintiffs' First Amended Complaint was clearly erroneous pursuant to the above authority. Respondent manifestly abused its discretion when it failed to dismiss the Family Trust as an improper wrongful death party. A Writ of Mandamus is the proper remedy for this manifest abuse of discretion.

IV. CONCLUSION

Connie Stewart filed an heir claim for the alleged professional negligence wrongful death of her husband, Gary Stewart, five days before the statute of limitations expired. No claims were filed on this day for any of Gary Stewart's children or the Estate of Gary Stewart. After Connie Stewart's death, the Plaintiff was substituted and the new Plaintiff was the Estate of Connie Stewart. Again, no attempt was made to add any more heir claims or a claim on behalf of the Estate of Gary Stewart.

However, once Connie Stewart passed away, the Plaintiffs retained a new law firm and decided to file claims on behalf of the four new heirs, the Estate of Gary Stewart and the improper party The Stewart Family Trust. The statute of limitations had already expired and these claims are barred by the statute of limitations as wrongful death claims accrue upon the date of death. Plaintiffs cannot evade the statute of limitations because they changed their mind about

whether to file claims, or as a result of the unfortunate death of Connie Stewart.

Adding six new Plaintiffs to this case greatly increases the size and, thus, cost of this case, which is prejudicial to the Defendant as the statute of limitations has expired. Thus, Petitioner respectfully requests that this Court grant this Petition for Writ of Mandamus and direct the Respondent to issue an Order granting Petitioner's Motion to Dismiss First Amended Complaint.

Dated this 17th day of September, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

Bv /s/ Erin E. Jordan
S. Brent Vogel
Nevada Bar No. 006858
Erin E. Jordan
Nevada Bar No. 010018
6385 S. Rainbow Boulevard
Suite 600
Las Vegas, Nevada 89118
702.893.3383
Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

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 imposed 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 be supported by reference to the page or transcript or appendix where the matter relied upon is found. In addition, I certify that this brief satisfied NRAP 32 with an approximate word count of 6,400 words, proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point type. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirement of the Nevada Rules of Appellate Procedure.

Dated this 17th day of September, 2021.

By: /s/ Erin E. Jordan
Erin E. Jordan, Esq.
6385 S. Rainbow Boulevard
Suite 600
Las Vegas, Nevada 89118
702.893.3383
Attorneys for Petitioner

26.1 DISCLOSURE STATEMENT

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 judges of this court may evaluate possible disqualification or recusal. There are no corporations remaining in this case.

Minh Nguyen, M.D.

Lewis Brisbois Bisgaard & Smith, LLP, attorneys S. Brent Vogel, Esq. and Erin E. Jordan, Esq.

Dated this 17th day of September, 2021.

By: /s/ Erin E. Jordan
Erin E. Jordan, Esq.
6385 S. Rainbow Boulevard
Suite 600
Las Vegas, Nevada 89118
702.893.3383
Attorneys for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this 17th day of September, 2021, I served the foregoing 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:

The Honorable Monica Trujillo
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

Carol P. Michel, Esq.
Marjan Hajimirzaee, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, NV 89118
*Attorneys for Real Party in Interest Emil
Morneault, RPH*

Dale A. Hayes, Jr., Esq.
Liane K. Wakayama, Esq.
HAYES WAKAYAMA
4735 S. Durango Dr., Suite 105
Las Vegas, NV 89147
*Attorneys for Real Parties In Interest
PATRICIA ANN ADAMS, individually,
in her capacity as Trustee of THE
STEWART FAMILY TRUST dated
January 31, 2007, in her capacity as
Special Administrator of the ESTATE
OF CONNIE STEWART and in her
capacity as Special Administrator of the
ESTATE OF GARY STEWART; GARY
LINCK STEWART, JR.; MARY KAY
FALLON; ELIZABETH A HODGE*

/s/ Roya Rokni

An employee of LEWIS BRISBOIS
BISGAARD & SMITH, LLP