

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. ~~EC201811411~~ Electronically Filed
Sep 17 2021 02:29 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS
VOL. 1**

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

INDEX TO PETITIONERS' APPENDIX

Exhibit	Document	Date	Page Nos.
1	Plaintiffs' Complaint	2/28/20	2-9
2	Defendant Morneault's Answer to Complaint	6/24/20	11-17
3	Suggestion of Death	6/24/20	19-22
4	Stipulation and Order for Substitution of Party Upon Suggestion of Death of Connie Stewart and for Substitution of Counsel	11/25/20	24-31
5	Defendant Nguyen's Partial Motion to Dismiss	12/9/20	33-39
6	Plaintiffs' Motion for Leave to Amend Complaint	12/21/20	41-63
7	Plaintiffs' Opposition to Defendant Nguyen's Partial Motion to Dismiss	12/23/20	65-78
8	Defendant Nguyen's Opposition to Motion for Leave to Amend Complaint	1/4/21	80-97
9	Defendant Morneault's Opposition to Motion for Leave to Amend Complaint	1/4/21	99-108
10	Defendant Nguyen's Reply in Support of Partial Motion to Dismiss	1/5/21	110-119
11	District Court's Minutes	1/19/21	121
12	Plaintiffs' Reply in Support of Motion for Leave to Amend Complaint	1/25/21	123-132
13	Defendant Nguyen's Answer to Complaint	1/27/21	134-139
14	District Court's Minutes	2/4/21	141
15	Notice of Entry of Order Denying Defendant Nguyen's Partial Motion to Dismiss	2/11/21	143-153

16	First Amended Complaint	3/19/21	155-166
17	Notice of Entry of Order Granting Plaintiffs' Motion for Leave to Amend	4/1/21	168-176
18	Defendant Morneault's Motion to Dismiss in Part Plaintiffs' First Amended Complaint	4/2/21	178-188
19	Defendant Nguyen's Motion to Dismiss First Amended Complaint	4/2/21	190-198
20	Plaintiffs' Opposition to Defendant Morneault's Motion to Dismiss in Part Plaintiffs' First Amended Complaint	4/19/21	200-211
21	Plaintiffs' Opposition to Defendant Nguyen's Motion to Dismiss First Amended Complaint	4/19/21	213-240
22	Defendant Morneault's Reply in Support of Motion to Dismiss in Part Plaintiffs' First Amended Complaint	4/26/21	242-250
23	Defendant Nguyen's Joinder to Defendant Morneault's Motion to Dismiss in Part Plaintiffs' First Amended Complaint	4/27/21	252-254
24	Defendant Nguyen's Reply in Support of Motion to Dismiss First Amended Complaint	4/27/21	256-262
25	Court Transcript regarding 5/11/21 Oral Argument	8/17/21	264-276
26	District Court's Minutes	5/25/21	278
27	Order Denying Defendant Nguyen's Motion to Dismiss Plaintiffs' First Amended Complaint	8/5/21	280-288

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2021, a true and correct copy of **PETITIONER'S APPENDIX VOL. 1 TO PETITION FOR WRIT OF MANDAMUS** was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

The Honorable Monica Trujillo
The Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101
Respondent

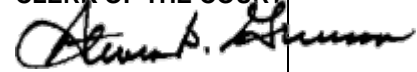
Aaron Ford
Attorney General
Nevada Department of Justice
100 North Carson Street
Carson City, Nevada 89701
Counsel for Respondent

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*

By /s/ Roya Rokni
An Employee of
LEWIS BRISBOIS BISGAARD &
SMITH LLP

EXHIBIT 1



COMJD
DOUGLAS M. COHEN, ESQ.
WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP
Nevada Bar No. 1214
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
(702) 341-5200/Fax: (702) 341-5300
dcohen@wrslawyers.com

CASE NO: A-20-811421-C
Department 10

Attorney for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

CONNIE STEWART, an individual,

Case No.:

Plaintiff,

Dept. No.:

vs.

COMPLAINT AND JURY DEMAND

MINH NGUYEN, M.D. AND EMIL
MORNEAULT, RPH; and DOES 1-5 and
ROE ENTITIES 1-5

**(Medical Malpractice/Wrongful Death,
Automatically Exempt from ADR)**

Defendants.

1. Plaintiff, Connie Stewart, wife of deceased Gary Stewart (date of birth 10/21/1938), is his heir for this wrongful death/medical malpractice complaint and complains against the Defendants as stated below. Gary Stewart was Defendants' patient during all material times. Gary Stewart died on March 5, 2019.

JURISDICTION

2. This Court has subject matter jurisdiction over this matter pursuant to NRS 4.370(1), as the matter in controversy exceeds \$15,000, exclusive of attorney's fees, interest, and costs.

(First Claim for Relief)

PROFESSIONAL NEGLIGENCE/NEGLIGENCE/WRONGFUL

DEATH/VULNERABLE AND OLDER PERSON

3. Paragraphs 1 through 2 are incorporated herein.

1 4. Defendant, Minh Nguyen, M.D., is a provider of health care in Clark County,
2 Nevada pursuant to NRS 41A.017 and at all material times was Gary Stewart's physician in
3 Clark County. Defendant, Emil Morneault, RPh, was at all material times a pharmacist for Gary
4 Stewart in Clark County, Nevada.

5 5. Defendants' conduct fell below the standard of care, they were professionally
6 negligent, and their conduct caused Gary Stewart's mental and physical pain and suffering,
7 emotional distress, disfigurement and wrongful death (NRS 41.085). The Defendants caused
8 Connie Stewart to suffer loss of probable support, companionship, society, comfort and
9 consortium and costs and attorney's fees because of her beloved husband Gary Stewart's
10 wrongful death (NRS 41.085). The Declaration of expert, Diana Koin, M.D., (**exhibit 1**), details
11 the allegations of Defendants' professional negligence and/or negligence and/or abuse and
12 neglect and/or punitive conduct and is incorporated herein. The Defendants negligent medication
13 errors violated State and/or Federal Statutes and these errors are negligent *per se*.

14 6. Pursuant to NRS 41.1395, Gary Stewart was an older and vulnerable person who
15 was neglected and/or abused by Defendants who acted recklessly and caused him physical and
16 mental pain and suffering and death as stated above and in the incorporated declaration of Diana
17 Koin, M.D.

18 7. Defendants acted with a conscious disregard because they had knowledge of the
19 probable harmful consequences of their wrongful acts and exhibited a willful and deliberate
20 failure to act to avoid those consequences. Defendants acted with malice, express or implied,
21 because they engaged in conduct which was despicable conduct and which was engaged in with
22 a conscious disregard of Gary Stewart's rights or safety. Defendants acted with oppression
23 because it engaged in despicable conduct that subjected Gary Stewart to cruel and unjust
24 hardship with a conscious disregard of his rights and safety.

25 8. The true names and capacities of Defendants DOES 1-5 and ROE ENTITIES 1-5
26 are unknown to Plaintiff, therefore, Plaintiff sues those Defendants by such fictitious names.
27 Plaintiff alleges on information and belief that each of the Defendants designated as a DOE is a
28 partner, officer, director, employer, or employee, or is in some manner associated with one or

1 more of the Defendants, and is responsible in some manner for the events referred to herein, and
2 is the proximate cause of the damages suffered by Plaintiff. Plaintiff does not know the name of
3 the Doe and ROE ENTITY defendants, but said Doe and ROE ENTITY Defendants participated
4 in the described negligence and other causes of action described herein.

5 **PRAYER FOR RELIEF**

6 **WHEREFORE**, Plaintiff prays for a judgment against the Defendants, jointly and
7 severally, as follows:

- 8 1. For general damages in excess of \$15,000;
- 9 2. For specific and special damages in excess of \$15,000;
- 10 3. For double damages and costs and attorney's fees in excess of \$15,000 pursuant
11 to NRS 41.1395;
- 12 4. For punitive damages in excess of \$15,000;
- 13 5. For reasonable costs and attorney's fees; and
- 14 6. For further relief that the Court deems appropriate.

15 DATED this 28th day of February, 2020.

16 **WOLF, RIFKIN, SHAPIRO,**
17 **SCHULMAN & RABKIN, LLP**

18 By: /s/ Douglas M. Cohen
19 DOUGLAS M. COHEN, ESQ.
20 Nevada Bar No. 1214
21 3556 E. Russell Road, Second Floor
22 Las Vegas, Nevada 89120
23 (702) 341-5200/Fax: (702) 341-5300
24 dcohen@wrslawyers.com

25 *Attorney for Plaintiff*
26
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

DATED this 28th day of February, 2020.

By: /s/ Douglas M. Cohen
DOUGLAS M. COHEN, ESQ.
Nevada Bar No. 1214
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
(702) 341-5200/Fax: (702) 341-5300
dcohen@wrslawyers.com

-4-

EXHIBIT 1

EXHIBIT 1

DIANA KOIN, M.D.
4660 ALPINE ROAD
PORTOLA VALLEY, CA 94028-8008

DECLARATION OF DIANA KOIN, M.D.

I am a licensed physician in the State of California, specializing in Internal Medicine and Geriatric Medicine. I have been board certified in Internal Medicine and Geriatric Medicine. My faculty affiliations have been Stanford University and the University of California, San Francisco. I was the Medical Director of the Sequoias in Portola Valley, California, and the Chief Medical Officer of the California Veterans' Home in Yountville, California. My clinical background includes care of patients with many of the same patient needs and patient problems suffered by Mr. Stewart including seizures and the prescription of seizure medication. In addition, I was the Director of Elder and Dependent Adult Abuse Education at the California Medical Training Center at the University of California, Davis, a project funded by the Governor's Office of Emergency Services and thus have experience in identifying elder abuse and neglect.

OVERVIEW OF THE CASE

I reviewed Mr. Gary Stewart's medical records from Encompass Health Rehabilitation Hospital of Henderson, Dr. Loring Jacobs, Dr. Edgar Evangelista, Family Care Home Health, St. Rose Hospital and Sunrise Hospital. In addition I reviewed Mr. Stewart's Death Certificate, a medication list prepared by the family provided to his health care providers, and a Walgreens list of medications.

When Mr. Stewart was admitted to Encompass Health Rehabilitation Hospital of Henderson his diagnoses included:

- Seizures
- Metabolic Encephalopathy
- Esophageal Reflux
- Hypertension
- Hypothyroidism
- Hyperlipidemia
- History of Gout
- Anemia
- Coronary Artery Disease, s/p Coronary Artery Bypass
- Depression
- Prostate Disease

Mr. Stewart had a lengthy history of seizures. When managed in years prior to the Encompass admission under the care of Dr. Edgar Evangelista, he only rarely had any seizure activity. His seizures were controlled with:

- Depakote (Divalproex) Delayed Release Tablet 500 mg
- Vimpat (Lacosamide) Tablet 100 mg

- Depakote (Divalproex) Delayed Release Tablet 125 mg

Mr. Stewart was discharged from Sunrise Hospital on October 18, 2018 to home, where he received services from Family Care Home Health. On February 13, 2019, Mr. Stewart was admitted to Encompass Health Rehabilitation Hospital of Henderson. The family provided the facility a list of all three of Mr. Stewart's medications at the time of his admission. At the time of his admission, the History and Physical Exam by Minh Nguyen, M.D. includes the diagnosis of seizures both under "Chief Complaint" and "History of the Present Illness."

Despite the clear diagnosis of seizures, not only are two of the three appropriate anti-seizure medications not prescribed, the only one of the three anti-seizure medications that is on Mr. Stewart's orders (Depakote (Divalproex) Delayed Release Tablet 125 mg) was discontinued by Dr. Nguyen on February 16, 2019. The order to discontinue was approved by Emil Morneault, RPh, pharmacist. Additional red flags include the fact that Dr. Nguyen ordered a laboratory test for adequacy of the valproate (Divalproex) level even though the patient was not ordered any anti-seizure medication, and the lab result on February 15, 2019 shows a low level 25.7, with an acceptable therapeutic range of 50-100).

On February 21, 2019, Mr. Stewart seized and required emergency transfer to St. Rose Dominican Hospital. The Encompass Health Rehabilitation Hospital of Henderson covering physician Olumide Olagunju M.D. wrote:

"Patient had multiple witnessed seizure episode, given ativan, sent to ER for further evaluation, somebody discontinue valproic acid?"

At Dominican Hospital, he was found to have aspirated during the seizure, with 0 therapeutic levels of seizure medication, and subsequently required intubation. Mr. Stewart died March 5, 2019.

1. Dr. Minh Nguyen failed to meet a basic level of the standard of care for Mr. Stewart. Dr. Nguyen failed to provide reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care. While under their care, Mr. Stewart seized because he had not received the necessary anti-seizure medications. The failure to order and monitor the correct medications is serious and life-threatening. The failure to provide an order for the appropriate medications was life-endangering and in fact caused the patient's death.
2. Multiple entries in the medical record should have alerted Dr. Nguyen and Mr. Emil Morneault, RPh that Mr. Stewart was a patient with a seizure disorder and required medication to prevent seizures. Attention to the patient's diagnoses, ordering seizure medication, related laboratory tests, lab results that reveal a below acceptable level of medication, and appropriate review of prior medical records and medication monitoring are all basic standards of care that were not fulfilled.

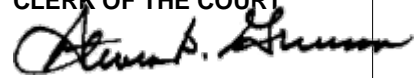
3. In my opinion, these findings represent severe neglect by Minh Nguyen MD and Emil Morneauult, RPh whose conduct fell below the standard of care because Dr. Nguyen consistently failed to prescribe anti-seizure medications and discontinued the Depakote 125 mg. Emil Morneauult, RPh failed to monitor the medication and advise Dr. Nguyen of the seizure medication irregularity. These failures in the standard of care caused Mr. Stewart's condition to deteriorate, and caused his death his death.
4. All of my opinions are made within a reasonable degree of medical certainty.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed
On February 28, 2020

Diana Koin M.D.
Diana Koin, M.D.

EXHIBIT 2



1 **ANSC**
Carol P. Michel, Esq.
2 Nevada Bar No. 11420
cmichel@wwhgd.com
3 Marjan Hajimirzaee, Esq.
Nevada Bar No. 11984
4 mhajimirzaee@wwhgd.com
WEINBERG, WHEELER, HUDGINS,
5 GUNN & DIAL, LLC
6385 S. Rainbow Boulevard, Suite 400
6 Las Vegas, Nevada 89118
Telephone: (702) 938-3838
7 Facsimile: (702) 938-3864

8 *Attorneys for Defendant Emil Morneault, RPH*

9
10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 CONNIE STEWART, an individual,
13
14 Plaintiff,

15 vs.

16 MINH NGUYEN, M.D. AND EMIL
MORNEAULT, RPH; and DOES 1-5 and
17 ROE ENTITIES 1-5,
18 Defendants.

Case No. A-20-811421-C
Dept. No. X

**DEFENDANT EMIL MORNEAULT,
RPH'S ANSWER TO PLAINTIFF'S
COMPLAINT**

19
20 Defendant Emil Morneault, RPH ("Defendant"), by and through his attorneys, Carol P.
21 Michel, Esq. and Marjan Hajimirzee, Esq., of the law firm of Weinberg Wheeler Hudgins Gunn
22 & Dial, LLC, hereby submits his Answer to Plaintiff's Complaint.

23 1. Answering paragraph 1 of the Complaint, Defendant is without knowledge or
24 information sufficient to form a belief about the truth of the allegations in this paragraph and on
25 that basis denies the same.

26 **JURISDICTION**

27 2. Answering paragraph 2 of the Complaint, Defendant Answering paragraph 1 of
28 the Complaint, Defendant is without knowledge or information sufficient to form a belief about



the truth of the allegations in this paragraph and on that basis denies the same.

(First Claim for Relief)

**PROFESSIONAL NEGLIGENCE/NEGLIGENCE/
WRONGFUL DEATH/VULNERABLE AND OLDER PERSON**

3. Answering paragraph 3 of the Complaint, Defendant incorporates by reference his responses and defenses to paragraphs 1 through 2 of Plaintiff's Complaint as if fully set forth herein.

4. Answering paragraph 4 of the Complaint, Defendant denies the allegations contained therein.

5. Answering paragraph 5 of the Complaint, Defendant denies the allegations contained therein. Moreover, Defendant denies those opinions pertaining to him set forth in the purported Declaration attached as exhibit 1 to Plaintiff's Complaint. Defendant is without knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and the exhibit 1 attached to Plaintiff's Complaint to the extent those allegations pertain to anyone else. Any remaining allegations in this paragraph are denied.

6. Answering paragraph 6 of the Complaint, Defendant denies the allegations contained therein.

7. Answering paragraph 7 of the Complaint, Defendant denies the allegations contained therein.

8. Answering paragraph 8 of the Complaint, Defendant is without knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and on that basis denies the same.

Responding to the last unnumbered paragraph of the Complaint which begins with WHEREFORE, Defendant denies Plaintiff is entitled any relief or recovery whatsoever of Defendant. Any allegations of the Complaint not heretofore responded to are hereby denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted.



1 **SECOND AFFIRMATIVE DEFENSE**

2 Defendant owed no duty to Plaintiff and to the extent owed, breached no duty alleged.

3 **THIRD AFFIRMATIVE DEFENSE**

4 Defendant, at all times relevant to the allegations contained in Plaintiff's Complaint,
5 acted with reasonable care in the performance of any and all duties, if any.

6 **FOURTH AFFIRMATIVE DEFENSE**

7 In all services rendered by Defendant to Gary Stewart, if any, Defendant possessed and
8 exercised that degree of skill and learning ordinarily possessed and exercised by the members of
9 his profession in good standing, practicing in similar localities, and that at all times Defendant
10 used reasonable care and diligence in the exercise of his skills and the application of his learning,
11 and at all times acted according to his best judgment; that the services provided by Defendant, if
12 any, was usual and customary. At no time was Defendant guilty of negligence; that, on the
13 contrary, Defendant did perform each and every act of such service, if any, in a proper and
14 efficient manner and in a manner most thoroughly approved and followed by the profession
15 generally and under the circumstances and conditions as they existed when such services were
16 rendered.

17 **FIFTH AFFIRMATIVE DEFENSE**

18 The negligence of Plaintiff, Plaintiff's decedent, other defendants, cross-defendants,
19 third-party defendants, other parties, and/or non-parties contributed to the cause of the alleged
20 incident and/or exceeded the negligence of Defendant, and therefore, any liability which may be
21 attributed to Defendant is barred or must be reduced, apportioned, or allocated as against other
22 parties and non-parties accordingly.

23 **SIXTH AFFIRMATIVE DEFENSE**

24 The injuries, if any, complained of by Plaintiff in the Complaint were proximately caused
25 by the acts or omissions of unknown third parties or other persons over whom Defendant
26 exercised no control and over whom Defendant had no right or duty to control, nor ever has had
27 a right or duty to exercise control.

28 ///



SEVENTH AFFIRMATIVE DEFENSE

The alleged injuries and damages complained of by Plaintiff were caused in whole or in part by a new, independent and superseding intervening cause over which Defendant had no control.

EIGHTH AFFIRMATIVE DEFENSE

The alleged injuries and damages complained of by Plaintiff were the result of unrelated, pre-existing, or subsequent conditions unrelated to Defendant's conduct.

NINTH AFFIRMATIVE DEFENSE

Plaintiff failed to mitigate her damages.

TENTH AFFIRMATIVE DEFENSE

Necessary and indispensable parties may not have been joined and/or parties may have been improperly joined, including Defendant.

ELEVENTH AFFIRMATIVE DEFENSE

The liability, if any, of Defendant must be reduced by the percentage of fault of others.

TWELFTH AFFIRMATIVE DEFENSE

The liability, if any, of Defendant is several and not joint and several and based upon his own acts and not the acts of others.

THIRTEENTH AFFIRMATIVE DEFENSE

If Plaintiff has settled with any other parties, Defendant is entitled to credit and set-off in the amount of such settlement.

FOURTEENTH AFFIRMATIVE DEFENSE

Defendant claims the right to apportionment and allocation as to any noneconomic damages, and requests a decision of the Court and/or of the jury to that effect, against all other defendants, cross-defendants, third-party defendants, parties, and non-parties who are in any way responsible for the injuries claimed by Plaintiff.

FIFTEENTH AFFIRMATIVE DEFENSE

The injuries complained of in the Complaint were not the result of willful, malicious or deliberate conduct on the part of Defendant.



1 **SIXTEENTH AFFIRMATIVE DEFENSE**

2 Plaintiff is not entitled to punitive damages. In any event, any such damages are subject
3 to the due process requirements of Articles 1 and 6, and by the First, Fifth, Eighth, and
4 Fourteenth Amendments to the United States Constitution and other constitutional limitations,
5 including, but not limited to, those set forth in *State Farm Mutual Automobile Insurance Co. v.*
6 *Campbell*, 538 U.S. 408 (2003), and *BMW of North America v. Gore*, 517 U.S. 559 (1996).

7 **SEVENTEENTH AFFIRMATIVE DEFENSE**

8 NRS 42.005 limits any punitive damages awarded here.

9 **EIGHTEENTH AFFIRMATIVE DEFENSE**

10 It has been necessary for Defendant to employ the services of an attorney to defend the
11 action, and to prosecute any necessary cross-actions or third-party actions, and a reasonable sum
12 should be allowed Defendant for attorney's fees and all incurred costs of the suit, as well as
13 apportionment of all economic damages and an allocation as between all parties found to be
14 culpable.

15 **NINETEENTH AFFIRMATIVE DEFENSE**

16 Plaintiff's claims are barred, in whole or in part, by the applicable statutes of limitations.

17 **TWENTIETH AFFIRMATIVE DEFENSE**

18 Defendant hereby incorporates by reference those affirmative defenses enumerated in
19 Rule 8 of the Nevada Rules of Civil Procedure as if fully set forth herein. In the event further
20 investigation or discovery reveals the applicability of any such defenses, Defendant reserves the
21 right to seek leave of Court to amend his Answer to specifically assert the same. Such defenses
22 are herein incorporated by reference for the specific purpose of not waiving the same.

23 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

24 Pursuant to NRCP 11, as amended, all possible affirmative defenses may not have been
25 alleged herein insofar as facts were not available after reasonable inquiry upon the filing of
26 Defendant's Answer to Plaintiff's Complaint, and therefore, Defendant reserves the right to
27 amend his Answer to allege additional affirmative defenses if subsequent investigation warrants.

28 WHEREFORE, Defendant respectfully requests that this Court enter judgment as



follows:

1. That Plaintiff take nothing by virtue of her Complaint;
2. That Plaintiff's Complaint be dismissed with prejudice and that Defendant be dismissed from this action;
3. For an award of reasonable attorneys' fees and costs of suit;
4. For such other relief as the Court may deem just and proper; and
5. That the case be tried before a jury.

DATED this 24th day of June, 2020.

/s/ Carol P. Michel

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 Defendant Emil Morneault, RPH



CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June, 2020, a true and correct copy of the foregoing **DEFENDANT EMIL MORNEAULT, RPH'S ANSWER TO PLAINTIFF'S COMPLAINT** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

Douglas M. Cohen, Esq.
dcohen@wrslawyers.com

WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN, LLP
3556 e. Russell Road, Second Floor
Las Vegas, NV 89120
(702) 341-5200
(702) 341-5300 FAX
Attorneys for Plaintiff Connie Stewart

Erin E. Jordan, Esq.

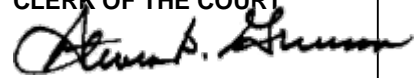
Erin.Jordan@lewisbrisbois.com

LEWIS BRISBOIS BISGAARD & SMITH, LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118
(702) 693-4354
(702) 893-3789 FAX
Attorneys for Defendant Minh Nguyen, M.D.

/s/ Kelly L. Pierce

An employee of WEINBERG, WHEELER, HUDGINS
GUNN & DIAL, LLC

EXHIBIT 3



1 S. BRENT VOGEL
Nevada Bar No. 6858
2 E-Mail: Brent.Vogel@lewisbrisbois.com
ERIN E. JORDAN
3 Nevada Bar No. 10018
E-Mail: Erin.Jordan@lewisbrisbois.com
4 LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
5 Las Vegas, Nevada 89118
702.893.3383
6 FAX: 702.893.3789
Attorneys for Defendant Minh Nguyen, M.D.

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

11 CONNIE STEWART,
12 Plaintiff,
13 vs.

CASE NO. A-20-811421-C
Dept. No.: 10

SUGGESTION OF DEATH

14 MINH NGUYEN, M.D. AND EMIL
MORNEAULT, RPH; and DOES 1-5 and
15 ROE ENTITIES 1-5
16 Defendants.

17
18
19 Defendant Minh Nguyen, M.D. ("Defendant"), by and through his counsel of record, the
20 Law Firm of LEWIS BRISBOIS BISGAARD & SMITH LLP, hereby suggests upon the record

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 pursuant to NRCP 25(a)(1), the death of CONNIE STEWART, Plaintiff herein, during the
2 pendency of this action.

3 DATED this 24th day of June, 2020.

4 LEWIS BRISBOIS BISGAARD & SMITH LLP

5
6 By /s/ Erin E. Jordan

7 S. BRENT VOGEL

8 Nevada Bar No. 6858

9 ERIN E. JORDAN

10 Nevada Bar No. 10018

11 6385 S. Rainbow Boulevard, Suite 600

12 Las Vegas, Nevada 89118

13 Tel. 702.893.3383

14 *Attorneys for Defendant Minh Nguyen, M.D.*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2020, a true and correct copy of SUGGESTION OF DEATH was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

Douglas M. Cohen, Esq.
WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN, LLP
3356 E. Russell Rd., 2nd Floor
Las Vegas, NV 89120
dcohen@wrslawyers.com
Attorneys for Plaintiff

By /s/ Johana Whitbeck
An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

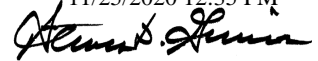
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of June, 2020, a true and correct copy of was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

By _____
, an Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

EXHIBIT 4



CLERK OF THE COURT

HAYES | WAKAYAMA
DALE A. HAYES, JR., ESQ.
Nevada Bar No. 9056
LIANE K. WAKAYAMA, ESQ.
Nevada Bar No. 11313
4735 S. Durango Drive, Ste. 105
Las Vegas, Nevada 89147
(702) 656-0808 – Telephone
(702) 655-1047 – Facsimile
dhayes@hwlawnv.com
lkw@hwlawnv.com
*Attorneys for Patricia Ann Adams,
as Special Administrator of the Estate
of Connie Rae Stewart*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

CONNIE STEWART, an individual,

Plaintiff,

vs.

Case No.: A-20-811421-C

Dept. No.: III

MINH NGUYEN, M.D. AND EMIL
MORNEAULT, RPH; and DOES 1-5 and ROE
ENTITIES 1-5,

Defendants.

**STIPULATION AND ORDER FOR SUBSTITUTION OF PARTY UPON SUGGESTION
OF DEATH OF CONNIE STEWART PURSUANT TO NRCP 25(a)(1) AND FOR
SUBSTITUTION OF COUNSEL**

The parties to this action, by and through their respective counsel of record, hereby stipulate as follows:

1. On June 24, 2020, a Suggestion of Death was filed in this matter concerning the death of the Plaintiff, Connie Stewart, on June 9, 2020.

2. Pursuant to NRCP 25(a)(1), a substitution must be made within 180 days of service of the Suggestion of Death.

3. On October 21, 2020, Patricia Ann Adams was issued Letters of Special Administration and duly appointed as the Special Administrator of the Estate of Connie Rae

Stewart *In the Matter of the Estate of Connie Rae Stewart*, in the Eighth Judicial District Court, Clark County, Nevada, Case No. P-20-104505-E, on file herein.

4. As such, the parties hereto agree that Patricia Ann Adams, in her personal capacity as the Special Administrator of the Estate of Connie Rae Stewart, is hereby substituted in place and stead of Plaintiff Connie Stewart in these proceedings;

5. The parties further agree that the law firm of Hayes Wakayama shall be substituted as counsel of record for Connie Rae Stewart in place and stead of the law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP.

IT IS SO STIPULATED.

Dated this 16th day of November, 2020

Dated this 16th day of November, 2020

ESTATE OF CONNIE RAE STEWART

HAYES | WAKAYAMA

By: Patricia Ann Adams
PATRICIA ANN ADAMS
In her personal capacity as the Special Administrator of the Estate of Connie Rae Stewart

By: /s/ Dale A. Hayes, Jr., Esq.
DALE A. HAYES, JR., ESQ.
Nevada Bar No. 9056
LIANE K. WAKAYAMA, ESQ.
Nevada Bar No. 11313
4735 S. Durango Drive, Ste. 105
Las Vegas, Nevada 89147
Attorneys for Patricia Ann Adams, as Special Administrator of the Estate of Connie Rae Stewart

Dated this 16th day of November, 2020

Dated this 16th day of November, 2020

**WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP**

**WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC**

By: /s/ Douglas M. Cohen, Esq.
DOUGLAS M. COHEN, ESQ.
Nevada Bar No. 1214
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Former attorneys for Connie Stewart

By: /s/ Carol P. Michel, Esq.
CAROL P. MICHEL, ESQ.
Nevada State Bar 11420
MARJAN HAJIMIRZAEI, ESQ.
Nevada State Bar 11984
6385 S. Rainbow Blvd., Ste. 400
Las Vegas, Nevada 89118
Attorneys for Defendant Emil Morneault, RPH

///

Dated this 16th day of November, 2020

**LEWIS BRISBOIS BISGAARD &
SMITH LLP**

By: /s/ Erin E. Jordan, Esq.

S. BRENT VOGEL

Nevada Bar No. 6858

ERIN E. JORDAN

Nevada Bar No. 10018

6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

*Attorneys for Defendant Minh Nguyen,
M.D.*

ORDER

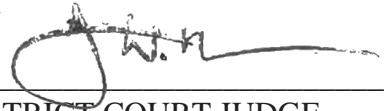
IT IS HEREBY ORDERED that, pursuant to the foregoing stipulation, Patricia Ann Adams, in her personal capacity as Special Administrator of the Estate of Connie Rae Stewart, is hereby substituted in place and stead of the deceased Plaintiff Connie Stewart; and

The law firm of Hayes Wakayama is hereby substituted as counsel for Connie Rae Stewart in place and stead of the law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP.

IT IS SO ORDERED.

DATED this _____ day of _____, 2020.

Dated this 25th day of November, 2020



DISTRICT COURT JUDGE

Submitted by:

HAYES | WAKAYAMA

35B FB8 DFF9 D58D
Douglas W. Herndon
District Court Judge

ak

/s/ Dale A. Hayes, Jr., Esq.

DALE A. HAYES, JR., ESQ.

Nevada State Bar No. 9056

LIANE K. WAKAYAMA, ESQ.

Nevada State Bar No. 11313

4735 S. Durango Drive, Ste. 105

Las Vegas, Nevada 89147

*Attorneys for Patricia Ann Adams,
as Special Administrator of the Estate
of Connie Rae Stewart*

From: Michel, Carol <CMichel@wwhgd.com>
Sent: Monday, November 16, 2020 12:39 PM
To: Julia Rodionova
Cc: Liane K Wakayama; Dale Hayes Jr; Whitbeck, Johana; Vogel, Brent; erin.jordan@lewisbrisbois.com; Douglas Cohen
Subject: RE: STEWART v. NGUYEN, et al. | Case No. A-20-811421-C

Okay to affix my signature to the proposed Stipulation.

From: Julia Rodionova [mailto:julia@hwlawnv.com]
Sent: Monday, November 16, 2020 3:01 PM
To: Michel, Carol
Cc: Liane K Wakayama; Dale Hayes Jr; Whitbeck, Johana; Vogel, Brent; erin.jordan@lewisbrisbois.com; Douglas Cohen
Subject: RE: STEWART v. NGUYEN, et al. | Case No. A-20-811421-C

This Message originated outside your organization.

Thank you. Ms. Michel, now that Erin Jordan and Doug Cohen have provided their approval to affix their electronic signatures to the Stipulation for Substitution and to continue this Wednesday's hearing, please advise if you also agree to the same and we will email Department 3 accordingly with all copied.



Julia Rodionova
Paralegal
4735 S. Durango Dr., Ste. 105
Las Vegas, Nevada 89147
(t) (702) 656-0808
(f) (702) 655-1047
www.hwlawNV.com

Pursuant to IRS Circular 230, any tax information or written tax advice contained herein (including any attachments) is not intended to be and can neither be used by any person for the purpose of avoiding tax penalties nor used to promote, recommend or market any tax-related matter addressed herein.

DO NOT read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication contains confidential and/or privileged information intended only for the addressee. If you have received this communication in error, please call us (collect) immediately at (702) 656-0808 and ask to speak to the sender of the communication. Also please e-mail the sender and notify the sender immediately that you have received the communication in error. Thank you. Hayes Wakayama - Attorneys at Law

From: Jordan, Erin <Erin.Jordan@lewisbrisbois.com>
Sent: Monday, November 16, 2020 11:32 AM
To: Michel, Carol; Julia Rodionova; Douglas Cohen; Vogel, Brent
Cc: Liane K Wakayama; Dale Hayes Jr; Whitbeck, Johana
Subject: RE: STEWART v. NGUYEN, et al. | Case No. A-20-811421-C

CAUTION:EXTERNAL EMAIL

I agree



Erin E. Jordan
Partner
Erin.Jordan@lewisbrisbois.com

T: 702.693.4354 F: 702.893.3789

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV 89118 | LewisBrisbois.com

Representing clients from coast to coast. [View our locations nationwide.](#)

This e-mail may contain or attach privileged, confidential or protected information intended only for the use of the intended recipient. If you are not the intended recipient, any review or use of it is strictly prohibited. If you have received this e-mail in error, you are required to notify the sender, then delete this email and any attachment from your computer and any of your electronic devices where the message is stored.

From: Michel, Carol <CMichel@wwhgd.com>
Sent: Monday, November 16, 2020 11:13 AM
To: Julia Rodionova <julia@hwlawnv.com>; Douglas Cohen <DCohen@wrslawyers.com>; Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Jordan, Erin <Erin.Jordan@lewisbrisbois.com>
Cc: Liane K Wakayama <lkw@hwlawnv.com>; Dale Hayes Jr <dhayes@hwlawnv.com>; Whitbeck, Johana <Johana.Whitbeck@lewisbrisbois.com>
Subject: [EXT] RE: STEWART v. NGUYEN, et al. | Case No. A-20-811421-C

Thanks. Has Brent Vogel or Erin Jordan approved?



LITIGATION DEPARTMENT
OF THE YEAR ALM'S DAILY REPORT
2020-2019 - 2018 - 2017 - 2016 - 2014

Carol P. Michel, Attorney
Weinberg Wheeler Hudgins Gunn & Dial

From: Douglas Cohen <DCohen@wrslawyers.com>
Sent: Monday, November 16, 2020 9:21 AM
To: Julia Rodionova <julia@hwlawnv.com>; Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Michel, Carol <CMichel@wwhgd.com>
Cc: ehernandez@hayeslawnv.com; Stephanie Giraldo <sgiraldo@hwlawnv.com>; Liane K Wakayama <lkw@hwlawnv.com>; Dale Hayes Jr <dhayes@hwlawnv.com>
Subject: RE: STEWART v. NGUYEN, et al. | Case No. A-20-811421-C

Ok with me!

Douglas Cohen, Esq.
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120
(702) 341-5200 x 5111
(702) 341-5300 - Facsimile
E-Mail: DCohen@wrslawyers.com

This message contains information which may be confidential and privileged. Unless you are the addressee (or authorized to receive e-mails for the addressee), you may not use, copy or disclose to anyone this message or any information contained in this message. If you have received this message in error, please advise the sender by reply e-mail to DCohen@wrslawyers.com, and delete the message. Thank you.

From: Julia Rodionova [<mailto:julia@hwlawnv.com>]
Sent: Monday, November 16, 2020 9:18 AM
To: Vogel, Brent; Michel, Carol; Douglas Cohen
Cc: ehernandez@hayeslawnv.com; Stephanie Giraldo; Liane K Wakayama; Dale Hayes Jr
Subject: RE: STEWART v. NGUYEN, et al. | Case No. A-20-811421-C
Importance: High

CAUTION:EXTERNAL EMAIL

Good morning everyone,

Please allow this email to follow up with you regarding the proposed Stipulation for Substitution Upon Suggestion of Death of Connie Stewart attached hereto. Please advise if you will authorize our office to affix your electronic signature to the same and submit, which we would like to do today.

Thank you for your attention,
Julia



Julia Rodionova
Paralegal
4735 S. Durango Dr., Ste. 105
Las Vegas, Nevada 89147
(t) (702) 656-0808

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Connie Stewart, Plaintiff(s)

CASE NO: A-20-811421-C

7 vs.

DEPT. NO. Department 3

8 Minh Nguyen, M.D.,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Stipulation and Order was served via the court's electronic eFile system
to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 11/25/2020

15 Carol Michel

cmichel@wwhgd.com

16 Kelly Pierce

kpierce@wwhgd.com

17 Raiza Anne Torrenueva

rtorrenueva@wwhgd.com

18 Douglas Cohen

dcohen@wrslawyers.com

19 Jennifer Finley

jfinley@wrslawyers.com

20 S. Vogel

brent.vogel@lewisbrisbois.com

21 Theresa McCracken

tmccracken@wrslawyers.com

22 Johana Whitbeck

johana.whitbeck@lewisbrisbois.com

23 Dale Hayes, Jr.

dhayes@hwlawnv.com

24 Josephine Groh

25 jgroh@wwhgd.com

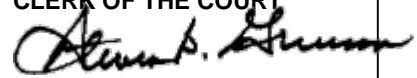
26 Amy Cvetovich

27 acvetovich@wwhgd.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Flor Gonzalez-Pacheco	FGonzalez-Pacheco@wwhgd.com
Kelly Gaez	kgaez@wwhgd.com
Marjan Hajimirzaee	mhajimirzaee@wwhgd.com
Liane Wakayama	lkw@hwlawnv.com
Julia Rodionova	julia@hwlawnv.com
Erin Jordan	Erin.Jordan@lewisbrisbois.com
Joshua Daor	joshua.daor@lewisbrisbois.com

EXHIBIT 5



1 S. BRENT VOGEL
Nevada Bar No. 6858
2 E-Mail: Brent.Vogel@lewisbrisbois.com
ERIN E. JORDAN
3 Nevada Bar No. 10018
E-Mail: Erin.Jordan@lewisbrisbois.com
4 LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
5 Las Vegas, Nevada 89118
702.893.3383
6 FAX: 702.893.3789
Attorneys for Defendant Minh Nguyen, M.D.

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

11 PATRICIA ANN ADAMS as Special
Administrator of the Estate of Connie Rae
12 Stewart,

13 Plaintiff,

14 vs.

15 MINH NGUYEN, M.D. AND EMIL
MORNEAULT, RPH; and DOES 1-5 and
16 ROE ENTITIES 1-5

17 Defendants.

CASE NO. A-20-811421-C
Dept. No.: 3

**DEFENDANT MINH NGUYEN, M.D.'S
PARTIAL MOTION TO DISMISS**

Hearing Requested

18 Defendant Minh Nguyen M.D., by and through his attorneys of record, S. Brent Vogel,
19 Esq. and Erin E. Jordan, Esq. of LEWIS BRISBOIS BISGAARD & SMITH LLP, hereby files this
20 Partial Motion to Dismiss Plaintiff's Complaint pursuant to NRCP 12.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28

1 This Motion is based upon the following Memorandum of Points and Authorities, the
2 papers and pleadings on file herein, and any oral argument offered at the hearing of this matter.

3 DATED this 9th of December, 2020

4 LEWIS BRISBOIS BISGAARD & SMITH LLP

5
6 By /s/ Erin E. Jordan
7 S. BRENT VOGEL
8 Nevada Bar No. 6858
9 ERIN E. JORDAN
10 Nevada Bar No. 10018
11 6385 S. Rainbow Boulevard, Suite 600
12 Las Vegas, Nevada 89118
13 702.893.3383
14 *Attorneys for Defendant Minh Nguyen, M.D.*

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I. FACTUAL BACKGROUND**

15 This is a professional negligence case that arises out of the care and treatment Defendants
16 provided to decedent Gary Stewart between February 13-21, 2019. Plaintiff alleges that
17 Defendants breached the standard of care when they failed to properly order Mr. Stewart's seizure
18 medication. Plaintiff alleges that Mr. Stewart developed a condition caused status epilepticus due
19 to a medication error and that he died as a result. Affidavit Attached to Complaint.

20 This wrongful death action was filed by Gary Stewart's wife, Connie Stewart and his
21 Estate. Mrs. Stewart has since passed away and the Plaintiff is now Patricia Adams on behalf of
22 Connie Stewart's Estate.

23 The Plaintiff brought a claim entitled "Professional Negligence/ Negligence/ Wrongful
24 Death/ Vulnerable and Older Person." Plaintiff seeks a damages enhancement with her NRS
25 41.1395 vulnerable and older person claim (hereinafter referred to as elder abuse claim).
26 Complaint, p. 3.

27 Defendant Dr. Nguyen now brings this Partial Motion to Dismiss, which asks this Court to
28 Dismiss Plaintiff's elder abuse claim.

1 **II. STANDARD OF REVIEW**

2 Defendant brings this Motion to Dismiss pursuant to NRCP 12(b)(5), based upon
3 Plaintiff's failure to state a claim for which relief may be granted. A Plaintiff's claim must be
4 dismissed pursuant to NRCP 12(b)(5) if plaintiff is entitled to no relief under any set of facts
5 which could be proved in support of the claim. *Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev.
6 163 (1965); *Edgar v. Wagner*, 101 Nev. 226, (1985).

7 **III. ARGUMENT**

8 The Plaintiff brought a claim in this action for an enhancement of damages pursuant to
9 NRS 41.1395. Complaint, pp. 1, 3 ("Prayer for Damages: For double damages and costs and
10 attorney's fees in excess of \$15,000 pursuant to NRS 41.1395."). This statute provides for an
11 enhancement of damages in cases of *abuse, neglect or financial exploitation* of an older or
12 vulnerable person. NRS 41.1395 ("[I]f an older person or a vulnerable person suffers a personal
13 injury or death that is caused by abuse or neglect or suffers a loss of money or property caused by
14 exploitation, the person who caused the injury, death or loss is liable to the older person or
15 vulnerable person for two times the actual damages incurred by the older person or vulnerable
16 person."). It does not serve to automatically enhance damages in all cases in which an older or
17 vulnerable person is a Plaintiff, or in cases that are survivor actions brought after the death of an
18 older or vulnerable person.

19 In this case, there is no claim of financial exploitation. Complaint. Thus, the only two
20 scenarios in which NRS 41.1395 could apply are if Plaintiff alleged abuse or neglect pursuant to
21 the terms of that statute. And, as those terms are defined in NRS 41.1395, neither abuse nor
22 neglect is properly alleged in this case.

23 NRS 41.1395 defines abuse as follows:

24 (a) "Abuse" means **willful and unjustified**:

- 25 (1) Infliction of pain, injury or mental anguish; or
26 (2) Deprivation of food, shelter, clothing or services which are necessary
27 to maintain the physical or mental health of an older person or a vulnerable
28 person.

28 NRS 41.1395(4)(a) (emphasis added). There is no allegation in the Complaint that the Defendant

1 willfully inflicted harm upon Mr. Stewart. Accordingly, Plaintiff's own allegations establish that
2 the "abuse" provision does not apply to this case.

3 A similar finding must result with regard to the concept of "neglect" under the statute.

4 NRS 41.1395 defines neglect as follows:

5 (c) "Neglect" means the failure of a person who has assumed legal responsibility
6 or a contractual obligation for caring for an older person or a vulnerable person,
7 or who has voluntarily assumed responsibility for such a person's care, to provide
8 food, shelter, clothing or services within the scope of the person's responsibility
9 or obligation, which are necessary to maintain the physical or mental health of the
10 older person or vulnerable person. For the purposes of this paragraph, a person
voluntarily assumes responsibility to provide care for an older or vulnerable
person only to the extent that the person has expressly acknowledged the person's
responsibility to provide such care.

11 NRS 41.1395(4)(c). Like the provision in NRS 41.1395 for abuse, this section regarding neglect
12 calls for more than simple negligence in order to trigger the damages enhancement. Plaintiff has
13 only alleged facts that support a claim of negligent conduct and not anything alleging intentional
14 conduct or a state of mind more culpable than that which exists in negligence claims, and nothing
15 in that claim rises to the level of neglect. Plaintiffs' NRS 41.1395 claim only recites the
16 provisions of the statute itself and does not contain any factual allegations.

17 Importantly, Plaintiffs brought their claim for violation of NRS 41.1395 based upon the
18 same factual circumstances as their claims for professional negligence and negligence. This
19 is impossible, as professional negligence and NRS 41.1395 claims have different elements, and
20 are actually mutually exclusive.

21 NRS 41.1395 allows recovery for the deprivation of care, not for the negligent provision of
22 care. The Nevada Supreme Court has recently emphasized that actions that are grounded in
23 negligence, such as those alleged by Plaintiffs here, do not support an elder abuse claim under
24 NRS 41.1395. *Estate of Mary Curtis v. Life Care Center*, 136 Nev. Advance Opinion 39, *14 FN
25 5 ("We are not persuaded that requiring compliance with NRS 41A.071 eviscerates the protections
26 of NRS 41.1395, Nevada's elder abuse statute. First, **the record does not support an elder**
27 **abuse claim here, where Nurse Dawson's actions were grounded in negligence, rather than**
28 **in a willful abuse or the failure to provide a service.**") (internal citations omitted, emphasis

1 added).

2 The U.S. District Court of Nevada has held that there is distinction between professional
3 negligence claims and NRS 41.1395 claims. The Court's key holding was that "the elder abuse
4 statute was not intended as a remedy for torts that sound in medical malpractice." *Brown v. Mt.*
5 *Grant General Hospital*, 2013 U.S. Dist. LEXIS 120909 *18. The Court explained that NRS
6 41.1395 provides a remedy for intentional conduct while professional negligence (then called
7 medical malpractice) is focused on negligent conduct.

8 Therefore, the elder abuse statute's history reveals that it was initially concerned
9 with criminal conduct – conduct whose mens rea element usually exceeds mere
10 negligence. This is also reflected in the statute's concentration on intentional
11 conduct: the statute prohibits willful and unjustified abuse, exploitation and
12 neglect in the face of an expressly assumed duty. See NRS 41.1395. The mens
13 rea element of a medical malpractice claim – failure to use the reasonable care,
14 skill or knowledge ordinarily used under similar circumstances, NRS 41A.009 –
15 sits uneasily with NRS 41.1395 focus on intentional misconduct.

16 *Id.* at *19.

17 The allegations against Dr. Nguyen specifically, in their entirety, are as follows:

18 4. Defendant, Minh Nguyen, M.D., is a provider of health care in Clark County,
19 Nevada pursuant to NRS 41A.017 and at all material times was Gary Stewart's
20 physician in Clark County.

21 Affidavit paragraph 1. Dr. Minh Nguyen failed to meet a basic level of the
22 standard of care for Mr. Stewart. Dr. Nguyen failed to provide reasonable care,
23 skill or knowledge ordinarily used under similar circumstances by similarly
24 trained and experienced providers of health care. While under their care, Mr.
25 Stewart seized because he had not received the necessary anti-seizure
26 medications. The failure to order and monitor the correct medications is serious
27 and life threatening. The failure to provide an order for the appropriate
28 medications was life-endangering and in fact caused the patient's death.

2. Multiple entries in the medical record should have alerted Dr. Nguyen and Mr.
Emil Morneault, RPh that Mr. Stewart was a patient with a seizure disorder and
required medication to prevent seizures. Attention to the patient's diagnoses,
ordering seizure medication, related laboratory tests, lab results that reveal a
below acceptable level of medication, and appropriate review of prior medical
records and medication monitoring are all basic standards of care that were not
fulfilled.

3. In my opinion, these findings represent severe neglect by Minh Nguyen, M.D.
and Emil Morneault, RPh whose conduct fell below the standard of care because
Dr. Nguyen consistently failed to prescribe anti-seizure medications and
discontinued the Depakote 125 mg. Emil Morneault, RPh failed to monitor the
medication and advise Dr. Nguyen of the seizure medication irregularity. These
failures in the standard of care caused Mr. Stewart's condition to deteriorate and

caused his death.

The allegation against Dr. Nguyen is only that he negligently failed to prescribe a specific medication to Mr. Stewart for seizures. This is an allegation of professional negligence and not one, that even if proven, would be a sufficient factual predicate for either abuse or neglect under NRS 41.1395.

IV. CONCLUSION

Therefore, in accordance with the above authorities, Defendant Dr. Nguyen respectfully requests that this Court dismiss the Plaintiff's NRS 41.1395 claim.

DATED this 9th day of December, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Erin E. Jordan*

S. BRENT VOGEL

Nevada Bar No. 6858

ERIN E. JORDAN

Nevada Bar No. 10018

6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

Tel. 702.893.3383

Attorneys for Defendant Minh Nguyen, M.D.

1 **CERTIFICATE OF SERVICE**

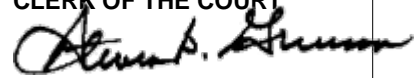
2 I hereby certify that on this 9th day of December, 2020, a true and correct copy
3 of DEFENDANT MINH NGUYEN, M.D.'S PARTIAL MOTION TO DISMISS was served by
4 electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and
5 serving all parties with an email-address on record, who have agreed to receive electronic service
6 in this action.

7 Dale A. Hayes, Jr., Esq.
8 Liane K. Wakayama, Esq.
9 HAYES WAKAYAMA
4735 S. Durango Dr., Suite 105
Las Vegas, NV 89147
10 Tel: 702.656.0808
Fax: 702.655.1047
11 dhayes@hwlawnv.com
12 lkw@hwlawnv.com
Attorneys for Plaintiff

Carol P. Michel, Esq.
Marjan Hajimirzaee, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN
& DIAL, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, NV 89118
Tel: 702.938.3838
Fax: 702.938.3864
cmichel@wwhgd.com
Attorneys for Defendant Emil Morneault, RPH

13
14 By /s/ Johana Whitbeck
15 An Employee of
16 LEWIS BRISBOIS BISGAARD & SMITH LLP
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 6



HAYES | WAKAYAMA
DALE A. HAYES, JR., ESQ.
Nevada Bar No. 9056
LIANE K. WAKAYAMA, ESQ.
Nevada Bar No. 11313
JEREMY D. HOLMES, ESQ.
Nevada Bar No. 14379
4735 S. Durango Drive, Ste. 105
Las Vegas, Nevada 89147
(702) 656-0808 – Telephone
(702) 655-1047 – Facsimile
dhayes@hwlawNV.com
lkw@hwlawNV.com
jholmes@hwlawNV.com
*Attorneys for Plaintiff, Estate of
Connie Stewart*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

ESTATE OF CONNIE STEWART,

Plaintiff,

vs.

MINH NGUYEN, M.D. AND EMIL
MORNEAULT, RPH; and DOES 1-5 and ROE
ENTITIES 1-5,

Defendants.

Case No.: A-20-811421-C
Dept. No.: III

HEARING REQUESTED

MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiff, the Estate of Connie Rae Stewart, by and through its counsel of record, the law firm of Hayes Wakayama, hereby respectfully submits its Motion for Leave to Amend Complaint. This Motion is made and based upon the pleadings and papers on file herein, the following Memorandum of Points & Authorities, the attached exhibits and any argument of counsel entertained at the time of hearing of this matter.

///

///

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Leave to file amendments to pleadings should be granted liberally unless there is an improper purpose or unfair prejudice. Here, Plaintiff requests to amend its complaint to add Gary Stewart's children along with the Stewart Family Trust as plaintiffs in this matter. No new claims will be added. Each of the newly added parties will assert the same causes of action that have already been asserted in this matter. Because the newly added claims are the same as the existing claims, Defendants will not be prejudiced by this amendment, and justice requires that Plaintiff be allowed to amend its Complaint in order to fully pursue relief from Defendants in this matter. For these reasons, the Court should grant Plaintiff's Motion and permit Plaintiff to file her Amended Complaint.

II. PERTINENT FACTS AND PROCEDURAL HISTORY

On February 28, 2020, Connie Stewart ("Connie") filed a Complaint on behalf of her deceased husband, Gary Stewart ("Gary"), alleging negligence, wrongful death, and medical malpractice against the Defendants for their role in Gary's death. On June 9, 2020, Connie passed away, and a Suggestion of Death was filed on June 24, 2020. On October 21, 2020 Patricia Ann Adams ("Adams") was issued Letters of Special Administration and duly appointed as the Special Administrator of the Estate of Connie Rae Stewart *In the Matter of the Estate of Connie Rae Stewart*, in the Eighth Judicial District Court, Clark County, Nevada, Case No. P-20-104505-E, on file herein. On November 25, 2020, the Parties filed a Stipulation and Order for Substitution of Party Upon Suggestion of Death of Connie Stewart Pursuant to NRCP 25(a)(1) and for Substitution of Counsel.

Defendant Morneault filed his Answer on June 24, 2020, and Defendant Nguyen filed a Partial Motion to Dismiss Plaintiff's elder abuse claims on December 9, 2020. Defendant Nguyen has not yet answered.

III. LEGAL ARGUMENT

Rule 25 of the Nevada Rules of Civil Procedure makes clear that amendments to pleadings should be granted liberally unless there is an improper purpose or unfair prejudice. Because there

1 is no improper purpose, and no prejudice by an amendment, “justice requires” that Plaintiff should
2 be granted leave to amend its Complaint to add Connie and Gary’s children, Gary Linck Stewart,
3 Jr., Patricia Ann Adams, Mary Kay Fallon, and Elizabeth A. Hodge, as parties, along with The
4 Stewart Family Trust and the Estate of Gary Stewart¹ (collectively, the “Amended Plaintiffs”).
5 The Amended Plaintiffs will be asserting the same claims that Plaintiff is currently asserting
6 against the Defendants: (1) Wrongful Death; (2) Negligence; and (3) Medical Malpractice
7 (Professional Negligence).

8 **A. PLAINTIFF SHOULD BE PERMITTED TO AMEND ITS COMPLAINT.**

9 This Court has broad discretion to allow amendments to pleadings, which should be used
10 to grant leave as often as possible. Leave to amend should only be denied when there is a specific
11 reason for doing so, such as an improper purpose on the part of the party seeking to amend, or
12 because there was undue delay or serious prejudice to the opposing party. The instant matter is in
13 its infancy. An Early Case Conference is currently scheduled for next week and a Scheduling
14 Order has not been issued. The early stage of this matter makes leave to amend even more
15 appropriate. Pursuant to EDCR 2.30(a), Plaintiff’s proposed First Amended Complaint is attached
16 as **Exhibit 1**.

17 **1. Leave to Amend Should be “Freely Given.”**

18 Rule 15 of the Nevada Rules of Civil Procedure provides that a party may amend its
19 pleading by leave of Court or written consent of the adverse party, and that “leave shall be freely
20 given when justice so requires.” NRCP 15(a). While the Court has discretion in allowing the
21 amendment, “outright refusal to grant leave without any justifying reason appearing for the denial
22 is not an exercise of jurisdiction; it is merely abuse . . . and inconsistent with the spirit of the
23 Federal Rules.” *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Connell vs. Carl’s Air Conditioning*,
24 97 Nev. 436, 634 P.2d 673 (1981). The Supreme Court of Nevada agrees that the grant or denial
25

26
27
28 ¹ Letters of Administration are currently being sought for the Estate of Gary Stewart.

of a Motion to Amend is within the discretion of the trial court, but if a court refuses to grant leave without a reason – especially when underlying facts and circumstances relied upon may be a proper subject of relief appearing – the denial is not an exercise of discretion; it is an abuse of that discretion and inconsistent with the spirit of the Nevada Rules of Civil Procedure. *Adamson v. Bowker*, 85 Nev. 115, 121, 450 P.2d 796, 800-801 (1969) (approving of *Foman, supra*, and stating that “we subscribe completely to this interpretation of the intent and purpose of NRCP 15(a)”).

1. Leave to Amend Should Only be Denied When There is a Declared Reason of Improper Purpose.

The Nevada Supreme Court has further explained that “in the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant – the leave to amend should be freely given.” *Stephens v. Southern Nevada Music Co.*, 89 Nev. 104, 105-106, 507 P.2d, 138, 139 (1973). The policy behind allowing amendments freely is to “reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate proper decision on the merits.” *Foman*, 371 U.S. at 182-183 (quoting *Conley v. Gibson*, 355 U.S. 41 (1957)). Furthermore, a party should “be afforded an opportunity to test his claim upon the merits.” *Adamson*, 85 Nev. at 121. For this reason, the Ninth Circuit has said “the sufficiency of an amended pleading ordinarily will not be considered on motion for leave to amend.” *Breier v. N. Cal. Bowling Proprietors’ Assn.*, 316 F.2d 787, 790 (9th Cir. 1963). The commentators *Wright and Miller* agree and have said that “[i]f a proposed amendment is not clearly futile, then denial of leave to amend is improper.” *Wright & Miller, Amendments Under Rule 15(a)*, 6 Fed. Prac. & Proc. Civ.2d. § 1487 (2004).

B. PLAINTIFF’S AMENDED COMPLAINT IS PROPER, TIMELY, AND ASSERTED IN GOOD FAITH.

Plaintiff’s First Amended Complaint is brought timely and in good faith. Here, there is no improper purpose in the amendment, and allowing Plaintiff to amend serves the interests of justice. *Wright & Miller* stated that the most common reason a court denies leave to amend is that the

opposing party will be prejudiced, but “if a court is persuaded that no prejudice will accrue, the amendment should be allowed.” *Id.* There is no prejudice in granting Plaintiff’s request to amend its Complaint as this lawsuit is in its relative infancy. As set forth above, no discovery has been performed, an Early Case Conference is still needed, and this Court’s *continued* Mandatory Rule 16 Conference is not scheduled until January 20, 2021.

While NRCP 15(c) is generally invoked for the purpose of adding new defendants, courts have found that it is similarly proper to add new plaintiffs by way of this rule. However, there are limitations to this in order to prevent undue prejudice to defendants, such as limiting the addition of new plaintiffs who plead claims that are barred by the statute of limitations. In this matter, the only claim the Amended Plaintiffs will be asserting that is arguably barred by the statute of limitations is the medical malpractice claim, as more than one year has passed since the conduct giving rise to that cause of action. The remaining claims being asserted by the Amended Plaintiffs both have two-year statute of limitations, which have not yet run and are thus completely proper to assert at this time.

Nevertheless, similar to amending a complaint to introduce new claims, if a newly added plaintiff’s claims relates back to the filing of the original complaint, the new plaintiff and those claims are proper. While Nevada courts have not addressed the issue of claims relating back in the context of amended pleadings adding new parties under Rule 15, California and Federal Courts have addressed the issue while dealing with practically identical Rules in those jurisdictions. In California, to protect defendants, “an amended pleading that adds a new plaintiff will not relate back to the filing of the original complaint if the new party seeks to enforce an independent right or to impose greater liability against the defendants.” *San Diego Gas & Elec. Co. v. Superior Court*, 53 Cal. Rptr. 3d 722, 725 (2007), *as modified on denial of reh’g* (Feb. 21, 2007) (citing *Bartalo v. Superior Court*, 124 Cal. Rptr. 370, 375 (Ct. App. 1975)). Under the Federal Rule:

An amendment adding a party plaintiff relates back to the date of the original pleading only when: 1) the original complaint gave the defendant adequate notice of the claims of the newly proposed plaintiff; 2) the relation back does not unfairly prejudice the defendant; and 3) there is an identity of interests between the original and newly proposed plaintiff.

1 *Immigrant Assistance Project of Los Angeles County Fed'n of Labor (AFL-CIO) v. I.N.S.*, 306 F.3d
2 842, 857 (9th Cir. 2002), quoting *Rosenbaum v. Syntex Corp.*, 95 F.3d 922, 924 (9th Cir. 1996)).

3 Under the California rule, the only concern is whether the claim relating back is an
4 independent right or seeks to impose greater liability against the defendants. In this case, it is the
5 same medical malpractice claim already asserted by the current Plaintiff and it is barred by statute
6 from imposing any greater liability against Defendants. Pursuant to NRS 41.035, in a medical
7 malpractice action “the amount of noneconomic damages awarded . . . must not exceed \$350,000,
8 **regardless of the number of plaintiffs**, defendants or theories upon which liability may be
9 based.” Accordingly, this statute bars the Amended Plaintiffs claims from imposing greater
10 liability against Defendants for the medical malpractice claim, as no matter the number of plaintiffs
11 or theories of liability, no more than \$350,000 in noneconomic damages can be assessed against
12 Defendants under that claim. As a result, under the California rule, the Amended Plaintiffs’
13 medical malpractice claims should properly relate back to the original Complaint.

14 Under the Federal rule a similar outcome should be reached. The claims are the same as
15 those brought by Plaintiff in the original Complaint, meaning Defendants have adequate notice of
16 the claims. Next, as discussed above, there is no additional monetary exposure to Defendants by
17 operation of NRS 41.035, meaning that Defendants are not unfairly prejudiced. Lastly, there is a
18 clear shared interest between the Plaintiff and the Amended Plaintiffs, as the Amended Plaintiffs
19 are the Plaintiff’s children and family trust, all of whom share the same interests in this litigation.
20 Therefore, under the Federal rule, the Amended Plaintiffs’ medical malpractice claims should
21 properly relate back to the original Complaint.

22 Accordingly, the Amended Complaint will not unduly complicate the litigation, and the
23 Defendants will not be prejudiced. Therefore, Plaintiff should be granted leave to amend.

24 **IV. CONCLUSION**

25 Because amendments to pleadings should be granted liberally, Plaintiff should be granted
26 leave to amend its Complaint against the Defendants. There is no improper purpose and the
27 proposed First Amended Complaint seeks to litigate all issues in good faith. The Defendants will
28 not be unduly prejudiced by the addition of the Amended Plaintiffs.

1 Given that the interests of justice are served by allowing the requested amendment, Plaintiff should
2 be granted leave to file its First Amended Complaint attached hereto as **Exhibit 1**.

3 DATED this 21st day of December, 2020.

4
5 **HAYES | WAKAYAMA**

6
7 By /s/ Dale A. Hayes, Jr., Esq.
8 DALE A. HAYES, JR., ESQ.
9 Nevada Bar No. 9056
10 LIANE K. WAKAYAMA, ESQ.
11 Nevada Bar No. 11313
12 JEREMY D. HOLMES, ESQ.
13 Nevada Bar No. 14379
14 4735 S. Durango Drive, Suite 105
15 Las Vegas, Nevada 89147
16 *Attorneys for Plaintiff, Estate of*
17 *Connie Stewart*
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **MOTION FOR LEAVE TO AMEND COMPLAINT** was submitted electronically for filing and service with the Eighth Judicial District Court on the 21st day of December, 2020. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:²

Joshua Daor	joshua.daor@lewisbrisbois.com
Erin Jordan	Erin.Jordan@lewisbrisbois.com
S. Brent Vogel	brent.vogel@lewisbrisbois.com
Johana Whitbeck	johana.whitbeck@lewisbrisbois.com
Amy Cvetovich	acvetovich@wwhgd.com
Kelly Gaez	kgaez@wwhgd.com
Flor Gonzalez-Pacheco	FGonzalez-Pacheco@wwhgd.com
Josephine Groh	jpgroh@wwhgd.com
Marjan Hajimirzaee	mhajimirzaee@wwhgd.com
Carol Michel	cmichel@wwhgd.com
Kelly Pierce	kpierce@wwhgd.com
Raiza Anne Torrenueva	rtorrenueva@wwhgd.com
Douglas Cohen	dcohen@wrslawyers.com
Jennifer Finley	jfinley@wrslawyers.com
Theresa McCracken	tmccracken@wrslawyers.com

/s/ Julia Rodionova
An employee of Hayes Wakayama

² Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

Exhibit 1

HAYES | WAKAYAMA
DALE A. HAYES, JR., ESQ.
Nevada Bar No. 9056
LIANE K. WAKAYAMA, ESQ.
Nevada Bar No. 11313
JEREMY D. HOLMES, ESQ.
Nevada Bar No. 14379
4735 S. Durango Drive, Ste. 105
Las Vegas, Nevada 89147
(702) 656-0808 – Telephone
(702) 655-1047 – Facsimile
dhayes@hwlawNV.com
lkw@hwlawNV.com
jholmes@hwlawNV.com
Attorneys for Plaintiffs

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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.

Case No.: A-20-811421-C

Dept. No.: III

FIRST AMENDED COMPLAINT

JURY TRIAL DEMAND

Arbitration Exemption Requested:
Medical Malpractice/Wrongful Death,
Automatically Exempt from ADR

FIRST AMENDED COMPLAINT AND JURY DEMAND

Plaintiffs, the Estate of Connie Stewart, the Estate of Gary Stewart, Patricia Ann Adams as Trustee of The Stewart Family Trust, Patricia Ann Adams, Gary Linck Stewart, Jr., Mary Kay Fallon and Elizabeth A. Hodge by and through their attorneys of record, the law firm of HAYES WAKAYAMA, hereby allege and complain as follows:

PARTIES

1. At all times relevant herein, Gary Stewart (“Decedent”) was a resident of Clark County, Nevada.

2. Plaintiff PATRICIA ANN ADAMS AS SPECIAL ADMINISTRATOR OF THE ESTATE OF GARY STEWART will hereinafter be referred to as “the Decedent’s Estate.”¹

3. At all times relevant herein, Connie Stewart (“Connie”) was a resident of Clark County, Nevada.

4. On October 21, 2020, PATRICIA ANN ADAMS was duly appointed as Special Administrator of the ESTATE OF CONNIE STEWART (the “Estate”). On that same day, Letters of Special Administration were issued to her.

5. 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 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.

6. Plaintiff, PATRICA ANN ADAMS, (“Adams”) is and was at all times relevant herein, a resident of Clark County, Nevada.

7. Plaintiff, GARY LINCK STEWART, JR. (“Stewart”) is and was at all times relevant herein, a resident of Clark County, Nevada.

8. Plaintiff, MARY KAY FALLON (“Fallon”) is and was at all times relevant herein, a resident of Livingston County, Michigan.

9. Plaintiff, ELIZABETH A. HODGE (“Hodge”) is and was at all times relevant herein, a resident of Clark County, Nevada.

10. Defendant, MINH NGUYEN, M.D. (“Nguyen”), is and was at all times relevant herein a provider of health care in Clark County, Nevada pursuant to NRS 41A.017 and at all material times was Decedent’s physician in Clark County, Nevada.

¹ Letters of Administration are immediately forthcoming.

11. Defendant, EMIL MORNEAULT, RPh (“Morneault”), is and was at all times relevant herein a pharmacist for Decedent in Clark County, Nevada.

12. The names and capacities, whether individuals, corporate, associate or otherwise of Defendants named herein as DOE and ROE CORPORATION are unknown or not yet confirmed. Upon information and belief, said DOE and ROE CORPORATION Defendants are responsible for damages suffered by Plaintiffs and, therefore, Plaintiffs sues said Defendants by such fictitious names. Plaintiffs will ask leave to amend this Complaint to show the true names and capacities of each DOE and ROE CORPORATION Defendant at such time as the same has been ascertained.

JURISDICTION AND VENUE

13. The Eighth Judicial District Court, Clark County, Nevada, has original jurisdiction over this matter pursuant to Nev. Const. art. VI, § 6(1) as “[t]he District Courts . . . of this State have original jurisdiction in all cases excluded by law from the original jurisdiction of justices’ courts.” This case is excluded by law from the original jurisdiction of the justices’ courts pursuant to NRS 4.370 as the action concerns recovery on a contract for an amount in excess of \$15,000.00.

14. Venue is proper in the Eighth Judicial District Court, Clark County, Nevada, pursuant to NRS 13.040 because Defendants provides the relevant services and professional services in Clark County, Nevada and also reside in Clark County, Nevada.

THE PARTIES

15. On January 31, 2007, Gary Stewart (“Decedent”) and his wife, Connie Stewart (“Connie”), created the Trust.

16. The Trust named both Decedent and Connie as trustees and Stewart and Adams as co-alternate or co-successor trustees.

17. Decedent was born on October 21, 1938.

18. Decedent passed away on March 5, 2019.

19. Decedent died as a result of the negligence, professional negligence and/or wrongful conduct of Defendants.

20. As a result, Connie initiated the instant action on February 28, 2020, asserting negligence, professional negligence and wrongful death theories of relief.

21. On June 9, 2020, Connie passed away.

22. On October 21, 2020, Adams was issued Letters of Special Administration and was appointed as the Special Administrator of the Estate of Connie Stewart (“Estate”).

23. On November 25, 2020, via stipulation and order, the Estate was substituted into this lawsuit in the place of Connie.

24. As both Decedent and Connie have passed away, Stewart and Adams are the Co-Trustees for the Trust.

25. Stewart, Adams, Fallon and Hodge are siblings and the surviving children/heirs of Decedent.

GENERAL ALLEGATIONS

26. Nguyen is a provider of health care in Clark County, Nevada.

27. Pursuant to NRS 41A.017, and at all material times herein, Nguyen was Decedent’s physician in Clark County, Nevada.

28. At all material times herein, Morneault was a pharmacist for Decedent in Clark County, Nevada.

29. On February 13, 2019, Decedent was admitted to Encompass Health Rehabilitation Hospital of Henderson.

30. The facility was provided with a list of all three of Decedent’s anti-seizure medications at the time of his admission.

31. At the time of his admission, the History and Physical Exam by Nguyen includes the diagnosis of seizures both under “Chief Complaint” and “History of the Present Illness.”

32. Despite the clear diagnosis of seizures, not only were two of the three appropriate antiseizure medications not prescribed to Decedent, the only one of the three anti-seizure medications that is on Decedent’s orders (Depakote (Divalproex) Delayed Release Tablet 125 mg) was discontinued by Nguyen on February 16, 2019.

33. The order to discontinue was approved by Morneault, Decedent’s pharmacist.

34. Nguyen also ordered a laboratory test for adequacy of the valproate (Divalproex) level even though the patient was not ordered any anti-seizure medication, and the lab result on February 15, 2019, shows a low level 25.7 (with an acceptable therapeutic range of 50-100).

35. Despite the foregoing *unacceptably* low level, Defendants failed to address it and further continued to fail to provide Decedent with any necessary medications.

36. On February 21, 2019, Decedent seized and required emergency transfer to St. Rose Dominican Hospital.

37. The Encompass Health Rehabilitation Hospital of Henderson covering physician, Olumide Olagunju M.D., wrote: "Patient had multiple witnessed seizure episode, given ativan, sent to ER for further evaluation, somebody discontinue valproic acid?"

38. At St. Rose Dominican Hospital, Decedent was found to have aspirated during the seizure, with 0 therapeutic levels of seizure medication, and subsequently required intubation. As a result, Decedent died on March 5, 2019.

39. Defendant's acts in failing to provide Decedent his known and necessary medication regiment constitutes simple negligence. *See Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263 (2020).

40. Defendant's acts in absent mindedness discontinuing one appropriate medication constitutes simple negligence. *See Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263 (2020).

41. "Common knowledge" establishes that Defendants' acts and omissions constitute negligence. It does not take an expert to know that failing to fill and administer known prescription medications is negligence. *See Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263 (2020).

42. Defendants' conduct in failing to provide *known* necessary medications, discontinuing one *known* necessary medication and further failing to administer any medications at all despite knowledge of an existing condition *with required medications* does not raise questions of mental judgment beyond the realm of common knowledge and experience. *See Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263 (2020).

43. 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 (NRS 41.085).

44. The Defendants caused Connie *and now the Estate* to suffer loss of probable support, companionship, society, mental anguish, pain and suffering, comfort and consortium and costs and attorney's fees because of her beloved husband's wrongful death (NRS 41.085).

45. The Defendants caused Stewart, Adams, Fallon and Hodge to suffer loss of probable support, companionship, society, mental anguish, pain and suffering, comfort and consortium and costs and attorney's fees because of their beloved father's wrongful death (NRS 41.085).

46. The Declaration of expert, Diana Koin, M.D., (**Exhibit 1**), details the allegations of Defendants' professional negligence, negligence, abuse, neglect and/or punitive conduct and is incorporated herein.

47. The Defendants' negligent medication errors violated State and/or Federal Statutes and these errors are negligence *per se*.

48. Pursuant to NRS 41.1395, Gary Stewart was an older and vulnerable person who was neglected and/or abused by Defendants who acted recklessly and caused him physical and mental pain and suffering and death as stated above and in the incorporated declaration of Diana Koin, M.D.

49. Defendants acted with a conscious disregard because they had knowledge of the probable harmful consequences of their wrongful acts and exhibited a willful and deliberate failure to act to avoid those consequences.

50. Defendants acted with malice, express or implied, because they engaged in conduct which was despicable conduct and which was engaged in with a conscious and obvious disregard of Decedent's rights, health and safety. Defendants acted with oppression because it engaged in despicable conduct that subjected Decedent to cruel and unjust hardship with a conscious disregard of his rights, health and safety.

FIRST CLAIM FOR RELIEF
(Negligence – All Plaintiffs v. Defendants)

51. Plaintiffs repeat and reallege the paragraphs as though fully stated herein.

52. Defendants had a duty to use reasonable care and consider the health and safety of others in the conduct of their business and affairs.

53. Defendants breached that duty as set forth herein.

54. Plaintiffs' simple negligence claim is supported by the recent decision of *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263 (2020).

55. As a direct and proximate cause of Defendants' actions, Plaintiffs have been damaged in an amount in excess of \$50,000.00.

56. Decedent was 80 years old at all relevant times herein and was therefore an "older person" as defined by NRS 41.1395(4)(d). Defendants' unlawful conduct described herein caused Decedent/Plaintiffs damages and Decedent/Plaintiffs are therefore entitled to two times their actual damages pursuant to NRS 41.1395(1).

57. Defendants' conduct towards Decedent/Plaintiffs was reckless, oppressive and/or with malice, and Decedent/Plaintiffs are therefore entitled to their attorney's fees and costs pursuant to NRS 41.1395(2).

58. As a direct and proximate result of the aforesaid acts of Defendants, it has become necessary for Plaintiffs to secure the services of an attorney, and Plaintiffs are entitled to recover attorney's fees and costs incurred herein as special damages.

SECOND CLAIM FOR RELIEF
(Professional Negligence (Medical Malpractice) – All Plaintiffs v. Defendants)

59. Plaintiffs repeat and reallege the paragraphs as though fully stated herein.

60. As providers of health care, Defendants had a duty to provide professional medical services to Decedent. More specifically, Defendants had the duty to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care.

61. Defendants breached their duty as outlined herein and in Dr. Koin's attached Declaration.

62. As an additional direct and proximate cause of Defendants' actions, Plaintiffs have been damaged in an amount in excess of \$50,000.00.

63. Decedent was 80 years old at all relevant times herein and was therefore an "older person" as defined by NRS 41.1395(4)(d). Defendants' unlawful conduct described herein caused Decedent/Plaintiffs damages and Decedent/Plaintiffs are therefore entitled to two times their actual damages pursuant to NRS 41.1395(1).

64. Defendants' conduct towards Decedent/Plaintiffs was reckless, oppressive and/or with malice, and Decedent/Plaintiffs are therefore entitled to their attorney's fees and costs pursuant to NRS 41.1395(2).

65. As a direct and proximate result of the aforesaid acts of Defendants, it has become necessary for Plaintiffs to secure the services of an attorney, and Plaintiffs are entitled to recover attorney's fees and costs incurred herein as special damages.

THIRD CLAIM FOR RELIEF

(Wrongful Death – NRS 41.085 - Stewart, Adams, Fallon, Hodge and Decedent's Estate v. Defendants)

66. Plaintiffs repeat and reallege the paragraphs as though fully stated herein.

67. Defendants committed wrongful and/or neglectful acts against Decedent.

68. Defendants' wrongful and/or neglectful acts caused Decedent's death.

69. Plaintiffs Stewart, Adams, Fallon, Hodge and Decedent's Estate are either the heirs, as defined by NRS 41.085(1) of Decedent, or the representative of Decedent's Estate.

70. As a direct and proximate cause of Defendants' actions, Plaintiffs have been damaged in an amount in excess of \$50,000.00.

71. Decedent was 80 years old at all relevant times herein and was therefore an "older person" as defined by NRS 41.1395(4)(d). Defendants' unlawful conduct described herein caused Decedent/Plaintiffs damages and Decedent/Plaintiffs are therefore entitled to two times their actual damages pursuant to NRS 41.1395(1).

72. Defendants' conduct towards Decedent/Plaintiffs was reckless, oppressive and/or with malice, and Decedent/Plaintiffs are therefore entitled to their attorney's fees and costs pursuant to NRS 41.1395(2).

73. As a direct and proximate result of the aforesaid acts of Defendants, it has become necessary for Plaintiffs to secure the services of an attorney, and Plaintiffs are entitled to recover attorney's fees and costs incurred herein as special damages.

FOURTH CLAIM FOR RELIEF
(Negligence *per se* – All Plaintiffs v. Morneault)

74. Plaintiffs repeat and reallege the paragraphs as though fully stated herein.

75. At all times relevant herein, Morneault violated NRS 639.210.

76. The violation of NRS 639.210 by Morneault was the proximate and legal cause of Plaintiffs/Decedent's injuries as alleged herein.

77. Plaintiffs/Decedent belonged/belong to the class of persons that NRS 639.210 was intended to protect.

78. The injuries sustained by Plaintiffs/Decedent as set forth herein were and are the type against which NRS 639.210 was intended to protect.

79. As a direct and proximate cause of Defendants' actions, Plaintiffs have been damaged in an amount in excess of \$50,000.00.

80. Decedent was 80 years old at all relevant times herein and was therefore an "older person" as defined by NRS 41.1395(4)(d). Defendants' unlawful conduct described herein caused Decedent/Plaintiffs damages and Decedent/Plaintiffs are therefore entitled to two times their actual damages pursuant to NRS 41.1395(1).

81. Defendants' conduct towards Decedent/Plaintiffs was reckless, oppressive and/or with malice, and Decedent/Plaintiffs are therefore entitled to their attorney's fees and costs pursuant to NRS 41.1395(2).

82. As a direct and proximate result of the aforesaid acts of Defendants, it has become necessary for Plaintiffs to secure the services of an attorney, and Plaintiffs are entitled to recover attorney's fees and costs incurred herein as special damages.

JURY DEMAND

Plaintiffs hereby demand a jury on all claims.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief against Defendants:

1. Compensatory damages in excess of \$50,000.00, according to proof at trial;
2. Special damages in excess of \$50,000.00, according to proof at trial;
3. For two times the actual damages incurred pursuant to NRS 41.1395(1);
4. For an award of reasonable attorney fees and costs of suit pursuant to NRS 41.1395(2);
5. Punitive and exemplary damages in an amount to be determined at trial;
6. Interest from the time of service of this complaint as allowed by NRS 17.130;
7. For an award of reasonable attorney fees and costs of suit; and
8. For any further relief as the Court deems to be just and proper.

DATED this __ day of December, 2020.

HAYES | WAKAYAMA

By _____
DALE A. HAYES, JR., ESQ.
Nevada Bar No. 9056
LIANE K. WAKAYAMA, ESQ.
Nevada Bar No. 11313
JEREMY D. HOLMES, ESQ.
Nevada Bar No. 14379
4735 S. Durango Drive, Suite 105
Las Vegas, Nevada 89147
Attorneys for Plaintiffs

EXHIBIT 1

EXHIBIT 1

DIANA KOIN, M.D.
4660 ALPINE ROAD
PORTOLA VALLEY, CA 94028-8008

DECLARATION OF DIANA KOIN, M.D.

I am a licensed physician in the State of California, specializing in Internal Medicine and Geriatric Medicine. I have been board certified in Internal Medicine and Geriatric Medicine. My faculty affiliations have been Stanford University and the University of California, San Francisco. I was the Medical Director of the Sequoias in Portola Valley, California, and the Chief Medical Officer of the California Veterans' Home in Yountville, California. My clinical background includes care of patients with many of the same patient needs and patient problems suffered by Mr. Stewart including seizures and the prescription of seizure medication. In addition, I was the Director of Elder and Dependent Adult Abuse Education at the California Medical Training Center at the University of California, Davis, a project funded by the Governor's Office of Emergency Services and thus have experience in identifying elder abuse and neglect.

OVERVIEW OF THE CASE

I reviewed Mr. Gary Stewart's medical records from Encompass Health Rehabilitation Hospital of Henderson, Dr. Loring Jacobs, Dr. Edgar Evangelista, Family Care Home Health, St. Rose Hospital and Sunrise Hospital. In addition I reviewed Mr. Stewart's Death Certificate, a medication list prepared by the family provided to his health care providers, and a Walgreens list of medications.

When Mr. Stewart was admitted to Encompass Health Rehabilitation Hospital of Henderson his diagnoses included:

- Seizures
- Metabolic Encephalopathy
- Esophageal Reflux
- Hypertension
- Hypothyroidism
- Hyperlipidemia
- History of Gout
- Anemia
- Coronary Artery Disease, s/p Coronary Artery Bypass
- Depression
- Prostate Disease

Mr. Stewart had a lengthy history of seizures. When managed in years prior to the Encompass admission under the care of Dr. Edgar Evangelista, he only rarely had any seizure activity. His seizures were controlled with:

- Depakote (Divalproex) Delayed Release Tablet 500 mg
- Vimpat (Lacosamide) Tablet 100 mg

- Depakote (Divalproex) Delayed Release Tablet 125 mg

Mr. Stewart was discharged from Sunrise Hospital on October 18, 2018 to home, where he received services from Family Care Home Health. On February 13, 2019, Mr. Stewart was admitted to Encompass Health Rehabilitation Hospital of Henderson. The family provided the facility a list of all three of Mr. Stewart's medications at the time of his admission. At the time of his admission, the History and Physical Exam by Minh Nguyen, M.D. includes the diagnosis of seizures both under "Chief Complaint" and "History of the Present Illness."

Despite the clear diagnosis of seizures, not only are two of the three appropriate anti-seizure medications not prescribed, the only one of the three anti-seizure medications that is on Mr. Stewart's orders (Depakote (Divalproex) Delayed Release Tablet 125 mg) was discontinued by Dr. Nguyen on February 16, 2019. The order to discontinue was approved by Emil Morneault, RPh, pharmacist. Additional red flags include the fact that Dr. Nguyen ordered a laboratory test for adequacy of the valproate (Divalproex) level even though the patient was not ordered any anti-seizure medication, and the lab result on February 15, 2019 shows a low level 25.7, with an acceptable therapeutic range of 50-100).

On February 21, 2019, Mr. Stewart seized and required emergency transfer to St. Rose Dominican Hospital. The Encompass Health Rehabilitation Hospital of Henderson covering physician Olumide Olagunju M.D. wrote:

"Patient had multiple witnessed seizure episode, given ativan, sent to ER for further evaluation, somebody discontinue valproic acid?"

At Dominican Hospital, he was found to have aspirated during the seizure, with 0 therapeutic levels of seizure medication, and subsequently required intubation. Mr. Stewart died March 5, 2019.

1. Dr. Minh Nguyen failed to meet a basic level of the standard of care for Mr. Stewart. Dr. Nguyen failed to provide reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care. While under their care, Mr. Stewart seized because he had not received the necessary anti-seizure medications. The failure to order and monitor the correct medications is serious and life-threatening. The failure to provide an order for the appropriate medications was life-endangering and in fact caused the patient's death.
2. Multiple entries in the medical record should have alerted Dr. Nguyen and Mr. Emil Morneault, RPh that Mr. Stewart was a patient with a seizure disorder and required medication to prevent seizures. Attention to the patient's diagnoses, ordering seizure medication, related laboratory tests, lab results that reveal a below acceptable level of medication, and appropriate review of prior medical records and medication monitoring are all basic standards of care that were not fulfilled.

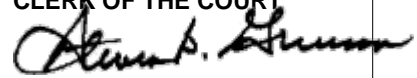
3. In my opinion, these findings represent severe neglect by Minh Nguyen MD and Emil Morneauult, RPh whose conduct fell below the standard of care because Dr. Nguyen consistently failed to prescribe anti-seizure medications and discontinued the Depakote 125 mg. Emil Morneauult, RPh failed to monitor the medication and advise Dr. Nguyen of the seizure medication irregularity. These failures in the standard of care caused Mr. Stewart's condition to deteriorate, and caused his death his death.
4. All of my opinions are made within a reasonable degree of medical certainty.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed
On February 28, 2020

Diana Koin M.D.
Diana Koin, M.D.

EXHIBIT 7



HAYES | WAKAYAMA
DALE A. HAYES, JR., ESQ.
Nevada Bar No. 9056
LIANE K. WAKAYAMA, ESQ.
Nevada Bar No. 11313
JEREMY D. HOLMES, ESQ.
Nevada Bar No. 14379
4735 S. Durango Drive, Ste. 105
Las Vegas, Nevada 89147
(702) 656-0808 – Telephone
(702) 655-1047 – Facsimile
dhayes@hwlawNV.com
lkw@hwlawNV.com
jholmes@hwlawNV.com
*Attorneys for Plaintiff, Estate of
Connie Stewart*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

ESTATE OF CONNIE STEWART,

Plaintiff,

vs.

MINH NGUYEN, M.D. and EMIL
MORNEAULT, RPH; and DOES 1-5 and ROE
ENTITIES 1-5,

Defendants.

Case No.: A-20-811421-C

Dept. No.: III

**OPPOSITION TO DEFENDANT MINH
NGUYEN, M.D.'S PARTIAL MOTION TO
DISMISS**

Date of Hearing: January 13, 2021

Time of Hearing: 10:00 a.m.

**OPPOSITION TO DEFENDANT MINH NGUYEN, M.D.'S PARTIAL MOTION TO
DISMISS**

Plaintiff, the Estate of Connie Rae Stewart, by and through its counsel of record, Dale A. Hayes, Jr., Esq. of the law firm of Hayes Wakayama, hereby files its Opposition to Defendant Minh Nguyen, M.D.'S Partial Motion to Dismiss (hereinafter "Opposition"). This Opposition is made and based upon the pleadings and papers on file herein, the following memorandum of points

///

///

and authorities, and any argument that the Court may allow at the time of hearing on this matter.

DATED this 23rd day of December, 2020.

HAYES | WAKAYAMA

By /s/ Dale A. Hayes, Jr., Esq.
 DALE A. HAYES, JR., ESQ.
 Nevada Bar No. 9056
 LIANE K. WAKAYAMA, ESQ.
 Nevada Bar No. 11313
 JEREMY D. HOLMES, ESQ.
 Nevada Bar No. 14379
 4735 S. Durango Drive, Suite 105
 Las Vegas, Nevada 89147
 Attorneys for Plaintiff, Estate of
 Connie Stewart

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Defendant Minh Nguyen, M.D.’s (hereinafter “Nguyen”) Partial Motion to Dismiss does not pass the threshold test for a Rule 12(b)(5) motion. Rule 12(b)(5) permits the dismissal of “claims” in certain circumstances. Nguyen erroneously seeks dismissal of Plaintiff’s *request for damages* under NRS 41.1395.¹ Nguyen’s Motion fails as a matter of law as a request for damages under NRS 41.1395 is not an independent claim subject to Rule 12(b)(5) adjudication. Such a request for damages is necessarily tethered to a valid cause of action. Thus, as a threshold matter, Nguyen’s Motion is improper and must be dismissed.

Next, Nguyen either failed to read or clearly ignored the allegations set forth in Plaintiff’s Complaint. Plaintiff was very clear with its allegations concerning Defendant’s scienter and actions. Plaintiff expressly alleged that Nguyen engaged in “reckless,” “willful,” “deliberate,” “oppressi[ve]” and “malicious” conduct. Plaintiff alleged that Nguyen acted “with a conscious

¹ Chapter 41 of the Nevada Revised Statutes defines “older person” as “a person who is 60 years of age or older.” NRS 41.1395(4)(d). Gary Stewart was 80 years old at all relevant times herein. This fact is not in dispute.

disregard” to Gary Stewart’s health and wellbeing which amounted to “severe neglect.” Plaintiff further alleged that such “severe neglect” was a result of Nguyen’s “willful and deliberate failure.” Despite the foregoing express allegations, the thrust of Nguyen’s argument is that dismissal is warranted because “nothing in [Plaintiff’s Complaint] rises to the level of neglect”² or “a state of mind more culpable than that which exists in negligence claims.”³ The foregoing statements are totally false and easily refuted by a cursory review of Plaintiff’s Complaint allegations. Accordingly, Nguyen’s Partial Motion to Dismiss should be dismissed in its entirety.

II. PERTINENT FACTS.

In its Complaint, Plaintiff alleges the following:

Defendant, Minh Nguyen, M.D., is a provider of health care in Clark County, Nevada pursuant to NRS 41A.017 and at all material times was Gary Stewart’s physician in Clark County.⁴

Defendants’ conduct fell below the standard of care, they were professionally negligent, and their conduct caused Gary Stewart’s mental and physical pain and suffering, emotional distress, disfigurement and wrongful death (NRS 41.085). 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). ***The Declaration of expert, Diana Koin, M.D., (exhibit 1), details the allegations of Defendants’ professional negligence and/or negligence and/or abuse and neglect and/or punitive conduct and is incorporated herein.*** The Defendants negligent medication errors violated State and/or Federal Statutes and these errors are negligent per se.⁵

Pursuant to NRS 41.1395, Gary Stewart was an older and vulnerable person who was neglected and/or abused by Defendants ***who acted recklessly*** and caused him physical and mental pain and suffering and death as stated above and in the incorporated declaration of Diana Koin, M.D.⁶

² See Defendant’s Motion on file herein at 4:14-15.

³ See *id.* at 4:13-14.

⁴ See February 28, 2020, Complaint on file herein at ¶ 4.

⁵ See *id.* at ¶ 5 (emphasis added).

⁶ See *id.* at ¶ 6 (emphasis added).

Defendants *acted with a conscious disregard* because they had knowledge of the probable harmful consequences of their wrongful acts and *exhibited a willful and deliberate failure* to act to avoid those consequences. Defendants *acted with malice, express or implied, because they engaged in conduct which was despicable conduct and which was engaged in with a conscious disregard of Gary Stewart's rights or safety*. Defendants *acted with oppression* because it *engaged in despicable conduct* that subjected Gary Stewart to cruel and unjust hardship *with a conscious disregard* of his rights and safety.⁷

Because the Complaint includes a claim for professional negligence, a declaration was attached to the same pursuant to NRS 41A.071. The declarant was Diana Koin, M.D. Declarations that are submitted pursuant to NRS 41A.071 are to be read "in conjunction with the complaint" allegations. *Zohar v. Zbiegien*, 130 Nev. 733, 739, 334 P.3d 402, 406 (2014). In her Declaration, Dr. Koin testified as follows:

Mr. Stewart had a *lengthy history of seizures*. When managed in years prior to the Encompass admission under the care of Dr. Edgar Evangelista, he only rarely had any seizure activity.⁸

On February 13, 2019, Mr. Stewart was admitted to Encompass Health Rehabilitation Hospital of Henderson. The family provided the facility a list of all three of Mr. Stewart's medications at the time of his admission. At the time of his admission, the History and Physical Exam by Minh Nguyen, M.D. includes the diagnosis of seizures both under "Chief Complaint" and "History of the Present Illness."⁹

Despite the clear diagnosis of seizures, not only are two of the three appropriate antiseizure medications not prescribed, the only one of the three anti-seizure medications that is on Mr. Stewart's orders (Depakote (Divalproex) Delayed Release Tablet 125 mg) was discontinued by Dr. Nguyen on February 16, 2019. Additional red flags include the fact that Dr. Nguyen ordered a laboratory test for adequacy of the valproate (Divalproex) level even though the patient was not ordered any anti-seizure medication, and the lab result on February 15, 2019 shows a low level 25.7, with an acceptable therapeutic range of 50-100).¹⁰

⁷ See February 28, 2020, Complaint on file herein at ¶ 7 (emphasis added).

⁸ See February 28, 2020, Declaration of Diana Koin, M.D. attached as "Exhibit 1" to February 28, 2020, Complaint on file herein (emphasis added).

⁹ See *id.*

¹⁰ See *id.* (emphasis added).

On February 21, 2019, Mr. Stewart seized and required emergency transfer to St. Rose Dominican Hospital.¹¹

At Dominican Hospital, he was found to have aspirated during the seizure, ***with 0 therapeutic levels of seizure medication***, and subsequently required intubation. Mr. Stewart died March 5, 2019.¹²

Dr. Minh Nguyen failed to meet a basic level of the standard of care for Mr. Stewart. Dr. Nguyen failed to provide reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care. While under their care, Mr. Stewart seized because he had not received the necessary anti-seizure medications. The failure to order and monitor the correct medications is serious and life-threatening. The failure to provide an order for the appropriate medications was life-endangering and in fact caused the patient's death.¹³

Multiple entries in the medical record should have alerted Dr. Nguyen and Mr. Emil Morneault, RPh that Mr. Stewart was a patient with a seizure disorder and required medication to prevent seizures. Attention to the patient's diagnoses, ordering seizure medication, related laboratory tests, lab results that reveal a below acceptable level of medication, and appropriate review of prior medical records and medication monitoring are all basic standards of care that were not fulfilled.¹⁴

In my opinion, these findings represent ***severe neglect*** by Minh Nguyen MD and . . . whose conduct fell below the standard of care because Dr. Nguyen consistently failed to prescribe anti-seizure medications and discontinued the Depakote 125 mg. Emil Morneault, RPh failed to monitor the medication and advise Dr. Nguyen of the seizure medication irregularity. These failures in the standard of care caused Mr. Stewart's condition to deteriorate, and caused his death his death.¹⁵

As this Court is aware, for purposes of this Motion, the foregoing allegations set forth in the Complaint and the accompanying NRS 41A.071 declaration must be accepted as true. *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997).

¹¹ See February 28, 2020, Declaration of Diana Koin, M.D. attached as "Exhibit 1" to February 28, 2020, Complaint on file herein.

¹² See *id.* (emphasis added).

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.* (emphasis added).

III. LEGAL ARGUMENT.

A. LEGAL STANDARD.

The standard of review for a dismissal under NRCP 12(b)(5) is rigorous as this court must construe the pleading liberally and draw every fair inference in favor of the non-moving party. *Simpson*, 113 Nev. at 190, 929 P.2d at 967. All factual allegations of the complaint must be accepted as true. *Id.* Further, “a [pleading] will not be dismissed for failure to state a claim unless it appears **beyond a doubt** that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief.” *Id.* (emphasis added).

On a motion to dismiss for failure to state a claim for relief, the trial court and this court must construe the pleading liberally and draw every fair intendment in favor of the plaintiff. Allegations in the complaint must be accepted as true. *Brown v. Kellar*, 97 Nev. 582, 583, 636 P.2d 874, 874 (1981).

The Court must determine whether the Complaint sets forth allegations sufficient to “give fair notice of the nature and basis of a legally sufficient claim and the relief requested.” *Vacation Vill., Inc. v. Hitachi Am., Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). As set forth more thoroughly below, Nguyen cannot overcome the foregoing heavy standard.

B. DEFENDANT’S MOTION SHOULD BE DENIED.

In his Motion, Nguyen argues that Plaintiff’s Complaint should be partially dismissed for three reasons: (1) “abuse,” under NRS 41.1395, was not properly alleged in the Complaint; (2) “neglect,” under NRS 41.1395, was not properly alleged in the Complaint; and (3) a claim for professional negligence has “different” elements than “claim[s] for violation of NRS 41.1395.” Once again, Nguyen’s Motion should be dismissed as a request *or prayer* for damages under NRS 41.1395 is not an independent legal claim subject to Rule 12(b)(5) adjudication. Even if it were, Nguyen’s arguments are predicated upon a clearly false premise, *i.e., that Plaintiff failed to allege “a state of mind more culpable than that which exists in negligence claims.”* Not only did Plaintiff absolutely allege such a state of mind, for purposes of this proceeding, such allegations must be

1 accepted as true. *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997).
2 Accordingly, Nguyen's Motion must be denied.

3 **1. Seeking Damages Under NRS 41.1395 is Not a "Claim" Subject to Rule**
4 **12(b)(5) Adjudication.**

5 NRS 41.1395 does not create an independent claim or cause of action. The statute
6 presupposes an injury arising from an independent act or omission.

7 [I]f an older person . . . ***suffers a personal injury or death*** that is caused by abuse
8 or neglect or suffers a loss of money or property caused by exploitation, the person
9 who caused the injury, death or loss ***is liable to the older person*** . . . for two times
the ***actual*** damages incurred by the older person . . . NRS 41.1395(1) (emphasis
added).

10 Although the statute contemplates "abuse," "neglect" and "exploitation" and even provides a
11 definition for the same, such definitions are generic in nature and clearly require an underlying
12 tort. As an illustration, "abuse" is defined as a "willful and unjustified . . . [i]nfliction of pain,
13 injury or mental anguish." NRS 41.1395(4)(a)(1). The foregoing definition necessarily requires
14 an underlying tort, *i.e.*, a battery, assault, intentional infliction of emotional distress and/or false
15 imprisonment.

16 ***[NRS 41.1395] does not create an independent claim.*** Rather it is a means to
17 recover special damages under certain circumstances. *Doe v. Clark County Sch.*
18 *Dist.*, 215CV00793APGGWF, 2016 WL 4432683, at *13 (D. Nev. Aug. 18, 2016)
(emphasis added), citing *Findlay Mgmt. Grp. v. Jenkins*, No. 60920, 2015 WL
19 5728870, at *2 (Nev. Sept. 28, 2015) (describing this statute as one for special
damages that must be specifically pleaded under Nevada law).

20 But this Nevada statute ***does not create an independent claim for recovery.*** Rather,
21 it allows for recovery of enhanced or double damages when the plaintiff is an
22 elderly or vulnerable person and is separately entitled to recovery under the
23 circumstances described in the statute. *Sligh v. Fator*, 419CV00036ALMCAN,
2019 WL 6833899, at *9 (E.D. Tex. Nov. 15, 2019), report and recommendation
24 adopted, 4:19-CV-36, 2019 WL 6828759 (E.D. Tex. Dec. 13, 2019) (emphasis
added), citing *Doe v. Clark Cty. Sch. Dist.*, No. 2:15-CV-00793-APG-GWF, 2016
25 WL 4432683, at *13 (D. Nev. Aug. 18, 2016), *Findlay Mgmt. Grp. v. Jenkins*, No.
60920, 2015 WL 5728870, at *2 (Nev. Sept. 28, 2015); *Phipps v. Clark Cty. Sch.*
26 *Dist.*, No. 2:13-CV-0002-GMN-PAL, 2016 WL 730728, at *7 (D. Nev. Feb. 22,
2016)).

Rule 12(b), in pertinent part, provides: “a party may assert the following defenses by motion . . . failure to state *a claim* upon which relief can be granted.” NRCP 12(b)(5) (emphasis added). Accordingly, Rule 12(b)(5) permits the dismissal of a “claim,” not the dismissal of damages that *could* be awarded if a party prevails on a legal claim. Requests for damages are not independent legal claims of relief. *See In re Gen. Motors Corp.*, 383 F. Supp. 2d 1340, 1344 (W.D. Okla. 2005)¹⁶ (denying motion to dismiss requests for remedies only “as the prayer for relief is not part of the claim”). As a matter of law, Defendant’s Motion should be denied as a request for damage is not subject to Rule 12(b)(5) adjudication.

2. Plaintiff Properly Alleged “Abuse” for Purposes of Seeking Damages Under NRS 41.1395.

The relevant language from NRS 41.1395 provides:

if an older person . . . suffers a personal injury or death *that is caused by abuse or neglect* . . . , the person who caused the injury [or] death . . . is liable to the older person . . . for two times the actual damages incurred by the older person . . . NRS 41.1395(1) (emphasis added).

The statute defines “abuse” as follows:

willful and unjustified: (1) [i]n infliction of pain, injury or mental anguish; or (2) [d]eprivation of food, shelter, clothing or services which are necessary to maintain the physical or mental health of an older person or a vulnerable person. NRS 41.1395(4)(a)(1)-(2).

Defendant argues that he is entitled to dismissal simply because Plaintiff failed to allege that he “willfully inflicted harm upon Mr. Stewart.”¹⁷ The Nevada Supreme Court has defined “willfull” as “intentional, deliberate, knowing, and voluntary” or “action taken with either intentional disregard of or plain indifference.” *Century Steel, Inc. v. State, Div. of Indus. Relations*,

¹⁶ Interpreting FRCP 12(b)(6), corollary to NRCP 12(b)(5). Federal cases interpreting the Federal Rules of Civil Procedure “are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.” *Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002), quoting *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990).

¹⁷ *See* Defendant’s Motion on file herein at 4:1 (emphasis in original).

1 *Occupational Safety & Health Section*, 122 Nev. 584, 589, 137 P.3d 1155, 1159 (2006), quoting
2 61 Am.Jur.2d *Plant and Job Safety* § 73, at 630 (2002). In its Complaint, Plaintiff alleged and/or
3 described Nguyen’s scienter, conduct and actions as follows:

- 4 • “*acted recklessly*”;
- 5 • “*acted with a conscious disregard* because they had knowledge of the probable
6 harmful consequences of their wrongful acts”;
- 7 • “*exhibited a willful and deliberate failure* to act to avoid those consequences”;
- 8 • “*acted with malice, express or implied, because they engaged in conduct
9 which was despicable conduct and which was engaged in with a conscious
10 disregard of Gary Stewart’s rights or safety*”;
- “*acted with oppression*”;
- “*engaged in despicable conduct*”; and
- [caused] “*severe neglect*.”

11 First and foremost, Plaintiff clearly alleged that Nguyen’s wrongful conduct in this case was
12 “willful.”

13 Defendants *acted with a conscious disregard* because they had knowledge of the
14 probable harmful consequences of their wrongful acts and *exhibited a willful and
15 deliberate failure* to act to avoid those consequences.¹⁸

16 Moreover, Plaintiff’s foregoing allegations are riddled with terms indicating *deliberate* and
17 certainly *indifferent* conduct on the part of Nguyen. Once again, for purposes of this Motion, the
18 foregoing allegations must be accepted as true. *Simpson*, 113 Nev. at 190, 929 P.2d at 967.
19 Plaintiff has clearly alleged facts that, if proven, would entitle it to damages under NRS 41.1395.
20 Accordingly, Nguyen’s Motion must be denied.

21 **3. Plaintiff Properly Alleged “Neglect” for Purposes of Seeking Damages**
22 **Under NRS 41.1395.**

23 Defendant next argues that the “neglect” contemplated by NRS 41.1395 “calls for more
24 than simple negligence.”¹⁹ Defendant *again* speciously argues that Plaintiff has not alleged
25

26 _____
27 ¹⁸ See February 28, 2020, Complaint on file herein at ¶ 7 (emphasis added).

28 ¹⁹ See Nguyen’s Motion on file herein at 4:11-12.

“intentional conduct or a state of mind more culpable than that which exists in negligence claims.”²⁰ Predicated upon the foregoing *clearly* false assertion, Nguyen argues that dismissal is appropriate because “nothing in [Plaintiff’s Complaint] rises to the level of neglect.”²¹ As set forth in the preceding section, Plaintiff alleged that Nguyen’s conduct was “reckless,” “with a conscious disregard” to Gary Stewart’s wellbeing, “a willful and deliberate failure” to avoid detrimental health consequences to Gary Stewart, “with malice,” “despicable conduct which was engaged in with a conscious disregard of Gary Stewart’s rights or safety,” “with oppression” and a willful and deliberate failure” amounting to “severe neglect.”²² Once again, the foregoing allegations clearly allege intentional misconduct and clearly “rises to the level of neglect.”

The statute defines “neglect” as follows:

the failure of a person who has assumed legal responsibility or a contractual obligation for caring for an older person . . . , or who has voluntarily assumed responsibility for such a person's care, to provide . . . services within the scope of the person's responsibility or obligation, which are necessary to maintain the physical or mental health of the older person . . . NRS 41.1395(4)(c) (emphasis added).

Despite the fact that Plaintiff’s foregoing allegations clearly allege intentional and deliberate conduct, nothing in the foregoing definition of “neglect” rises to such a state of mind. The definition simply requires a “failure . . . for caring . . . or to provide . . . services . . . which are necessary to maintain the physical or mental health of the older person.” NRS 41.1395(4)(c). Accordingly, Nguyen’s assertion of a lack of intentional or willful allegations in connection with his request for dismissal of Plaintiff’s *neglect-damages* request is erroneous. Significantly, Plaintiff’s allegations are sufficient to trigger damages for “neglect” under NRS 41.1395 as

²⁰ See Nguyen’s Motion on file herein at 4:13-14.

²¹ See *id.* at 4:14-15.

²² See February 28, 2020, Complaint on file herein at ¶¶ 5-7 (emphasis in original).

1 Plaintiff expressly alleged that Nguyen’s “failure to act” caused Gary Stewart and Plaintiff
2 damages.

3 Nguyen next asserts the unreported and nonbinding case of *Brown v. Mt. Grant Gen. Hosp.*
4 for the continued proposition that NRS 41.1395 concerns only intentional conduct “while
5 professional negligence . . . is focused on negligent conduct.”²³ *Brown v. Mt. Grant Gen. Hosp.*,
6 3:12-CV-00461-LRH, 2013 WL 4523488, at *6 (D. Nev. Aug. 26, 2013). In doing so, Nguyen
7 continues to ignore Plaintiff’s unequivocal allegations of willful and intentional conduct. *See*
8 *supra*. Additionally, the *Brown* opinion is not a reported case and, even if it were, is not binding
9 on this Court. Next, the arguments and excerpts Nguyen asserts from *Brown* are mere dicta. Even
10 the text from the opinion indicates that it is a mere prediction as to how the Nevada Supreme Court
11 would rule (“[i]n order to predict how the Nevada courts would resolve this conflict . . .” *Id.*).
12 Finally, and most importantly, as set forth above, Plaintiff *did* allege that Nguyen’s conduct
13 included intentional and willful acts.²⁴ Thus, the *Brown* opinion supports Plaintiff’s position, not
14 Nguyen’s.

15 Nguyen’s assertion of *Estate of Mary Curtis*²⁵ is erroneous for the same reasons as his
16 assertion of *Brown*. The *Curtis* opinion makes no holdings that are dispositive of the issues at bar
17 and, more importantly, the cited dicta supports Plaintiff’s position, not Nguyen’s.

18 **4. Nguyen’s Conflating Claims Argument is an Erroneous Red Herring.**

19 Nguyen next argues that Plaintiff is commingling its professional negligence claim with its
20 “claim for violation of NRS 41.1395.”²⁶

21 Plaintiffs brought their claim for violation of NRS 41.1395 based upon the **same**
22 **factual circumstances as their claims for professional negligence and**

23 ²³ See Nguyen’s Motion on file herein at 5:2-7.

24 ²⁴ Once again, NRS 41.1395 does not require that intentional or willful acts be alleged if the death or injury
25 is alleged to have been caused by “neglect.” NRS 41.1395(4)(c). In this case, Plaintiff has alleged both
26 “abuse” and “neglect.”

27 ²⁵ *Estate of Curtis v. S. Las Vegas Med. Inv’rs, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263 (2020).

28 ²⁶ See Nguyen’s Motion on file herein at 4:17.

negligence. This is impossible, as professional negligence and NRS 41.1395 claims have different elements, and are mutually exclusive.²⁷

Nguyen argues that Plaintiff's "claim" pursuant to NRS 41.1395 must be dismissed because Plaintiff did not allege separate facts in support of the "different elements" of its "claim." This argument is erroneous as NRS 41.1395 does not create an independent cause of action. "[NRS 41.1395] *does not create an independent claim*. Rather it is a means to recover special damages under certain circumstances." *Doe*, 2016 WL 4432683, at *13 (emphasis added); *Findlay*, 2015 WL 5728870, at *2;

[NRS 41.1395] *does not create an independent claim for recovery*. Rather, it allows for recovery of enhanced or double damages when the plaintiff is an elderly or vulnerable person and is separately entitled to recovery under the circumstances described in the statute. *Sligh*, 2019 WL 6833899, at *9 (emphasis added), citing *Doe*, 2016 WL 4432683, at *13; *Findlay*, 2015 WL 5728870, at *2; *Phipps*, 2016 WL 730728, at *7.

There is no claim to commingle with and there are no "different elements." In its Complaint, Plaintiff properly alleged sufficient facts to establish all three of its claims for relief (negligence, professional negligence and wrongful death). Plaintiff further alleged acts and conduct sufficient to enhance its damage claim pursuant to NRS 41.1395. Accordingly, Nguyen's Motion should be denied.

C. EVEN IF NGUYEN'S ARGUMENTS WERE MERITORIOUS, THE PROPER REMEDY IS AMENDMENT, NOT DISMISSAL.

A complaint should not be dismissed unless it appears to a certainty that the plaintiff could prove no set of facts that would entitle him or her to relief. *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003). Moreover, when a complaint can be amended to state a claim for relief, leave to amend, rather than dismissal, is the preferred remedy. *Id.* Leave to amend should be freely given when justice requires, and a request to amend should not be denied simply because it was made in open court rather than by formal motion. *Id.* If the Court is inclined to

²⁷ See Nguyen's Motion on file herein at 4:17-20 (emphasis in original).

1 grant Nguyen's Motion, Plaintiff respectfully requests that the Court deny the Motion nonetheless
2 and instead permit Plaintiff leave to amend its complaint.

3 **IV. CONCLUSION.**

4 Based on the foregoing, Plaintiff respectfully requests that the Court deny Nguyen's Partial
5 Motion to Dismiss in its entirety.

6 DATED this 23rd day of December, 2020.

7 **HAYES | WAKAYAMA**

8
9 /s/ Dale A. Hayes, Jr., Esq.
10 DALE A. HAYES, JR., ESQ.
Nevada State Bar No. 9056
11 LIANE K. WAKAYAMA, ESQ.
Nevada State Bar No. 11313
12 JEREMY D. HOLMES, ESQ.
Nevada State Bar No. 3430
13 4735 S. Durango Drive, Suite 105
14 Las Vegas, Nevada 89147
15 *Attorneys for Plaintiff*
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

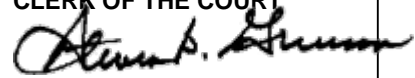
I hereby certify that the foregoing **OPPOSITION TO DEFENDANT MINH NGUYEN, M.D.’S PARTIAL MOTION TO DISMISS** was submitted electronically for filing and service with the Eighth Judicial District Court on the 23rd day of December, 2020. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:²⁸

Joshua Daor	joshua.daor@lewisbrisbois.com
Erin Jordan	Erin.Jordan@lewisbrisbois.com
S. Brent Vogel	brent.vogel@lewisbrisbois.com
Johana Whitbeck	johana.whitbeck@lewisbrisbois.com
Amy Cvetovich	acvetovich@wwhgd.com
Kelly Gaez	kgaez@wwhgd.com
Flor Gonzalez-Pacheco	FGonzalez-Pacheco@wwhgd.com
Josephine Groh	jpgroh@wwhgd.com
Marjan Hajimirzaee	mhajimirzaee@wwhgd.com
Carol Michel	cmichel@wwhgd.com
Kelly Pierce	kpierce@wwhgd.com
Raiza Anne Torrenueva	rtorrenueva@wwhgd.com
Douglas Cohen	dcohen@wrslawyers.com
Jennifer Finley	jfinley@wrslawyers.com
Theresa McCracken	tmccracken@wrslawyers.com

/s/ Julia Rodionova
An employee of Hayes Wakayama

²⁸ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

EXHIBIT 8



1 S. BRENT VOGEL
Nevada Bar No. 6858
2 E-Mail: Brent.Vogel@lewisbrisbois.com
ERIN E. JORDAN
3 Nevada Bar No. 10018
E-Mail: Erin.Jordan@lewisbrisbois.com
4 LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
5 Las Vegas, Nevada 89118
702.893.3383
6 FAX: 702.893.3789
Attorneys for Defendant Minh Nguyen, M.D.

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

11 PATRICIA ANN ADAMS as Special
Administrator of the Estate of Connie Rae
12 Stewart,

13 Plaintiff,

14 vs.

15 MINH NGUYEN, M.D. AND EMIL
MORNEAULT, RPH; and DOES 1-5 and
16 ROE ENTITIES 1-5

17 Defendants.

CASE NO. A-20-811421-C
Dept. No.: 3

**DEFENDANT MINH NGUYEN, M.D.'S
OPPOSITION TO MOTION FOR LEAVE
TO AMEND COMPLAINT**

19 Defendant Minh Nguyen M.D., by and through his attorneys of record, S. Brent Vogel,
20 Esq. and Erin E. Jordan, Esq. of LEWIS BRISBOIS BISGAARD & SMITH LLP, hereby files this
21 Opposition to Plaintiff's Motion to Amend.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 This Opposition is based upon the following Memorandum of Points and Authorities, the
2 attached exhibit, the papers and pleadings on file herein, and any oral argument offered at the
3 hearing of this matter.

4 DATED this 4th of January, 2021

5 LEWIS BRISBOIS BISGAARD & SMITH LLP
6

7 By /s/ Erin E. Jordan

8 S. BRENT VOGEL

9 Nevada Bar No. 6858

10 ERIN E. JORDAN

11 Nevada Bar No. 10018

6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

702.893.3383

12 *Attorneys for Defendant Minh Nguyen, M.D.*
13

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. FACTUAL BACKGROUND**

16 This is a professional negligence case that arises out of the care and treatment Defendants
17 provided to decedent Gary Stewart between February 13-21, 2019. Plaintiff alleges that
18 Defendants breached the standard of care when they failed to properly order Mr. Stewart's seizure
19 medication. Plaintiff alleges that Mr. Stewart developed a condition caused status epilepticus due
20 to a medication error, and that he died as a result. Affidavit Attached to Complaint.

21 This wrongful death action was first filed by Gary Stewart's wife, Connie Stewart, who
22 filed an individual heir wrongful death claim only. Mrs. Stewart has since passed away, and the
23 Plaintiff is now Patricia Adams on behalf of Connie Stewart's Estate. The caption was changed
24 by agreement of all the parties after Connie Stewart passed away. SAO Regarding Plaintiff,
25 attached hereto as **Exhibit A**. Thus, at present this case contains Connie Stewart's individual heir
26 wrongful death claim brought as a survival claim. *Id.*
27
28

4. As such, the parties hereto agree that Patricia Ann Adams, in her personal capacity as the Special Administrator of the Estate of Connie Rae Stewart, is hereby substituted in place and stead of Plaintiff Connie Stewart in these proceedings;

ORDER

IT IS HEREBY ORDERED that, pursuant to the foregoing stipulation, Patricia Ann Adams, in her personal capacity as Special Administrator of the Estate of Connie Rae Stewart, is hereby substituted in place and stead of the deceased Plaintiff Connie Stewart; and

The law firm of Hayes Wakayama is hereby substituted as counsel for Connie Rae Stewart in place and stead of the law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP.

IT IS SO ORDERED.

DATED this _____ day of _____, 2020.

Dated this 25th day of November, 2020

DISTRICT COURT JUDGE

Submitted by:

HAYES | WAKAYAMA

35B FB8 DFF9 D58D
Douglas W. Herndon
District Court Judge

ak

Plaintiff has now filed a Motion for Leave to Amend the Complaint asking this Court to add six additional Plaintiffs whose claims are barred by NRS 41.085, as well as the statute of limitations. Plaintiffs' Motion for Leave asks this Court to amend the Complaint to add Gary Stewart's children (Gary Stewart, Jr., Patricia Adams, Mary Kay Fallon, and Elizabeth Hodge), the Estate of Gary Stewart, and the Stewart Family Trust as plaintiffs. Motion, p. 2-3.

II. ARGUMENT

a. Motions to Amend

Plaintiffs seek to amend their Complaint pursuant to NRCP 15. As a responsive pleading has been filed in this matter, Plaintiffs must seek the leave of this Court to amend her Complaint. NRCP 15(a). The Rule states that leave shall be freely given when justice requires:

Amendments Before Trial.

1 (1) Amending as a Matter of Course. A party may amend its pleading once as a
2 matter of course within:

3 (A) 21 days after serving it, or

4 (B) if the pleading is one to which a responsive pleading is required, 21
5 days after service of a responsive pleading 21 days after service of a
6 motion under Rule 12(b), (e), or (f), whichever is earlier.

7 (2) Other Amendments. In all other cases, a party may amend its pleading only
8 with the opposing party's written consent or the court's leave. The court should
9 freely give leave when justice so requires.

10 NRCP 15(a) (emphasis added).

11 However, even though the Rule states that leave shall be freely given, this does not mean
12 that leave to amend a party's Complaint shall always be given. If that were the case, it would be
13 meaningless to require a party to seek leave by the terms of the Rule. The Nevada Supreme Court
14 has recognized this and stated that it is left to the discretion of the District Court to determine
15 whether to grant a party's Motion for Leave to Amend Complaint. *Stephens v. Southern Nevada*
16 *Music Co., Inc.*, 89 Nev. 104, 105 (1973). In *Stephens*, the Nevada Supreme Court explained as
17 follows:

18 Rule 15(a) of the Nevada Rules of Civil Procedure clearly provides that leave to
19 amend shall be freely given when justice so requires. This does not, however,
20 mean that a trial judge may not, in a proper case, deny a motion to amend. If that
21 were the intent, leave of the court would not be required. A motion for leave to
22 amend is addressed to the sound discretion of the trial court and its action in
23 denying the motion should not be held to be error unless that discretion has been
24 abused.

25 *Id.* The situation before this Court with Plaintiff's Motion for Leave to Amend is a proper case for
26 denial of a motion made under NRCP 15(a). Bad faith, undue delay and undue prejudice are
27 reasons for denying a Motion for Leave to Amend. *Id.* at 105-06 ("We have held that in the
28 absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on
the part of the movant – the leave sought should be freely given.").

Plaintiffs themselves point out that an amended pleading adding Plaintiffs should not be
allowed if it seeks to enforce an independent right or to impose greater liability against the

1 defendants. Motion for Leave, p. 5. This is precisely what Plaintiffs' Amended Complaint would
2 do. Each heir has a claim for loss of probable support and grief and sorrow pursuant to NRS
3 41.085. As originally filed, the only claim was for the heir damages incurred by Connie Stewart.
4 If the Plaintiffs are allowed to add the four proposed individual Plaintiffs, the claim would now be
5 for the heir damages incurred by Connie Stewart, Gary Stewart, Jr., Patricia Adams, Mary Kay
6 Fallon, and Elizabeth Hodge.

7 Heir damages include loss of probable support, and grief and sorrow of the heir for each
8 individual heir Plaintiff. NRS 41.085(4) ("The heirs may prove their respective damages in the
9 action brought pursuant to subsection 2 and the court or jury may award each person pecuniary
10 damages for the person's grief or sorrow, loss of probable support, companionship, society,
11 comfort and consortium, and damages for pain, suffering or disfigurement of the decedent.")
12 (emphasis added). Additionally, while non-economic damages for the entire case are capped at
13 \$350,000 as Plaintiffs point out, loss of probable support damages are not capped, and there is no
14 guarantee that Mrs. Stewart's heir claim would amount to \$350,000. Opposition, p. 6.

15 Plaintiffs also seek to add the Estate of Gary Stewart to the Complaint, which adds an
16 entirely new category of allowable damages pursuant to NRS 41.085(5).

17 The damages recoverable by the personal representatives of a decedent on
18 behalf of the decedent's estate include:

19 (a) Any special damages, such as medical expenses, which the
20 decedent incurred or sustained before the decedent's death, and funeral expenses;
21 and

22 (b) Any penalties, including, but not limited to, exemplary or punitive
23 damages, that the decedent would have recovered if the decedent had lived,

24 This is a case of undue delay and undue prejudice to the Defendants and Plaintiffs' Motion
25 for Leave should be denied..

26 **b. The Family Trust Is Not a Proper Party Pursuant to NRS 41.085**

27 Wrongful death is a statutory claim and Nevada's wrongful death sets forth the only parties
28 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

1 the person who caused the death.”) (emphasis added). An heir is a person who would inherit from
2 the decedent if the decedent died intestate per NRS Chapter 134. NRS 41.085(1) (“As used in this
3 section, “heir” means a person who, under the laws of this State, would be entitled to succeed to
4 the separate property of the decedent if the decedent had died intestate.”). Those are the only
5 parties that may bring a claim for wrongful death. At the time of Mr. Stewart’s death, his heirs
6 were his wife, Connie Stewart, and his children, Gary Stewart, Jr., Patricia Adams, Mary Kay
7 Fallon, and Elizabeth Hodge. NRS 134.040(2).

8 NRS 134.040 Surviving spouse and issue.

9 ...
10 2. If the decedent leaves a surviving spouse and more than one child
11 living, or a child and the lawful issue of one or more deceased children, the estate
goes one-third to the surviving spouse and the remainder in equal shares to the
children and the lawful issue of any deceased child by right of representation.

12 However, only Mrs. Stewart filed an heir claim against the Defendants within the statute of
13 limitations.

14 Thus, the Family Trust is not a proper party to this case pursuant to NRS 41.085, and
15 Plaintiffs’ Motion for Leave to add the Family Trust should be denied. Upon Mr. Stewart’s death,
16 the proper parties were his estate and his heirs. Upon Mrs. Stewart’s death, the proper parties are
17 Mr. Stewart’s estate and Mrs. Stewart’s heir claim brought as a NRS 41.100 survival action.

18 **c. The Proposed Individual Plaintiffs’ Claims are Barred by the Statute of**
19 **Limitations.**

20 The proposed children Plaintiffs had a cause of action that accrued on the day of Mr.
21 Stewart’s death, as Mrs. Stewart’s death did not create a new cause of action for them, and thus,
22 their individual heir claims are barred by the statute of limitations. Pursuant to NRS 134.040, the
23 proposed children Plaintiffs had individual heir wrongful death claims upon Mr. Stewart’s death.
24 Thus, their wrongful death actions accrued on the day of his death, March 5, 2019. Complaint, ¶
25 1.

26
27 Where a person is injured based upon the alleged professional negligence of a provider of
28 health care, NRS 41A.097(2) states the following:

1 ... an action for injury or death against a provider of health care may not be
2 commenced more than 3 years after the date of injury or 1 year after the plaintiff
3 discovers or through the use of reasonable diligence should have discovered the
injury, whichever occurs first ...

4 Wrongful death claims accrue on the date of death. *Gilloon v. Humana, Inc.*, 100 Nev.
5 518, 519-20 (1984) (“In an action for wrongful death, the injury contemplated by Nev. Rev. Stat. §
6 41A.097 is the death of the malpractice victim and the ... period of limitation begins to run from
7 the time of death or the discovery thereof.”).

8 The Estate of Gary Stewart’s claims are also time-barred under the same analysis. Here,
9 the proposed Plaintiffs’ statute of limitations expired on March 5, 2020. Plaintiffs did not file a
10 Motion for Leave to Amend the Complaint until after they had already substituted Mrs. Stewart’s
11 estate as the Plaintiff by stipulation, and until December 21, 2020. Their claims do not relate back
12 as there is no allegation that they were unaware that their father had died or that there was alleged
13 negligence as Connie Stewart filed a claim within the proper statute of limitations.

14 **d. The Plaintiffs’ Exclusive Remedy is a Wrongful Death Claim**

15 There was no remedy for wrongful death in the common law. *Pitman v. Thorndike*, 762 F.
16 Supp. 870, 871 (D.C. Nev. 1991) (“the common law provided no wrongful death action”).
17 Therefore, Nevada’s statutory remedy for wrongful death, NRS 41.085, is a wrongful death
18 Plaintiff’s exclusive remedy. *Id.* (“Nevada’s statutory remedy is exclusive.”); *Wells v. Shoemaker*,
19 64 Nev. 57, 66 (1947) (“The common law afforded no remedy in damages for a wrongful death.
20 Whatever standing Plaintiff has in the present case must be found in the statutes of Nevada. The
21 remedy, being wholly statutory, is exclusive. The statute provides the only measure of damages,
22 and designates the only person who can maintain such an action.”). Therefore, Nevada law is
23 clear that Plaintiffs bringing claims for what they deem to be the wrongful death of another person
24 are limited to a claim for wrongful death pursuant to NRS 41.085.

25 Plaintiffs allege that two of their claims are not professional negligence claims and that
26 their statute of limitations is therefore two years. Motion, p. 5. This is incorrect. The allegation
27 against Dr. Nguyen is only that he negligently failed to prescribe a specific medication to Mr.
28 Stewart for seizures. This is an allegation of professional negligence wrongful death and the

1 proposed individual heir Plaintiffs' claims are time-barred..

2 **III. CONCLUSION**

3 Therefore, in accordance with the above authorities, Defendant Dr. Nguyen respectfully
4 requests that this Court deny Plaintiffs' Motion for Leave to Amend Complaint.

5 DATED this 4th day of January, 2021.

6 LEWIS BRISBOIS BISGAARD & SMITH LLP

7
8 By /s/ Erin E. Jordan

9 S. BRENT VOGEL

10 Nevada Bar No. 6858

11 ERIN E. JORDAN

12 Nevada Bar No. 10018

13 6385 S. Rainbow Boulevard, Suite 600

14 Las Vegas, Nevada 89118

15 Tel. 702.893.3383

16 *Attorneys for Defendant Minh Nguyen, M.D.*

CERTIFICATE OF SERVICE

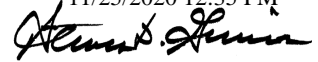
I hereby certify that on this 4th day of January, 2021, a true and correct copy of DEFENDANT MINH NGUYEN, M.D.'S OPPOSITION TO MOTION FOR LEAVE TO AMEND COMPLAINT was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

Dale A. Hayes, Jr., Esq.
Liane K. Wakayama, Esq.
HAYES WAKAYAMA
4735 S. Durango Dr., Suite 105
Las Vegas, NV 89147
Tel: 702.656.0808
Fax: 702.655.1047
dhayes@hwlawnv.com
lkw@hwlawnv.com
Attorneys for Plaintiff

Carol P. Michel, Esq.
Marjan Hajimirzaee, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN
& DIAL, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, NV 89118
Tel: 702.938.3838
Fax: 702.938.3864
cmichel@wwhgd.com
Attorneys for Defendant Emil Morneault, RPH

By /s/ Johana Whitbeck
An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

Exhibit A


CLERK OF THE COURT

HAYES | WAKAYAMA
DALE A. HAYES, JR., ESQ.
Nevada Bar No. 9056
LIANE K. WAKAYAMA, ESQ.
Nevada Bar No. 11313
4735 S. Durango Drive, Ste. 105
Las Vegas, Nevada 89147
(702) 656-0808 – Telephone
(702) 655-1047 – Facsimile
dhayes@hwlawnv.com
lkw@hwlawnv.com
*Attorneys for Patricia Ann Adams,
as Special Administrator of the Estate
of Connie Rae Stewart*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

CONNIE STEWART, an individual,

Plaintiff,

vs.

Case No.: A-20-811421-C

Dept. No.: III

MINH NGUYEN, M.D. AND EMIL
MORNEAULT, RPH; and DOES 1-5 and ROE
ENTITIES 1-5,

Defendants.

**STIPULATION AND ORDER FOR SUBSTITUTION OF PARTY UPON SUGGESTION
OF DEATH OF CONNIE STEWART PURSUANT TO NRCP 25(a)(1) AND FOR
SUBSTITUTION OF COUNSEL**

The parties to this action, by and through their respective counsel of record, hereby stipulate as follows:

1. On June 24, 2020, a Suggestion of Death was filed in this matter concerning the death of the Plaintiff, Connie Stewart, on June 9, 2020.

2. Pursuant to NRCP 25(a)(1), a substitution must be made within 180 days of service of the Suggestion of Death.

3. On October 21, 2020, Patricia Ann Adams was issued Letters of Special Administration and duly appointed as the Special Administrator of the Estate of Connie Rae

Stewart *In the Matter of the Estate of Connie Rae Stewart*, in the Eighth Judicial District Court, Clark County, Nevada, Case No. P-20-104505-E, on file herein.

4. As such, the parties hereto agree that Patricia Ann Adams, in her personal capacity as the Special Administrator of the Estate of Connie Rae Stewart, is hereby substituted in place and stead of Plaintiff Connie Stewart in these proceedings;

5. The parties further agree that the law firm of Hayes Wakayama shall be substituted as counsel of record for Connie Rae Stewart in place and stead of the law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP.

IT IS SO STIPULATED.

Dated this 16th day of November, 2020

Dated this 16th day of November, 2020

ESTATE OF CONNIE RAE STEWART

HAYES | WAKAYAMA

By: Patricia Ann Adams
PATRICIA ANN ADAMS
*In her personal capacity as the Special
Administrator of the Estate of Connie
Rae Stewart*

By: /s/ Dale A. Hayes, Jr., Esq.
DALE A. HAYES, JR., ESQ.
Nevada Bar No. 9056
LIANE K. WAKAYAMA, ESQ.
Nevada Bar No. 11313
4735 S. Durango Drive, Ste. 105
Las Vegas, Nevada 89147
*Attorneys for Patricia Ann Adams,
as Special Administrator of the Estate
of Connie Rae Stewart*

Dated this 16th day of November, 2020

Dated this 16th day of November, 2020

**WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP**

**WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC**

By: /s/ Douglas M. Cohen, Esq.
DOUGLAS M. COHEN, ESQ.
Nevada Bar No. 1214
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Former attorneys for Connie Stewart

By: /s/ Carol P. Michel, Esq.
CAROL P. MICHEL, ESQ.
Nevada State Bar 11420
MARJAN HAJIMIRZAEI, ESQ.
Nevada State Bar 11984
6385 S. Rainbow Blvd., Ste. 400
Las Vegas, Nevada 89118
*Attorneys for Defendant
Emil Morneault, RPH*

///

Dated this 16th day of November, 2020

**LEWIS BRISBOIS BISGAARD &
SMITH LLP**

By: /s/ Erin E. Jordan, Esq.

S. BRENT VOGEL

Nevada Bar No. 6858

ERIN E. JORDAN

Nevada Bar No. 10018

6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

*Attorneys for Defendant Minh Nguyen,
M.D.*

ORDER

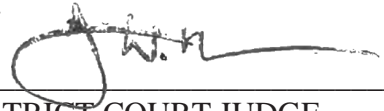
IT IS HEREBY ORDERED that, pursuant to the foregoing stipulation, Patricia Ann Adams, in her personal capacity as Special Administrator of the Estate of Connie Rae Stewart, is hereby substituted in place and stead of the deceased Plaintiff Connie Stewart; and

The law firm of Hayes Wakayama is hereby substituted as counsel for Connie Rae Stewart in place and stead of the law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP.

IT IS SO ORDERED.

DATED this _____ day of _____, 2020.

Dated this 25th day of November, 2020



DISTRICT COURT JUDGE

Submitted by:

HAYES | WAKAYAMA

35B FB8 DFF9 D58D
Douglas W. Herndon
District Court Judge

ak

/s/ Dale A. Hayes, Jr., Esq.

DALE A. HAYES, JR., ESQ.

Nevada State Bar No. 9056

LIANE K. WAKAYAMA, ESQ.

Nevada State Bar No. 11313

4735 S. Durango Drive, Ste. 105

Las Vegas, Nevada 89147

*Attorneys for Patricia Ann Adams,
as Special Administrator of the Estate
of Connie Rae Stewart*

From: Michel, Carol <CMichel@wwhgd.com>
Sent: Monday, November 16, 2020 12:39 PM
To: Julia Rodionova
Cc: Liane K Wakayama; Dale Hayes Jr; Whitbeck, Johana; Vogel, Brent; erin.jordan@lewisbrisbois.com; Douglas Cohen
Subject: RE: STEWART v. NGUYEN, et al. | Case No. A-20-811421-C

Okay to affix my signature to the proposed Stipulation.

From: Julia Rodionova [mailto:julia@hwlawnv.com]
Sent: Monday, November 16, 2020 3:01 PM
To: Michel, Carol
Cc: Liane K Wakayama; Dale Hayes Jr; Whitbeck, Johana; Vogel, Brent; erin.jordan@lewisbrisbois.com; Douglas Cohen
Subject: RE: STEWART v. NGUYEN, et al. | Case No. A-20-811421-C

This Message originated outside your organization.

Thank you. Ms. Michel, now that Erin Jordan and Doug Cohen have provided their approval to affix their electronic signatures to the Stipulation for Substitution and to continue this Wednesday's hearing, please advise if you also agree to the same and we will email Department 3 accordingly with all copied.



Julia Rodionova
Paralegal
4735 S. Durango Dr., Ste. 105
Las Vegas, Nevada 89147
(t) (702) 656-0808
(f) (702) 655-1047
www.hwlawNV.com

Pursuant to IRS Circular 230, any tax information or written tax advice contained herein (including any attachments) is not intended to be and can neither be used by any person for the purpose of avoiding tax penalties nor used to promote, recommend or market any tax-related matter addressed herein.

DO NOT read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication contains confidential and/or privileged information intended only for the addressee. If you have received this communication in error, please call us (collect) immediately at (702) 656-0808 and ask to speak to the sender of the communication. Also please e-mail the sender and notify the sender immediately that you have received the communication in error. Thank you. Hayes Wakayama - Attorneys at Law

From: Jordan, Erin <Erin.Jordan@lewisbrisbois.com>
Sent: Monday, November 16, 2020 11:32 AM
To: Michel, Carol; Julia Rodionova; Douglas Cohen; Vogel, Brent
Cc: Liane K Wakayama; Dale Hayes Jr; Whitbeck, Johana
Subject: RE: STEWART v. NGUYEN, et al. | Case No. A-20-811421-C

CAUTION:EXTERNAL EMAIL

I agree



Erin E. Jordan
Partner
Erin.Jordan@lewisbrisbois.com

T: 702.693.4354 F: 702.893.3789

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV 89118 | LewisBrisbois.com

Representing clients from coast to coast. View our locations nationwide.

This e-mail may contain or attach privileged, confidential or protected information intended only for the use of the intended recipient. If you are not the intended recipient, any review or use of it is strictly prohibited. If you have received this e-mail in error, you are required to notify the sender, then delete this email and any attachment from your computer and any of your electronic devices where the message is stored.

From: Michel, Carol <CMichel@wwhgd.com>
Sent: Monday, November 16, 2020 11:13 AM
To: Julia Rodionova <julia@hwlawnv.com>; Douglas Cohen <DCohen@wrslawyers.com>; Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Jordan, Erin <Erin.Jordan@lewisbrisbois.com>
Cc: Liane K Wakayama <lkw@hwlawnv.com>; Dale Hayes Jr <dhayes@hwlawnv.com>; Whitbeck, Johana <Johana.Whitbeck@lewisbrisbois.com>
Subject: [EXT] RE: STEWART v. NGUYEN, et al. | Case No. A-20-811421-C

Thanks. Has Brent Vogel or Erin Jordan approved?



**LITIGATION DEPARTMENT
OF THE YEAR A.M.'S DAILY REPORT
2020-2019 - 2018 - 2017 - 2016 - 2014**

Carol P. Michel, Attorney
Weinberg Wheeler Hudgins Gunn & Dial

From: Douglas Cohen <DCohen@wrslawyers.com>
Sent: Monday, November 16, 2020 9:21 AM
To: Julia Rodionova <julia@hwlawnv.com>; Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Michel, Carol <CMichel@wwhgd.com>
Cc: ehernandez@hayeslawnv.com; Stephanie Giraldo <sgiraldo@hwlawnv.com>; Liane K Wakayama <lkw@hwlawnv.com>; Dale Hayes Jr <dhayes@hwlawnv.com>
Subject: RE: STEWART v. NGUYEN, et al. | Case No. A-20-811421-C

Ok with me!

Douglas Cohen, Esq.
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120
(702) 341-5200 x 5111
(702) 341-5300 - Facsimile
E-Mail: DCohen@wrslawyers.com

This message contains information which may be confidential and privileged. Unless you are the addressee (or authorized to receive e-mails for the addressee), you may not use, copy or disclose to anyone this message or any information contained in this message. If you have received this message in error, please advise the sender by reply e-mail to DCohen@wrslawyers.com, and delete the message. Thank you.

From: Julia Rodionova [<mailto:julia@hwlawnv.com>]
Sent: Monday, November 16, 2020 9:18 AM
To: Vogel, Brent; Michel, Carol; Douglas Cohen
Cc: ehernandez@hayeslawnv.com; Stephanie Giraldo; Liane K Wakayama; Dale Hayes Jr
Subject: RE: STEWART v. NGUYEN, et al. | Case No. A-20-811421-C
Importance: High

CAUTION:EXTERNAL EMAIL

Good morning everyone,

Please allow this email to follow up with you regarding the proposed Stipulation for Substitution Upon Suggestion of Death of Connie Stewart attached hereto. Please advise if you will authorize our office to affix your electronic signature to the same and submit, which we would like to do today.

Thank you for your attention,
Julia



Julia Rodionova
Paralegal
4735 S. Durango Dr., Ste. 105
Las Vegas, Nevada 89147
(t) (702) 656-0808

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Connie Stewart, Plaintiff(s)

CASE NO: A-20-811421-C

7 vs.

DEPT. NO. Department 3

8 Minh Nguyen, M.D.,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Stipulation and Order was served via the court's electronic eFile system
to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 11/25/2020

15 Carol Michel

cmichel@wwhgd.com

16 Kelly Pierce

kpierce@wwhgd.com

17 Raiza Anne Torrenueva

rtorrenueva@wwhgd.com

18 Douglas Cohen

dcohen@wrslawyers.com

19 Jennifer Finley

jfinley@wrslawyers.com

20 S. Vogel

brent.vogel@lewisbrisbois.com

21 Theresa McCracken

tmccracken@wrslawyers.com

22 Johana Whitbeck

johana.whitbeck@lewisbrisbois.com

23 Dale Hayes, Jr.

dhayes@hwlawnv.com

24 Josephine Groh

25 jgroh@wwhgd.com

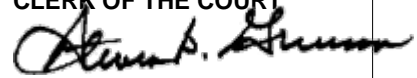
26 Amy Cvetovich

27 acvetovich@wwhgd.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Flor Gonzalez-Pacheco	FGonzalez-Pacheco@wwhgd.com
Kelly Gaez	kgaez@wwhgd.com
Marjan Hajimirzaee	mhajimirzaee@wwhgd.com
Liane Wakayama	lkw@hwlawnv.com
Julia Rodionova	julia@hwlawnv.com
Erin Jordan	Erin.Jordan@lewisbrisbois.com
Joshua Daor	joshua.daor@lewisbrisbois.com

EXHIBIT 9



OPPM

Carol P. Michel, Esq.
Nevada Bar No. 11420

cmichel@wwhgd.com

Marjan Hajimirzaee, Esq.
Nevada Bar No. 11984

mhajimirzaee@wwhgd.com

Josephine E. Groh, Esq.
Nevada Bar No. 14209

jgroh@wwhgd.com

WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC

6385 S. Rainbow Boulevard, Suite 400

Las Vegas, Nevada 89118

Telephone: (702) 938-3838

Facsimile: (702) 938-3864

Attorneys for Defendant Emil Morneault, RPH

DISTRICT COURT

CLARK COUNTY, NEVADA

CONNIE STEWART, an individual,

Plaintiff,

vs.

MINH NGUYEN, M.D. AND EMIL
MORNEAULT, RPH; and DOES 1-5 and ROE
ENTITIES 1-5,

Defendants.

Case No. A-20-811421-C

Dept. No. III

**DEFENDANT EMIL MORNEAULT,
RPH'S OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO AMEND
COMPLAINT**

Hearing Date: February 1, 2021

Hearing Time: Chambers

Defendant Emil Morneault, RPH ("Morneault"), by and through its attorneys Carol P. Michel, Esq., Marjan Hajimirzaee, Esq., and Josephine E. Groh, Esq., of the law firm of Weinberg Wheeler Hudgins Gunn & Dial, LLC, hereby files this Opposition to Plaintiff's Motion for Leave to Amend Complaint.

///

///

///

///





1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

This Motion is made and based upon the pleadings and papers on file here, the following Memorandum of Points and Authorities, and any oral argument that may be allowed.

DATED this 4th day of January, 2021.

/s/ Carol P. Michel

Carol P. Michel, Esq.
Marjan Hajimirzaee, Esq.
Josephine E. Groh, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, NV 89118
Attorneys for Defendant Emil Morneault, RPH



MEMORANDUM OF POINTS AND AUTHORITY

I. INTRODUCTION

This matter concerns the death of decedent Gary Stewart and allegations based in professional negligence regarding the care that was rendered to him in the time leading up to his death. Plaintiff has named Morneault as a Defendant in this action, despite the fact that he is a pharmacist and had no responsibility for diagnosis and medical treatment of the decedent at any time that Plaintiff is alleging any negligence. Plaintiff now seeks to add an additional purported “claim” against Morneault for negligence per se and further seeks to name six additional parties as plaintiffs who would each have a separate right to recovery. Plaintiff’s Motion should be denied as futile because Plaintiff’s proposed Amended Complaint would be subject to an immediate motion to dismiss. *Allum v. Valley Bank of Nev.*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993) (“It is not an abuse of discretion to deny leave to amend when any proposed amendment would be futile.” (quoting *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990))).

II. ARGUMENT

A. Standard of Review

Under Nevada Rule of Civil Procedure 15(a), courts need not grant leave to amend, even if leave is sought in a timely fashion, if the proposed amendment would be “futile.” *Allum*, 109 Nev. at 287, 849 P.2d at 302 (“It is not an abuse of discretion to deny leave to amend when any proposed amendment would be futile.” (quoting *Reddy*, 912 F.2d at 296)); *see also Halcrow Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013); *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 289, 357 P.3d 966, 971 (Nev. App. 2015) (“A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim, such as one which would not survive a motion to dismiss under NRCPP 12(b)(5)[.]”).

///

///

///



B. Plaintiff's Claims Are Futile

i. The Proposed Additional Professional Negligence Claims And Wrongful Death Claims Are Barred By The Statute Of Limitations.

On February 28, 2020, Connie Stewart ("Connie") filed a Complaint solely as an heir of Gary Stewart and alleged a single cause of action titled "PROFESSIONAL NEGLIGENCE/NEGLIGENCE/WRONGFUL DEATH/VULNERABLE AND OLDER PERSON." *See* Complaint, ¶ 1 ("Plaintiff, Connie Stewart, wife of deceased Gary Stewart (date of birth 10/21/1938), is his heir for this wrongful death/medical malpractice complaint and complains against the Defendants as stated below."). There was no language in the Complaint that identified Connie as the personal representative of the Estate of Gary Stewart. Connie passed away on June 9, 2020, and Patricia Ann Adams was appointed as the Special Administrator of Connie's Estate to pursue the claims in this matter. On November 25, 2020, the parties stipulated to substitute the Special Administrator as the Plaintiff in this matter. Plaintiff now seeks to amend her Complaint to name six new plaintiffs, including the personal representative of the Estate of Gary Stewart: 1) Patricia Ann Adams, in her individual capacity, 2) Gary Linck Stewart, Jr., 3) Mary Kay Fallon, 4) Elizabeth A. Hodge, 5) Patricia Ann Adams as Special Administrator of the Estate of Gary Stewart, and 6) Patricia Ann Adams as the trustee of THE STEWART FAMILY TRUST as plaintiffs. The proposed first amended complaint includes four causes of action: 1) Negligence, 2) Professional Negligence (Medical Malpractice), 3) Wrongful Death – NRS 41.085, and 4) Negligence *per se*.

Gary Stewart passed away on March 5, 2019. NRS 41A.097 explicitly imposes a one-year period for all actions for "injury or death" caused by alleged professional negligence. It is clear from the proposed first amended complaint that the third claim for wrongful death is premised entirely on the same negligence alleged in the second claim for professional negligence. The one-year from discovery statute of limitations imposed by NRS 41A.097 therefore applies because the wrongful death alleged here sounds in professional negligence. Pursuant to NRS 41A.097, the proposed plaintiffs including the heirs and the personal representative of the Estate of Gary Stewart had until **March 4, 2020** to file a claim and failed to



do so. In *Massey v. Litton*, 99 Nev. 723, 669 P.2d 248 (1983), the Nevada Supreme Court held that a plaintiff “discovers” his 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.” 99 Nev. at 728, 669 P.2d at 252. The focus is on knowledge of or access to facts rather than on the discovery of legal theories. *Id.* citing to *Graham v. Hanse*, 180 Cal.Rptr. 604, 609-610 (1982).) Here, the heirs and personal representative of the Estate of Gary Stewart were put on “inquiry notice” from the date of Mr. Stewart’s death and had a full year to file a complaint as Connie did. Since the wrongful death claim is subsumed within the professional negligence claim, the NRS 41A.097 period of limitations applies to that claim as well. Therefore, the effort to amend the Complaint and add additional parties is futile. These claims are barred by the one-year statute of limitations and the Court should deny Plaintiff’s motion to amend her Complaint.

ii. The Negligence And Negligence Per Se Claims Are Derivative Of The Professional Negligence Claim.

This is a straightforward professional negligence case concerning the death of Gary Stewart. Plaintiff alleges that Defendants breached the standard of care by allegedly failing to properly order Mr. Stewart’s seizure medication. Plaintiff now seeks to amend her complaint to add new parties to allege direct negligence and a purported new claim for negligence per se. First, the Nevada Supreme Court has stated negligence per se is not an independent cause of action. *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev. 918, 267 P.3d 771, fn. 3 (2011) (plaintiffs “pleaded negligence per se as a separate cause of action from negligence; however, it is not a separate cause of action, but rather a method of establishing the duty and breach elements of a negligence claim.”); *see also Cervantes v. Health Plan of Nevada*, 127 Nev. 789, 793, 263 P.3d 261, 264, fn. 4 (2011) (stating negligence per se is only a method of establishing the duty and breach elements of a negligence claims and is not a separate cause of action.). Additionally, even if negligence per se were a separate cause of action, Plaintiff only offhandedly referenced it in one sentence of her entire Complaint, rather than setting forth allegations that would be legally sufficient to constitute the elements of the purported claim. *See Complaint*, ¶ 5, 2:12-13 (“The



1 Defendants negligent medication errors violated State and/or Federal Statutes and these errors
2 are negligent *per se*.”). Contrary to Plaintiff’s assertion, she is in fact attempting to assert an
3 entirely new “claim”.

4 Additionally, Plaintiff’s proposed first and fourth causes of actions are markedly similar
5 to the professional negligence cause of action. If these were independent causes of action, how
6 could there be damages, unless the damages result from Defendants’ professional negligence?
7 And if the only damages that can be sustained result from professional negligence, then the
8 claims for negligence and negligence per se are derivative of the professional negligence claim.
9 Put another way, one simply cannot exist without the other. The requirement of damages
10 necessarily and invariably presupposes a nexus of professional negligence. As such, (1)
11 negligence and (2) negligence per se, are necessarily and invariably part of the broader
12 professional negligence action.

13 A claim sounds in “professional negligence” if the claim arises out of “the failure of a
14 provider of health care, in rendering services, to use the reasonable care, skill or knowledge
15 ordinarily used under similar circumstances by similarly trained and experienced providers of
16 health care.” *See* NRS 41A.015 (emphasis added). The Nevada Supreme Court held in an
17 unpublished disposition, *Zhang v. Barnes*, 382 P.3d 878, 2016 WL 4926325 (September 12,
18 2016), wherein the Supreme Court relied on *Tam v. Eighth Jud. Dist. Ct.* and its broad definition
19 of “professional negligence” that encompassed the term “medical malpractice”. *Id.* at 5, citing
20 to *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. 792, 803 (2015). The Court concluded a “case-by-case
21 analysis of whether claims asserted by a plaintiff are grounded in professional negligence” must
22 be undertaken to determine if NRS 41A statutes apply. *Zhang*, 2016 WL 4926325 at 6. Similarly,
23 claims for negligent training and supervision have been addressed by the Supreme Court in the
24 context of professional negligence. *See Fierle v. Perez*, 125 Nev. 728, 738, 219 P.3d 906, 912
25 (2009) overruled on other grounds by *Egan v. Chambers*, 129 Nev. Adv. Op. 25, 299 P.3d 364,
26 367 (2013) (The Supreme Court affirmed the dismissal of a negligent training and supervision

27 ///

28 ///



1 claim for the failure to comply with the affidavit requirement of NRS 41A.) Furthermore, the
2 Nevada Supreme Court added that:

3 ...when a negligent hiring, training, and supervision claim is based upon the
4 underlying negligent medical treatment, the liability is coextensive. Negligent
5 hiring, training, and supervision claims cannot be used as a channel to allege
6 professional negligence against a provider of health care to avoid the statutory
caps on such actions.

7 *See Zhang, supra*, 2016 WL 492632 at 7. Guided by this premise, the Court in *Zhang* - as the
8 Court did in *Fierle* -found plaintiff's claims for supervision against a defendant physician's
9 practice group to be "rooted in [the physicians] professional negligence." *Id.*

10 In the instant case, Plaintiff's allegations of negligence and negligence per se against
11 Morneault are "rooted" in the alleged professional negligence. Plaintiff cannot attempt to avoid
12 the statute of limitations and statutory cap provided by NRS 41A by amending the complaint to
13 add new parties and to allege ordinary negligence and negligence per se. Morneault acted within
14 the scope of his healthcare-based employment. He is not subject to other forms of tort liability
15 when he acted within the scope of his professional employment. The proposed first amended
16 complaint is not based on the performance of non-medical services that would support a claim
17 for ordinary negligence and negligence per se. The claims involve Morneault's professional
18 judgment and purported treatment of Mr. Stewart that are grounded in professional negligence.¹
19 Thereby, the negligence and negligence per se claims are related and interdependent on the
20 underlying professional negligence claim and any amendment would be futile.

21 California has faced a similar issue in resolving whether a negligent
22 credentialing/hiring/training by a hospital is, in and of itself, professional negligence. In *Bell v.*
23 *Sharp Cabrillo Hosp.*, 212 Cal.App.3d 1034 (1989), the court affirmed, holding that the trial
24 court properly reduced the plaintiff's award of noneconomic damages to \$250,000. In that case,
25 the plaintiff was suing Sharp Cabrillo Hospital for having previously renewed the surgical staff
26 privileges of the "negligent surgeon" who operated on the plaintiff's son, who died. *Id.* at 1037.

27
28 ¹ Defendant Morneault denies any and all allegations of professional liability, negligence or negligence
per se.



The plaintiff argued that the hospital's duty to exercise reasonable care in reviewing the competence of medical staff was separate from any duty-breach based on professional negligence. *Id.* at 1049. Disagreeing with the plaintiff, the court held that the Hospital's failure to ensure the competence of the medical staff constituted a negligent act or omission "in the rendering of professional services," and was "inextricably interwoven" with the kind of professional and diagnostic responsibilities typically involved in professional negligence actions. *Id.* at 1040-50 (citing *Hedlund v. Superior Court*, 34 Cal. 3d 695, 703-04 (1983)). Ultimately, the court held "the competent selection and review of medical staff is precisely the type of professional service a hospital is licensed and expected to provide... [And] inadequate fulfillment of that responsibility constitutes 'professional negligence' involving conduct necessary to the rendering of professional services within the scope of the services a hospital is licensed to provide." *Id.* at 1050-51; see also *So v. Shin*, 212 Cal.App.4th 652, 666-67 (2013) (holding that a hospital's credentialing decisions "directly related to the professional services provided by a health care provider acting in its capacity as such" and were "an ordinary and usual part of medical professional services," and were therefore based in professional negligence) (citing *Cent. Pathology Serv. Med. Clinic, Inc. v. Superior Ct.*, 3 Cal.4th 191, 193 (1992)).

While here, Plaintiff's amended complaint is based on negligence and negligence per se, rather than negligent hiring, the analysis is the same. Morneault's alleged purported failure to provide the proper treatment, care, and/or medication to Mr. Stewart constituted a negligent act or omission in the rendering of professional services that are interwoven with the kind of responsibilities involved in professional negligence actions. There is no allegation that Morneault performed any nonprofessional services that would open him up to ordinary tort liability. Thereby, this Court should deny Plaintiff's motion to amend.

iii. The Trustee Lacks Standing To File A Wrongful Death Action.

Wrongful death is a cause of action created by statute, having no roots in the common law. *Wells, Inc. v. Shoemaker*, 64 Nev. 57, 66, 177 P.2d 451, 456 (1947). In Nevada, such causes of action are governed by NRS 41.085. Under this statute, both the decedent's heirs and representatives can maintain a cause of action for wrongful death. In this respect, NRS 41.085 is



1 bifurcated. The act also separately describes the types of damages available to the heirs and
2 the estate respectively. Here, Plaintiff seeks to amend the complaint to name Mr. Stewart's heirs,
3 the special administrator of his estate, and the successor trustee of The Stewart Family Trust
4 ("Trust"). However, the trustee is not a proper party to this action and cannot maintain a separate
5 independent claim under NRS 41.085. NRS 41.085; *see also Alcantara ex rel. Alcantara v. Wal-*
6 *Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014) ("The NRS 41.085 statutory
7 scheme creates two separate wrongful death claims, one belonging to the heirs of the decedent
8 and the other belonging to the personal representative of the decedent"). Thereby, any
9 amendment to name the trustee as a plaintiff is futile because the trustee does not have standing
10 to file a wrongful death action pursuant to NRS 41.085.

11 **III. CONCLUSION**

12 For the foregoing reasons, Defendant Morneault requests that the Court deny Plaintiff's
13 Motion for Leave to Amend Complaint.

14
15 DATED this 4th day of January, 2021.

16
17 /s/ Carol P. Michel

18 Carol P. Michel, Esq.

19 Marjan Hajimirzaee, Esq.

20 Josephine E. Groh, Esq.

21 WEINBERG, WHEELER, HUDGINS,

22 GUNN & DIAL, LLC

23 6385 S. Rainbow Blvd., Suite 400

24 Las Vegas, NV 89118

25 *Attorneys for Defendant Emil Morneault, RPH*



CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, 2021, a true and correct copy of the foregoing **DEFENDANT EMIL MORNEAULT, RPH'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

Dale A. Hayes, Jr., Esq.
dhayes@hwlawnv.com
Liane K. Wakayama, Esq.
lkw@hwlawnv.com
Hayes Wakayama
4735 S. Durango Drive, Suite 105
Las Vegas, NV 89147
(702) 656-0808
(702) 655-1047 FAX

*Attorneys for Plaintiff Patricia Ann Adams, as
Special Administrator of the Estate of Connie
Rae Stewart*

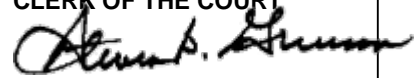
Erin E. Jordan, Esq.
Erin.Jordan@lewisbrisbois.com
LEWIS BRISBOIS BISGAARD & SMITH, LLP
6385 S. Rainbow Blvd., Suite 600
Las Vegas, NV 89118
(702) 693-4354
(702) 893-3789 FAX

Attorneys for Defendant Minh Nguyen, M.D.

/s/ Kelly L. Pierce

An employee of WEINBERG, WHEELER, HUDGINS
GUNN & DIAL, LLC

EXHIBIT 10



1 S. BRENT VOGEL
Nevada Bar No. 6858
2 E-Mail: Brent.Vogel@lewisbrisbois.com
ERIN E. JORDAN
3 Nevada Bar No. 10018
E-Mail: Erin.Jordan@lewisbrisbois.com
4 LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
5 Las Vegas, Nevada 89118
702.893.3383
6 FAX: 702.893.3789
Attorneys for Defendant Minh Nguyen, M.D.

8 DISTRICT COURT

9 CLARK COUNTY, NEVADA

10 PATRICIA ANN ADAMS as Special
Administrator of the Estate of Connie Rae
11 Stewart,

12 Plaintiff,

13 vs.

14 MINH NGUYEN, M.D. AND EMIL
MORNEAULT, RPH; and DOES 1-5 and
15 ROE ENTITIES 1-5

16 Defendants.

CASE NO. A-20-811421-C
Dept. No.: 3

**DEFENDANT MINH NGUYEN, M.D.'S
REPLY IN SUPPORT OF PARTIAL
MOTION TO DISMISS**

17
18 Defendant Minh Nguyen M.D., by and through his attorneys of record, S. Brent Vogel,
19 Esq. and Erin E. Jordan, Esq. of LEWIS BRISBOIS BISGAARD & SMITH LLP, hereby files this
20 Reply in Support of Partial Motion to Dismiss Plaintiff's Complaint pursuant to NRCP 12.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 This Reply is based upon the following Memorandum of Points and Authorities, the papers
2 and pleadings on file herein, and any oral argument offered at the hearing of this matter.

3 DATED this 5th of January, 2021.

4 LEWIS BRISBOIS BISGAARD & SMITH LLP

6 By /s/ Erin E. Jordan

7 S. BRENT VOGEL

8 Nevada Bar No. 6858

9 ERIN E. JORDAN

10 Nevada Bar No. 10018

6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

702.893.3383

11 Attorneys for Defendant Minh Nguyen, M.D.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. ARGUMENT**

14 Defendant Dr. Nguyen filed a partial Motion to Dismiss asking this Court to dismiss
15 Plaintiff's older and vulnerable person (NRS 41.1395) claim. Defendant explained that the older
16 and vulnerable person claim should be dismissed for failure to state a claim as it relied upon the
17 same facts as the medical malpractice claim, which are insufficient to support the claim, and that
18 alleged "negligent medication errors" were insufficient to support an older and vulnerable person
19 claim.

20 Plaintiffs filed an Opposition in which they made the following arguments: 1) Plaintiffs
21 made a request for *damages* pursuant to NRS 41.1395, rather than bringing an independent claim
22 for relief; 2) Plaintiffs allege their Complaint was sufficient to ask for a NRS 41.1395 damages
23 enhancement.

24 Plaintiffs have failed to provide this Court with a reason to deny Dr. Nguyen's partial
25 Motion to Dismiss.

26 **a. Plaintiffs Concede that the Factual Allegations Underlying all Claims are the**
27 **Same**

28 The factual allegation against Dr. Nguyen is that he negligently failed to prescribe one of

1 Mr. Stewart's seizure medications. This allegedly breached the standard of care, and allegedly
2 caused or contributed to Mr. Stewart's death. Opposition, p. 3. That factual allegation is the basis
3 for both Plaintiffs' professional negligence claim and older and vulnerable person claim (or prayer
4 for damages as Plaintiffs contend). Plaintiffs concede that this is the factual allegation underlying
5 all claims against Dr. Nguyen in this case.

6 **b. Only Alleged *Facts* Assumed True**

7 Plaintiffs correctly point out in their Opposition that Plaintiffs' allegations are assumed to
8 be true for the purposes of ruling on a Motion to Dismiss. Opposition, p. 5. However, Plaintiffs
9 have misapplied this rule to include the legal conclusions in their Complaint. Plaintiffs' legal
10 conclusions that Dr. Nguyen was reckless, acted willfully, deliberately, and engaged in oppressive
11 and malicious conduct, as well as with a conscious disregard are not to be assumed as true for the
12 purposes of deciding the Motion to Dismiss. *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973)
13 (9th Cir. 2004) (*cited* by Nevada Supreme Court in 2015 unpublished decision *Cramer v. Bank of*
14 *Am., N.A.*, 2015 Nev. Unpub. LEXIS 971).

15 However, the court is not required to accept legal conclusions cast in the form of
16 factual allegations if those conclusions cannot reasonably be drawn from the facts
17 alleged. Nor is the court required to accept as true allegations that are merely
conclusory, unwarranted deductions of fact, or unreasonable inferences.

18 *Id.*; see also *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136 (9th Cir. 2003)

19 However we are not required to accept as true conclusory allegations which are
20 contradicted by documents referred to in the complaint, and we do not necessarily
21 assume the truth of legal conclusions merely because they are cast in the form of
factual allegations.

22 *Id.* (internal citations omitted).

23 Thus, Plaintiffs' statements that Dr. Nguyen was reckless, acted willfully, deliberately and
24 engaged in oppressive and malicious conduct as well as with a conscious disregard are not and
25 should not be assumed to be true when ruling on any Motion to Dismiss.

26 **c. Buzz Words are Insufficient to Survive a Motion to Dismiss**

27 Plaintiffs argue that their older and vulnerable persons claim survives a Motion to Dismiss
28 because they listed the elements of the claim in their Complaint, and that they listed the required

1 buzz words such that their claim survives. Opposition, pp. 2-3. In fact, Plaintiffs listed these
2 words and put quotation marks around them in the text of their Opposition to emphasize that they
3 had ticked all the boxes, which they argue prevents dismissal. *Id.*

4 Plaintiffs have misstated the standard of review for Rule 12 Motions to Dismiss.
5 Conclusory allegations such as those Plaintiff summarizes on pages 2-3 of their Opposition, do not
6 prevent dismissal pursuant to Rule 12. *G.K. Las Vegas Ltd. P'ship v. Simon Prop. Group, Inc.*,
7 460 F. Supp. 2d 1222, 1234-35 (D. Nev. 2006) (“Thus, conclusory allegations without more are
8 insufficient to defeat a motion to dismiss for failure to state a claim.”).

9 Thus, Plaintiffs’ recitation of the words “reckless,” “willful,” “deliberate,” “oppressive,”
10 “malicious and conscious disregard” do not save their older and vulnerable person claim as they
11 are not supported by any factual allegations. The use of the words willful, malicious et al. do not
12 alter the fact that the *only* factual allegation against Dr. Nguyen is that he negligently failed to
13 prescribe one medication.

14 **d. NRS 41.1395 Provides for a Claim, Not Just a Remedy**

15 Plaintiffs argue that they are not bringing a claim pursuant to NRS 41.1395 but simply
16 stating a prayer for damages. Opposition, pp. 7-8. Plaintiffs have filed an older and vulnerable
17 persons claim, not simply a prayer for relief.

18 First, the statute itself is entitled “Action,” which by definition means that it provides for a
19 civil claim. NRS 41.1395 (“41.1395. **Action** for damages for injury or loss suffered by older or
20 vulnerable person from abuse, neglect or exploitation; double damages; attorney's fees and
21 costs.”). NRCP 2 makes this clear in stating “There is one form of action – the civil action.”

22 Second, the legislative history of NRS 41.1395 clearly states that the legislature intended
23 to create a claim. The purpose of NRS 41.1395 was to incentivize attorneys to take older and
24 vulnerable persons cases that were usually only within the purview of criminal law. The
25 description of Senate Bill 80¹ described this statute as follows:

26 _____
27 ¹ Legislative History may be accessed at
28 <http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1997/SB080,1997.pdf>
(footnote continued)

1 Senate Bill 80 provides that any person who willfully inflicts pain, injury, or
2 mental anguish on an individual over the age of 60 or on a vulnerable person is
3 liable for two times the actual damages to the victim or victim's estate.
Bill Summary 69th Regular Session of the Nevada State Legislature.

4 The Attorney General's Office explained that the statute was intended to encourage civil causes of
5 action for crimes that were difficult to prosecute.

6 Bonnie Brand, Deputy Attorney General, Office of the Attorney General, spoke
7 with regard to serious cases of elder abuse and financial exploitation which are
8 very difficult to prove. She concurred by allowing recovery of attorney's fees **the**
9 **private bar would be encouraged to prosecute these cases** when criminal
prosecutors cannot. Attorneys would also be able to assist senior citizens when
they are at a stage in their lives where they cannot help themselves.

10 (Emphasis added.)

11 Minutes of the Senate Committee on Judiciary, 69th Session, February 12, 1997. This statute was
12 enacted in to create a civil action for victims of crime.

13 The Federal District Court for the District of Nevada discussed NRS 41.1395 at length in
14 the *Brown* case. Plaintiffs are mistaken when they assert that *Brown* may not be relied upon. It is
15 not an unpublished opinion, and includes a lengthy analysis of the issues before this Court.
16 Importantly, *Brown* begins its discussion of NRS 41.1395 by referring to a NRS 41.1395 claim.

17 These principles of interpretation suggest that Plaintiffs
18 may not allege an elder abuse claim under the present
19
20
21
22
23
24
25
26
27
28

1 circumstances. First, the elder abuse statute was not
2 intended as a remedy for torts that sound in medical
3 malpractice such as those alleged here. As revealed by
4 [NRS § 41.1395](#)'s legislative history, Nevada's Attorney
5 General proposed the elder abuse statute in order to
6 incentivize private attorney generals to enforce criminal
7 prohibitions against elder abuse. The Attorney General
8 explained, "The burden of proof required in a civil action
9 is not as high as that in a criminal trial, so it is hoped
10 that this will help victims to recover for their losses."
11 *Minutes of the Nev. State Legislature: Hearing on*
12 *Senate Bill No. 80 Before the Senate Comm. on*
13 *Judiciary, Ex. D, 1997 Leg., 69th Sess. (Feb 12, 1997).*
14 The double-damages recovery [*19] and an additional
15 attorney's fee provision were designed to encourage
16 private attorneys "to prosecute [elder abuse] cases
when criminal prosecutors cannot." *Id.* (statement of
Deputy Attorney General Brand). Therefore, the elder
abuse statute's history reveals that it was initially
concerned with criminal conduct—conduct whose mens
rea element usually exceeds mere negligence. This is
also reflected in the statute's concentration on
intentional conduct: the statute prohibits "willful and
unjustified" abuse, "exploitation," and "neglect" in the
face of an expressly assumed duty. See [NRS §](#)
[41.1395](#). The mens rea element of a medical
malpractice claim—"failure . . . to use the reasonable
care, skill, or knowledge ordinarily used under similar
circumstances," [NRS § 41A.009](#)—sits uneasily with [§](#)
[41.1395](#)'s focus on intentional misconduct.

17 *Brown v. Mt. Grant General Hospital*, 2013 U.S. Dist. LEXIS 120909 *18.

18 Plaintiff cites to *Doe v. Clark County School District* and the unpublished decision *Findlay*
19 for the contention that NRS 41.1395 does not create a claim for relief. Opposition, pp. 7-8.
20 Plaintiffs are correct that *Doe* conflicts with *Brown* (as well as the statute's published legislative
21 history) and states that NRS 41.1395 does not create a claim for relief. The Federal District Court
22 for the District of Nevada does not discuss this conflict in *Doe*, and states only that "this statute
23 does not create an independent claim. Rather, it is a means to recover special damages under
24 certain circumstances." *Doe v. Clark Cnty. Sch. Dist.*, 2016 U.S. Dist. LEXIS 110787; 2016 WL
25 4432683, *41 (D. Nev., August 18, 2016).

26 The *Doe* decision relies upon the unpublished *Findlay* decision for this conclusion. *Id.*
27 However, unlike *Brown*, the *Findlay* decision offers no analysis of NRS 41.1395 or its legislative
28 history at all. Additionally, *Findlay* does not hold that NRS 41.1395 creates only a remedy and

1 not a claim for relief. *Findlay Mgmt. Grp. v. Jenkins*, 2015 Nev. Unpub. LEXIS 1144; *4; 131
2 Nev. 1278 (2015). The entirety of the Nevada Supreme Court’s discussion of NRS 41.1395 in
3 *Findlay* is as follows:

4 The district court did not abuse its discretion by refusing to award special
5 damages under NRS 41.1395. NRS 41.1395 authorizes a vulnerable person who
6 suffers a personal injury or a loss of money or property caused by exploitation to
7 recover double damages and, under certain circumstances, attorney fees and costs.
8 Special damages must be specifically pleaded.

9 Here, Jenkins did not specifically plead double damages and attorney fees under
10 NRS 41.1395 in his complaint. Therefore, the district court properly refused to
11 award them.

12 *Id.*

13 Thus, a thoughtful analysis of the case law shows that the Federal District Court for the
14 District of Nevada has authored two conflicting opinions on whether NRS 41.1395 creates a
15 claim, *Doe* and *Brown*. *Doe* contains no analysis of NRS 41.1395 and cites to an unpublished
16 Nevada Supreme Court case, which does not hold that the statute does not create a claim. *Brown*,
17 on the other hand, contains a lengthy analysis of the purpose of the statute and its legislative
18 history. As a result, this Court should accept *Brown* as the proper and only carefully reasoned
19 authority on the issues before it.

20 **e. Plaintiffs Have Failed to State an Older and Vulnerable Persons Claim**

21 Dr. Nguyen must stress again that Plaintiffs brought their claim for violation of NRS
22 41.1395 based upon the same factual circumstances as their claims for professional negligence
23 and negligence. This is impossible, as professional negligence and NRS 41.1395 claims have
24 different elements, and are mutually exclusive. Therefore, Plaintiffs have failed to state a claim
25 for relief with their older and vulnerable persons claim.

26 *Brown* delves into this issue in detail. The Court’s key holding was that “the elder abuse
27 statute was not intended as a remedy for torts that sound in medical malpractice.” *Brown v. Mt.*
28 *Grant General Hospital*, 2013 U.S. Dist. LEXIS 120909 *18.

 Therefore, the elder abuse statute’s history reveals that it was initially concerned
 with criminal conduct – conduct whose mens rea element usually exceeds mere
 negligence. This is also reflected in the statute’s concentration on intentional

1 conduct: the statute prohibits willful and unjustified abuse, exploitation and
2 neglect in the face of an expressly assumed duty. See NRS 41.1395. The mens
3 rea element of a medical malpractice claim – failure to use the reasonable care,
4 skill or knowledge ordinarily used under similar circumstances, NRS 41A.009 –
5 sits uneasily with NRS 41.1395 focus on intentional misconduct.

6 *Id.* at *19.

7 Plaintiffs may not plead NRS 41.1395 in an attempt to circumvent the professional
8 negligence statutes found in NRS Chapter 41A. The Nevada Supreme Court held last year that
9 claims that sound in negligence do not support an elder abuse (older and vulnerable person) claim.
10 *Estate of Mary Curtis v. Life Care Center*, 136 Nev. Advance Opinion 39, *14 FN 5 (“First, **the**
11 **record does not support an elder abuse claim here, where Nurse Dawson’s actions were**
12 **grounded in negligence, rather than in a willful abuse or the failure to provide a service.”)**
13 (internal citations omitted, emphasis added).

14 The only allegation against Dr. Nguyen is that he negligently failed to prescribe a specific
15 medication to Mr. Stewart for seizures. This is an allegation of professional negligence and not
16 one, that even if proven, would be a sufficient factual predicate for either abuse or neglect under
17 NRS 41.1395. There are no allegations that Dr. Nguyen failed to care for Mr. Stewart in any other
18 way, failed to evaluate him or failed to prescribe any treatment at all. Thus, the allegations against
19 Dr. Nguyen do not support Plaintiffs’ NRS 41.1395 claim.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

DATED this 5th day of January, 2021.

By /s/ Erin E. Jordan
S. BRENT VOGEL
Nevada Bar No. 6858
ERIN E. JORDAN
Nevada Bar No. 10018
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Tel. 702.893.3383
Attorneys for Defendant Minh Nguyen, M.D.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 5th day of January, 2021, a true and correct copy
3 of DEFENDANT MINH NGUYEN, M.D.'S REPLY IN SUPPORT OF PARTIAL MOTION TO
4 DISMISS was served by electronically filing with the Clerk of the Court using the Odyssey E-File
5 & Serve system and serving all parties with an email-address on record, who have agreed to
6 receive electronic service in this action.

7 Dale A. Hayes, Jr., Esq.
8 Liane K. Wakayama, Esq.
9 HAYES WAKAYAMA
4735 S. Durango Dr., Suite 105
Las Vegas, NV 89147
10 Tel: 702.656.0808
Fax: 702.655.1047
11 dhayes@hwlawnv.com
12 lkw@hwlawnv.com
Attorneys for Plaintiff

Carol P. Michel, Esq.
Marjan Hajimirzaee, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN
& DIAL, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, NV 89118
Tel: 702.938.3838
Fax: 702.938.3864
cmichel@wwhgd.com
Attorneys for Defendant Emil Morneault, RPH

13
14
15 By /s/ Johana Whitbeck
16 An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 11

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Malpractice - Medical/Dental

COURT MINUTES

January 19, 2021

A-20-811421-C	Estate of Connie Stewart, Plaintiff(s)
	vs.
	Minh Nguyen, M.D., Defendant(s)

January 19, 2021 9:00 AM All Pending Motions

HEARD BY: Trujillo, Monica **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Kathryn Hansen-McDowell

RECORDER: Rebeca Gomez

REPORTER:

PARTIES

PRESENT:	Hajimirzaee, Marjan	Attorney
	Hayes, Dale A., Jr.	Attorney
	Vogel, Stephen B.	Attorney

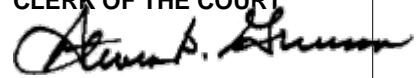
JOURNAL ENTRIES

- DEFENDANT MINH NGUYEN, M.D'S PARTIAL MOTION TO DISMISS . . . MANDATORY RULE 16 CONFERENCE

Court noted it reviewed the Motion and the opposition. Mr. Vogel argued in favor of the Motion to have the elder abuse claim dismissed stating the same facts used in this claim were used in the other claim. Mr. Hayes argued in opposition of the Motion. COURT stated its FINDINGS, ORDERED, Motion DENIED WITHOUT PREJUDICE. Mr. Vogel to prepare the order.

Upon Court's Inquiry, Mr. Hayes stated the parties had met and conferred, agreed upon discovery deadlines and the parties were going to submit a supplemental Joint Case Conference Report (JCCR). Mr. Vogel agreed. Parties were to submit the JCCR and staff would set a date.

EXHIBIT 12



HAYES | WAKAYAMA
DALE A. HAYES, JR., ESQ.
Nevada Bar No. 9056
LIANE K. WAKAYAMA, ESQ.
Nevada Bar No. 11313
JEREMY D. HOLMES, ESQ.
Nevada Bar No. 14379
4735 S. Durango Drive, Ste. 105
Las Vegas, Nevada 89147
(702) 656-0808 – Telephone
(702) 655-1047 – Facsimile
dhayes@hwlawNV.com
lkw@hwlawNV.com
jholmes@hwlawNV.com
*Attorneys for Plaintiff, Estate of
Connie Stewart*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

ESTATE OF CONNIE STEWART,

Plaintiff,

vs.

MINH NGUYEN, M.D. AND EMIL
MORNEAULT, RPH; and DOES 1-5 and ROE
ENTITIES 1-5,

Defendants.

Case No.: A-20-811421-C
Dept. No.: III

Date of Hearing: February 1, 2021
Time of Hearing: Chambers

REPLY IN SUPPORT OF MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiff, the Estate of Connie Rae Stewart, by and through its counsel of record, Dale A. Hayes, Jr., Esq. of the law firm of Hayes Wakayama, hereby respectfully submits its Reply in Support of Motion for Leave to Amend Complaint. This Reply is made and based upon the pleadings and papers on file herein, the following Memorandum of Points and Authorities and any

///

///

///

argument of counsel entertained at the time of hearing this matter.

DATED this 25th day of January, 2021.

HAYES | WAKAYAMA

By /s/ Dale A. Hayes, Jr., Esq.
DALE A. HAYES, JR., ESQ.
Nevada Bar No. 9056
LIANE K. WAKAYAMA, ESQ.
Nevada Bar No. 11313
JEREMY D. HOLMES, ESQ.
Nevada Bar No. 14379
4735 S. Durango Drive, Suite 105
Las Vegas, Nevada 89147
*Attorneys for Plaintiff, Estate of
Connie Stewart*

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Plaintiff Estate of Connie Stewart (hereinafter “Plaintiff”) has filed three separate claims for relief in this matter: (1) Negligence; (2) Professional Negligence (Medical Malpractice); and (3) Wrongful Death. Plaintiff is currently seeking to amend its Complaint to add additional plaintiffs. Plaintiff does not seek to add new claims. As Defendant Minh Nguyen, M.D. (hereinafter “Nguyen”) acknowledged in his Opposition, leave to amend is freely given. In addition to amendments being freely given, Nevada pleading rules permit plaintiffs to plead alternative claims for relief. In this case, Plaintiff should clearly be entitled to amend its Complaint. In opposing Plaintiff’s request, Nguyen ignored Plaintiff’s factual allegations and separate claims and repeatedly conflates separate legal doctrines in an effort to manufacture an argument. When examined carefully under the governing rules and caselaw, *including the right to plead in the alternative under Rule 8*, it is clear that Nguyen’s arguments lack merit and that leave to amend should be granted. There is no prejudice in granting Plaintiff’s request to amend its Complaint as this lawsuit is in its relative infancy. Defendants will not be prejudiced by this amendment, and justice requires that Plaintiff be allowed to amend its Complaint in order to fully

1 pursue relief from Defendants in this matter. For these reasons, the Court should grant Plaintiff's
2 Motion and permit Plaintiff to file its First Amended Complaint.

3 **II. LEGAL ARGUMENT**

4 Nguyen asserts five arguments in support of his Opposition: (1) Plaintiff's Motion should
5 be denied due to "undue delay" and "undue prejudice"; (2) Plaintiff's Motion should be denied as
6 Plaintiff seeks to enforce an independent right and to impose greater liability upon Nguyen; (3)
7 the Trust is not a proper party pursuant to NRS 41.085; (4) the proposed individual plaintiffs cannot
8 be added as the applicable statute of limitation bars them from bringing claims; and (5) Plaintiff's
9 exclusive remedy is a wrongful death claim. As set forth more thoroughly below, Nguyen's
10 arguments disregard Plaintiff's factual allegations and further ignore the fact that Plaintiff has
11 asserted more claims than a single claim for wrongful death. In the end, Nguyen's arguments fail
12 as they are predicated upon an incorrect description of Plaintiff's allegations and claims in this
13 matter. "Justice requires" that Plaintiff be granted leave to amend its Complaint to add Connie
14 and Gary's children, Gary Linck Stewart, Jr., Patricia Ann Adams, Mary Kay Fallon, and Elizabeth
15 A. Hodge, as parties, along with The Stewart Family Trust and the Estate of Gary Stewart¹
16 (collectively, the "Amended Plaintiffs"). The Amended Plaintiffs will be asserting the same claims
17 that Plaintiff is currently asserting against the Defendants: (1) Wrongful Death; (2) Negligence;
18 and (3) Medical Malpractice (Professional Negligence).

19 **A. ANY "INDEPENDENT RIGHTS" OR "GREATER LIABILITY" BEING 20 ASSERTED IS PROPER AND PERMISSIVE UNDER NEVADA LAW.**

21 In its Motion, Plaintiff argued that California and Federal Courts have held that *time-*
22 *barred* claims asserted by new plaintiffs relate back to the original complaint unless the amended
23 claims "seek[] to enforce an independent right or to impose greater liability against the
24 defendants." *San Diego Gas & Elec. Co. v. Superior Court*, 53 Cal. Rptr. 3d 722, 725 (2007), as
25 modified on denial of reh'g (Feb. 21, 2007), citing *Bartalo v. Superior Court*, 124 Cal. Rptr. 370,
26 375 (Ct. App. 1975). In response, Nguyen argued that "[i]f the plaintiffs are allowed to add the

27 ¹ Letters of Administration are currently being sought for the Estate of Gary Stewart, Case No. P-19-
28 099521-E.

four proposed individual plaintiffs, the claim would now be for the heir damages incurred by”² five plaintiffs versus one *and therefore impose greater liability upon Nguyen*. In making the foregoing argument, Nguyen conflates two separate legal doctrines. Specifically, Nguyen improperly conflates the recoverable damages for a **wrongful death claim** (“loss of probable support” damages outlined in NRS 41.085(4)) with the one-year limitation period for a **medical malpractice claim** (“while non-economic damages for the entire case are capped at \$350,000 as Plaintiffs point out, loss of probable support damages are not capped, and there is no guarantee that Mrs. Stewart’s heir claim would amount to \$350,000”³). Under Nevada law, wrongful death claims have two-year limitation periods and do *not* have a damage cap. NRS § 11.190(4)(e).

Nguyen’s argument misses the entire purpose of the relation-back doctrine. A relation-back analysis only comes into play where a party seeks to amend its pleading to add a claim (*or to add a plaintiff to an existing claim as in this case*) that **is otherwise time-barred**. In this matter, Plaintiff is not seeking to bring new claims against Defendants. Moreover, two of Plaintiff’s existing claims have two-year statute of limitations,⁴ neither of which have expired. As it relates to Plaintiff’s negligence and wrongful death claims, Plaintiff could just as easily file a separate complaint and then file a motion to consolidate the two actions. The relation-back doctrine, *and consequently any analysis concerning independent rights or imposing greater liability*, therefore, has no relevance as it relates to these two claims.

Next, as it relates to Plaintiff’s **existing** medical malpractice claim, the only claim that *would* be time-barred if filed today,⁵ the relation-back doctrine supports Plaintiff’s position as the

² See Nguyen’s Opposition on file herein at 5:3-6.

³ See *id.* at 5:12-14.

⁴ Pursuant to NRS § 11.190(4)(e), “an action to recover damages for injuries to a person or for the death of a person caused by the wrongful act or neglect of another” is subject to a two-year statute of limitations. As such, both the Amended Plaintiffs’ negligence claims as well as their wrongful death claims are subject to the same two-year statute of limitations. See *Parker v. Chrysler Motors Corp.*, 88 Nev. 560, 561, 502 P.2d 111, 112 (1972) (holding “an action to recover damages for wrongful death must be commenced within two years.”).

⁵ Professional negligence claims have one-year limitation periods. NRS § 41A.097(2).

1 damages are capped in such cases. Accordingly, there would be no greater exposure to Nguyen
2 by increasing the number of plaintiffs. In fact, the express language of the statute confirms the
3 foregoing. Specifically, in a medical malpractice action “the amount of noneconomic damages
4 awarded . . . must not exceed \$350,000, **regardless of the number of plaintiffs**, defendants or
5 theories upon which liability may be based.” NRS § 41A.035. Nguyen’s reference to the
6 possibility of multiple plaintiffs recovering different awards for “loss or probable support”
7 damages is therefore erroneous as such damages are subject to the foregoing damage cap
8 “regardless of the number of plaintiffs.” *See id.* Moreover, the relation-back analysis does not
9 apply to Plaintiff’s properly plead wrongful death claim as the limitation period for this claim has
10 not expired. There is no bar whatsoever related to increased exposure for claims that can still be
11 properly asserted. The restriction only applies to claims that would otherwise be time-barred.

12 **B. NGUYEN’S “UNDUE DELAY” & “UNDUE PREJUDICE” ARGUMENTS**
13 **LACKS MERIT.**

14 Nguyen next argues that “[t]his is a case of undue delay and undue prejudice to the
15 Defendants,”⁶ but provides no basis for how the Plaintiff has engaged in undue delay, or how
16 Nguyen has or will be unduly prejudiced. First and foremost, this case is in its infancy with no
17 discovery having been completed to this day. Plaintiff’s current counsel has been involved with
18 this case for approximately 60 days. Within 30 days of new counsel receiving this case, *despite*
19 *appearing during the Thanksgiving and Christmas holidays*, the Motion was filed. An Early Case
20 Conference was just held and a Scheduling Order has not yet been issued. Nguyen has offered
21 this Court no arguments or authority in support of his general assertion of “undue delay.” Pursuant
22 to EDCR 2.20(e), Nguyen’s “undue delay” argument should be disregarded for this reason alone.⁷

23 _____
24 ⁶ *See* Nguyen’s Opposition on file herein at 5:21-22.

25 ⁷ Eighth Judicial District Court Rule 2.20, in pertinent part, provides:

26 [w]ithin 10 days after the service of the motion, . . . the opposing party must serve and file
27 [an] . . . opposition thereto, ***together with a memorandum of points and authorities*** and
28 supporting affidavits, if any, stating facts showing why the motion . . . should be denied.
Failure of the opposing party to serve and file written opposition may be construed as an
admission that the motion . . . is meritorious and a consent to granting the same. EDCR
2.20(e) (emphasis added).

Next, as set forth above, there is no “undue prejudice” as the only time-barred claim (professional negligence) is capped, regardless of the number of plaintiffs asserting the claim. *See* § NRS 41.035 (“the amount of noneconomic damages awarded . . . must not exceed \$350,000, ***regardless of the number of plaintiffs . . .***”) (emphasis added). The only *existing* claims in which additional plaintiffs would be added are not barred by the statute of limitations and, as a result, the requested amendment is clearly proper. While these claims may ultimately increase Nguyen’s total exposure, that is not “undue prejudice” as the limitation periods have yet to expire on these claims. Accordingly, there is no “undue delay” and no “undue prejudice” to Nguyen.

C. NGUYEN’S ARGUMENT CONCERNING THE TRUST IS ERRONEOUS.

Nguyen next argues that the Trust is not a proper party to a wrongful death claim under NRS § 41.085. As a preliminary matter, the Trust was *not* included as a plaintiff on the wrongful death claim in the proposed First Amended Complaint.⁸ Further, even if it had been, there is no prejudice to Nguyen. Gary Stewart’s Will is a pour-over Will as it bequeaths his estate to the Trust. The proposed individual plaintiffs, in turn, are the beneficiaries of the Trust. The Trust is simply listed in this action as the Trust is the beneficiary of the Estate due to the decedent’s pour-over Will. Including the Trust as a plaintiff was/is merely a thorough formality. Moreover, the issue is irrelevant to Nguyen as it is not as if including the Trust would permit a double recovery. Notwithstanding the same, the proposed First Amended Complaint does not list the Trust as a

As it relates to the foregoing mandated “memorandum,” EDCR 2.20 provides:

[a] memorandum of points and authorities which consists of bare citations to statutes, rules, or case authority does not comply with this rule and the court may decline to consider it. EDCR 2.20(i) (emphasis added).

In this case, Nguyen’s Opposition fell substantially short of complying with EDCR 2.20. Nguyen cited to absolutely no legal authority in support of the argument that “undue delay” occurred. This Court should decline to consider Nguyen’s argument as it is offered with zero supporting legal authority. Nguyen failed to support this argument with even “bare citations.”

⁸ *See* “Exhibit 1” to Plaintiff’s Motion on file herein at 8:15-16.

1 plaintiff under the wrongful death claim.⁹ Nguyen’s argument is therefore erroneous and should
2 be disregarded.

3 **D. NGUYEN’S *LIMITATION* ARGUMENT IS ERROENOUS.**

4 Nguyen’s next argument once again conflates the medical malpractice claim with the
5 wrongful death and negligence claims. The limitation period set forth in NRS § 41A.097 applies
6 *only* to claims relating to assertions of professional negligence or other forms of medical
7 malpractice. Chapter 41A is itself titled “Actions for Professional Negligence.” The existing
8 claims of negligence and wrongful death are based on theories of simple negligence in accordance
9 with the decisions reached in several recent Nevada Supreme Court decisions. *See Estate of Curtis*
10 *v. S. Las Vegas Med. Inv’rs, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263, 1267 (2020); *see also*
11 *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 644, 403 P.3d 1280, 1286 (2017).
12 In those cases, the Nevada Supreme Court found that claims against medical professionals whose
13 negligence was obvious, basic and rooted in common knowledge, could be pursued as simple
14 negligence claims, rather than professional negligence. That is exactly what Plaintiff has alleged
15 in this case. The wrongful death and negligence claims are being asserted alongside the medical
16 malpractice claim as it has yet to be determined whether the Defendants’ negligence was
17 professional negligence or simple negligence. Such alternative pleading is permitted under NRC
18 8(d)(2), which states, in relevant part: “[a] party may set out two or more statements of a claim or
19 defense alternatively or hypothetically, either in a single count or defense or in separate ones.”

20 Accordingly, the applicable statute of limitations for the negligence and wrongful death
21 claims are contained in NRS § 11.190(4)(e). Pursuant to NRS § 11.190(4)(e), “an action to recover
22 damages for injuries to a person or for the death of a person caused by the wrongful act or neglect
23 of another” is subject to a two-year statute of limitations. As such, both the negligence and
24 wrongful death claims are subject to the same two-year statute of limitation. *See Parker v.*
25 *Chrysler Motors Corp.*, 88 Nev. 560, 561, 502 P.2d 111, 112 (1972) (holding “an action to recover
26 damages for wrongful death must be commenced within two years.”). Because the statute of

27 _____
28 ⁹ See “Exhibit 1” to Plaintiff’s Motion on file herein at 8:15-16.

1 limitation is two years, and has not yet expired, there is no need for these claims to relate back to
2 the filing of the original Complaint as they are still timely and may be freely asserted by the
3 Amended Plaintiffs today.

4 **E. NGUYEN’S “EXCLUSIVE REMEDY” ARGUMENT AGAIN CONFLATES**
5 **SEPARATE DOCTRINES OF LAW.**

6 Nguyen’s final argument once again conflates principles of wrongful death claims with
7 principles of negligence and medical malpractice claims. Nguyen’s final argument also ignores
8 the recent opinions of *Estate of Curtis v. S. Las Vegas Med. Inv’rs, LLC*, 136 Nev. Adv. Op. 39,
9 466 P.3d 1263, 1267 (2020); *see also Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev.
10 638, 644, 403 P.3d 1280, 1286 (2017). As discussed above, the existing wrongful death and
11 negligence claims are alternatively predicated upon the *ordinary* negligence of Defendants (rather
12 than exclusively on allegations of professional negligence). Thus, these claims are distinct and
13 separate from the medical malpractice claim and are not bound by the limitation period set forth
14 in NRS § 41A.097. As alternatively alleged, the facts at hand establish ordinary
15 negligence. Nevada law permits such alternative pleading. NRCP 8(d)(2).
16

17 Next, Nguyen appears to argue that Plaintiff’s wrongful death claim is subsumed by its
18 professional negligence claim. This argument is wholly refuted by *Estate of Curtis v. S. Las Vegas*
19 *Med. Inv’rs, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263, 1267 (2020) and *Szymborski v. Spring*
20 *Mountain Treatment Ctr.*, 133 Nev. 638, 644, 403 P.3d 1280, 1286 (2017) and further invades
21 upon Plaintiff’s right to plead in the alternative. At this juncture of the case, Plaintiff has properly
22 alleged *and the proposed First Amended Complaint further properly alleges* separate claims for
23 negligence, professional negligence and wrongful death.¹⁰ Plaintiff’s requested amendment is not
24 time-barred as adding additional plaintiffs to the professional negligence claim will not create
25
26

27
28 ¹⁰ See “Exhibit 1” to Plaintiff’s Motion on file herein.

independent rights or impose greater liability. Moreover, because the applicable limitation periods have yet to expire, leave to amend should be granted so Plaintiff can add the Amended Plaintiffs as additional plaintiffs to the negligence and wrongful death claims.

III. CONCLUSION

Because amendments to pleadings should be granted liberally, Plaintiff should be granted leave to amend its Complaint against the Defendants. There is no improper purpose and the proposed First Amended Complaint seeks to litigate all issues in good faith. The Defendants will not be unduly prejudiced by the addition of the Amended Plaintiffs and there are no limitation issues. Given that the interests of justice are served by allowing the requested amendment, Plaintiff should be granted leave to file its First Amended Complaint.

DATED this 25th day of January, 2021.

HAYES | WAKAYAMA

By /s/ Dale A. Hayes, Jr., Esq.
DALE A. HAYES, JR., ESQ.
Nevada Bar No. 9056
LIANE K. WAKAYAMA, ESQ.
Nevada Bar No. 11313
JEREMY D. HOLMES, ESQ.
Nevada Bar No. 14379
4735 S. Durango Drive, Suite 105
Las Vegas, Nevada 89147
*Attorneys for Plaintiff, Estate of
Connie Stewart*

CERTIFICATE OF SERVICE

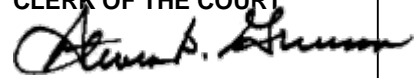
I hereby certify that the foregoing **REPLY IN SUPPORT OF MOTION FOR LEAVE TO AMEND COMPLAINT** was submitted electronically for filing and service with the Eighth Judicial District Court on the 25th day of January, 2021. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹¹

Joshua Daor	joshua.daor@lewisbrisbois.com
Erin Jordan	Erin.Jordan@lewisbrisbois.com
S. Brent Vogel	brent.vogel@lewisbrisbois.com
Johana Whitbeck	johana.whitbeck@lewisbrisbois.com
Amy Cvetovich	acvetovich@wwhgd.com
Kelly Gaez	kgaez@wwhgd.com
Flor Gonzalez-Pacheco	FGonzalez-Pacheco@wwhgd.com
Josephine Groh	jpgroh@wwhgd.com
Marjan Hajimirzaee	mhajimirzaee@wwhgd.com
Carol Michel	cmichel@wwhgd.com
Kelly Pierce	kpierce@wwhgd.com
Raiza Anne Torrenueva	rtorrenueva@wwhgd.com
Douglas Cohen	dcohen@wrslawyers.com
Jennifer Finley	jfinley@wrslawyers.com
Theresa McCracken	tmccracken@wrslawyers.com

/s/ Julia Rodionova
An employee of Hayes Wakayama

¹¹ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

EXHIBIT 13



S. BRENT VOGEL
Nevada Bar No. 6858
E-Mail: Brent.Vogel@lewisbrisbois.com
ERIN E. JORDAN
Nevada Bar No. 10018
E-Mail: Erin.Jordan@lewisbrisbois.com
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
702.893.3383
FAX: 702.893.3789
Attorneys for Defendant Minh Nguyen, M.D.

DISTRICT COURT
CLARK COUNTY, NEVADA

CONNIE STEWART,
Plaintiff,
vs.

MINH NGUYEN, M.D. AND EMIL
MORNEAULT, RPH; and DOES 1-5 and
ROE ENTITIES 1-5
Defendant.

CASE NO. A-20-811421-C
Dept. No.: 3

**DEFENDANT MINH NGUYEN, M.D.'S
ANSWER TO PLAINTIFF'S
COMPLAINT**

Defendant Minh Nguyen, M.D. ("Defendant") by and through his attorneys of record, S. Brent Vogel, Esq. and Erin E. Jordan, Esq. of LEWIS BRISBOIS BISGAARD & SMITH LLP hereby answers Plaintiff's Complaint as follows:

1. Answering Paragraph 1 of Plaintiff's Complaint, Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations contained therein, and upon that basis, denies each and every allegation contained therein.

JURISDICTION

2. Answering Paragraph 2 of Plaintiff's Complaint, Defendant admits the allegations contained therein.

(First Claim for Relief)

PROFESSIONAL NEGLIGENCE/NEGLIGENCE/WRONGFUL

DEATH/VULNERABLE AND OLDER PERSON

3. Answering Paragraph 3 of Plaintiff's Complaint, Defendant incorporates by reference the answers to paragraphs 1 to 2 above.

4. Answering Paragraph 4 of Plaintiff's Complaint, Defendant Minh Nguyen, M.D. admits that he is a provider of health care in Clark County. He denies that he was Gary Stewart's physician "at all material times" as that time period is not specified. Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the remaining allegations contained therein, and upon that basis, denies each and every remaining allegation contained therein.

5. Answering Paragraph 5 of Plaintiff's Complaint, Defendant Minh Nguyen, M.D. denies that he breached the standard of care or injured the Plaintiff. Defendant admits that the referenced affidavit was attached to the Complaint, but denies the allegations therein. Defendant Minh Nguyen, M.D. denies that he violated state or federal statutes. Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the remaining allegations contained therein, and upon that basis, denies each and every remaining allegation contained therein.

6. Answering Paragraphs 6 and 7 of Plaintiff's Complaint, Defendant denies as to the allegations against this Defendant and is without sufficient information or knowledge to form a belief as to the truth or falsity of the remaining allegations contained therein, and upon that basis, denies each and every remaining allegation contained therein.

7. Answering Paragraph 8 of Plaintiff's Complaint, Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations contained therein, and upon that basis, denies each and every allegation contained therein.

AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint on file herein fails to state a claim against Defendant for which relief can be granted.

2. Plaintiff's Complaint on file herein is barred by the applicable statute of limitations.

3. The injuries, if any, allegedly suffered by Plaintiff as set forth in the Complaint

1 were caused in whole or in part by the negligence of a third party or third parties over which
2 Defendant had no control.

3 4. The damages, if any, alleged by Plaintiff are not the result of any acts of omission,
4 commission, or negligence by the Defendant, but were the result of a known risk, which was
5 consented to by the Plaintiff.

6 5. Pursuant to NRS 41A.110, Defendant is entitled to a conclusive presumption of
7 informed consent.

8 6. The damages, if any, incurred by Plaintiff are not attributable to any act, conduct,
9 or omission on the part of the Defendant. Defendant denies that he was negligent or otherwise
10 culpable in any matter or in any degree with respect to the matters set forth in Plaintiff's
11 Complaint.

12 7. That it has been necessary for Defendant to employ the services of an attorney to
13 defend this action and a reasonable sum should be allowed Defendant for attorneys' fees, together
14 with costs of suit incurred herein.

15 8. Pursuant NRS 41A.035 Plaintiff's non-economic damages, if any, may not exceed
16 \$350,000.

17 9. Defendant is not jointly liable with any other entity that may or may not be named
18 in this action, and will only be severally liable for that portion of Plaintiff's claims that represent
19 the percentage of negligence attributable to Defendant, if any.

20 10. Plaintiff's damages, if any, were not proximately caused by Defendant.

21 11. Plaintiff's injuries and damages, if any, are the result of forces of nature over which
22 Defendant had no control or responsibility.

23 12. Plaintiff is barred from asserting any claims against Defendant because the alleged
24 damages were the result of one or more unforeseeable intervening and superseding causes.

25 13. Plaintiff failed to mitigate damages, if any.

26 14. Plaintiff failed to allege facts in support of any award of pre-judgment interest.

27 15. The incident alleged in the Complaint, and the resulting damages, if any, to
28 Plaintiff, were proximately caused or contributed to by the Plaintiff's own negligence, and such

1 negligence was greater than the negligence, if any, of Defendant.

2 16. Pursuant to NRCP 11, as amended, all applicable Affirmative Defenses may not
3 have been alleged herein insofar as sufficient facts were not available after reasonable inquiry
4 upon the filing of Defendant's Answer and, therefore, Defendant reserves the right to amend his
5 Answer to allege additional Affirmative Defenses if subsequent investigation warrants.

6 17. Plaintiff failed to substantively comply with NRS 41A.071.

7 18. At all times mentioned herein, Defendant acted reasonably and in good faith with
8 regard to the acts and transactions which are the subject of this lawsuit.

9 19. To the extent Plaintiff has been reimbursed from any source for any special
10 damages claimed to have been sustained as a result of the incidents alleged in Plaintiff's
11 Complaint, these Defendant may elect to offer those amounts into evidence and, if Defendant so
12 elects, Plaintiff's special damages shall be reduced by those amounts pursuant to NRS 42.021.

13 20. Defendant hereby incorporates by reference those affirmative defenses enumerated
14 in NRCP 8 as if fully set forth herein. In the event further investigation or discovery reveals the
15 applicability of such defenses, Defendant reserves the right to seek leave of the Court to amend
16 this Answer to assert the same. Such defenses are incorporated herein by reference for the
17 purpose of not waiving the same.

18 21. Defendant avails himself of all affirmative defenses and limitations of action as set
19 out in NRS 41.085, 41A.035, 41A.045, 41A.061, 41A.071, 41A.097, 41A.100, 42.005, 42.021,
20 41.141, and all applicable subparts.

21 22. NRS Chapters 41 and 41A limit damages that may be collectable against
22 Defendant.

23 23. Plaintiff is barred from bringing this action for failure to comply with applicable
24 contractual remedies and requirements, including arbitration, if applicable. Plaintiff's failure to
25 comply with the contractual remedies and requirements notwithstanding, Defendant reserves his
26 right to enforce any applicable arbitration provision.

27 WHEREFORE, Defendant prays for judgment as follows:

28 1. That Plaintiff takes nothing by way of the Complaint on file herein;

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2021, a true and correct copy of DEFENDANT MINH NGUYEN, M.D.'S ANSWER TO PLAINTIFF'S COMPLAINT was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

Dale A. Hayes, Jr., Esq.
Liane K. Wakayama, Esq.
HAYES WAKAYAMA
4735 S. Durango Dr., Suite 105
Las Vegas, NV 89147
Tel: 702.656.0808
Fax: 702.655.1047
dhayes@hwlawnv.com
lkw@hwlawnv.com
Attorneys for Plaintiff

Carol P. Michel, Esq.
Marjan Hajimirzaee, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN
& DIAL, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, NV 89118
Tel: 702.938.3838
Fax: 702.938.3864
cmichel@wwhgd.com
Attorneys for Defendant Emil Morneault, RPH

By /s/ Johana Whitbeck
An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

EXHIBIT 14

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Malpractice - Medical/Dental

COURT MINUTES

February 04, 2021

A-20-811421-C	Estate of Connie Stewart, Plaintiff(s)
	vs.
	Minh Nguyen, M.D., Defendant(s)

February 04, 2021 3:00 AM Motion

HEARD BY: Trujillo, Monica **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Grecia Snow

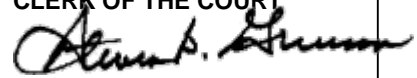
**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Plaintiff s Motion for Leave to Amend Complaint came before this Court on the February 4, 2021 Chamber Calendar. The Court also reviewed Defendant Minh Nguyen, M.D. s Opposition to Motion for Leave to Amend Complaint and Defendant Emil Morneault, RPH s Opposition to Plaintiff s Motion for Leave to Amend Complaint as well as Plaintiff s Reply in Support of Motion for Leave to Amend Complaint. Court having reviewed the papers and pleadings on file; and good cause appearing; COURT ORDERED the Motion for Leave to Amend Complaint is GRANTED. Counsel for Plaintiff to prepare the Order and submit the same to Chambers.

CLERKS NOTE: This Minute Order was electronically served by Courtroom Clerk, Grecia Snow, to all registered parties for Odyssey File & Serve. 2/5/21 gs

EXHIBIT 15



1 S. BRENT VOGEL
Nevada Bar No. 6858
2 E-Mail: Brent.Vogel@lewisbrisbois.com
ERIN E. JORDAN
3 Nevada Bar No. 10018
E-Mail: Erin.Jordan@lewisbrisbois.com
4 LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
5 Las Vegas, Nevada 89118
702.893.3383
6 FAX: 702.893.3789
Attorneys for Defendant Minh Nguyen, M.D.
7

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA
10

11 CONNIE STEWART,
12 Plaintiff,

13 vs.

14 MINH NGUYEN, M.D. AND EMIL
MORNEAULT, RPH; and DOES 1-5 and
15 ROE ENTITIES 1-5

16 Defendants.
17
18

CASE NO. A-20-811421-C
Dept. No.: 3

**NOTICE OF ENTRY OF ORDER
REGARDING DEFENDANT MINH
NGUYEN, M.D.'S PARTIAL MOTION TO
DISMISS**

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 PLEASE TAKE NOTICE that the ORDER REGARDING DEFENDANT MINH
2 NGUYEN, M.D.'S PARTIAL MOTION TO DISMISS was entered with the Court in the above-
3 captioned matter on the 11th day of February, 2021, a copy of which is attached hereto.

4 DATED this 11th day of February, 2021

5 LEWIS BRISBOIS BISGAARD & SMITH LLP
6

7 By /s/ Erin E. Jordan

8 S. BRENT VOGEL

9 Nevada Bar No. 6858

10 ERIN E. JORDAN

11 Nevada Bar No. 10018

12 6385 S. Rainbow Boulevard, Suite 600

13 Las Vegas, Nevada 89118

14 Tel. 702.893.3383

15 *Attorneys for Defendant Minh Nguyen, M.D.*
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2021, a true and correct copy of NOTICE OF ENTRY OF ORDER REGARDING DEFENDANT MINH NGUYEN, M.D.'S PARTIAL MOTION TO DISMISS was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

Dale A. Hayes, Jr., Esq.
Liane K. Wakayama, Esq.
HAYES WAKAYAMA
4735 S. Durango Dr., Suite 105
Las Vegas, NV 89147
Tel: 702.656.0808
Fax: 702.655.1047
dhayes@hwlawnv.com
lkw@hwlawnv.com
Attorneys for Plaintiff

Carol P. Michel, Esq.
Marjan Hajimirzaee, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN
& DIAL, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, NV 89118
Tel: 702.938.3838
Fax: 702.938.3864
cmichel@wwhgd.com
Attorneys for Defendant Emil Morneault, RPH

By /s/ Johana Whitbeck
An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

1 S. BRENT VOGEL
Nevada Bar No. 6858
2 Brent.Vogel@lewisbrisbois.com
ERIN E. JORDAN
3 Nevada Bar No. 10018
Erin.Jordan@lewisbrisbois.com
4 LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
5 Las Vegas, Nevada 89118
Tel.: 702.893.3383
6 Fax: 702.893.3789
Attorneys for Defendant Minh Nguyen, M.D.
7

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA
10

11 CONNIE STEWART,
12 Plaintiff,

13 vs.

14 MINH NGUYEN, M.D. AND EMIL
MORNEAULT, RPH; and DOES 1-5 and
15 ROE ENTITIES 1-5

16 Defendants.
17

CASE NO. A-20-811421-C
Dept. No.: 3

**ORDER REGARDING DEFENDANT
MINH NGUYEN, M.D.'S PARTIAL
MOTION TO DISMISS**

18 The above entitled matter having come before the Court for decision upon Defendant Minh
19 Nguyen's Partial Motion to Dismiss, and oral argument being held on January 19, 2021, S. Brent
20 Vogel, Esq. appearing on behalf of Defendant Minh Nguyen, M.D., Dale Hayes, Jr., Esq.
21 appearing on behalf of the Plaintiff, and Marjan Hajimirzaee, Esq. appearing on behalf of
22 Defendant Emil Morneault, RPH, this Court, having considered the pleadings and papers on file,
23 and for other good cause appearing finds as follows:

24 The Complaint provides sufficient notice of the claim.

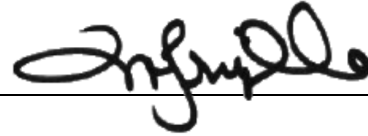
25 The standard of dismissal at this point in the proceedings is beyond a doubt.

26 Defendant has not established that it is beyond a doubt that Plaintiff has not stated a claim
27 for which relief may be granted pursuant to NRS 41.1395.

28 Consequently, and based upon the foregoing, IT IS HEREBY ORDERED, ADJUDGED

1 AND DECREED that Defendant Minh Nugyen's Partial Motion to Dismiss is DENIED
2 WITHOUT PREJUDICE.

Dated this 11th day of February, 2021



mg

3
4
5
6 Submitted by:
7 LEWIS BRISBOIS BISGAARD & SMITH LLP

EA8 34D 688D 5AFF
Monica Trujillo
District Court Judge

8 /s/ Erin E. Jordan
9 S. BRENT VOGEL
10 Nevada Bar No. 6858
11 ERIN E. JORDAN
12 Nevada Bar No. 10018
13 LEWIS BRISBOIS BISGAARD & SMITH LLP
14 6385 S. Rainbow Boulevard, Suite 600
15 Las Vegas, Nevada 89118
16 Brent.Vogel@lewisbrisbois.com
17 Erin.Jordan@lewisbrisbois.com
18 *Attorneys for Defendant Minh Nguyen, M.D.*

15 Approved as to Form:

16 HAYES WAKAYAMA

WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC

17 /s/ Dale A. Hayes, Jr.

/s/ Marjan Hajimirzaee

18 DALE A. HAYES, JR.
19 Nevada Bar No. 9056
20 LIANE K. WAKAYAMA
21 Nevada Bar No. 11313
22 4735 S. Durango Dr., Ste. 105
23 Las Vegas, NV 89147
24 dhayes@hwlawnv.com
25 lkw@hwlawnv.com
26 *Attorneys for Plaintiff*

CAROL P. MICHEL
Nevada Bar No. 11420
MARJAN HAJIMIRZAEI
Nevada Bar No. 11984
6385 S. Rainbow Blvd., Ste. 400
Las Vegas, NV 89118
cmichel@wwhgd.com
mhajimirzaee@wwhgd.com
*Attorneys for Defendant Emil Morneault,
RPH*

Whitbeck, Johana

From: Hajimirzaee, Marjan <MHajimirzaee@wwhgd.com>
Sent: Monday, January 25, 2021 4:44 PM
To: Whitbeck, Johana; Dale Hayes Jr; Liane K Wakayama; Michel, Carol
Cc: Jordan, Erin; Daor, Joshua; 'Julia Rodionova'; Cvetovich, Amy L.; Pierce, Kelly L.
Subject: [EXT] RE: Stewart v. Nguyen - Proposed Order re Def Nguyen's Partial MTD

External Email

Yes, you may affix my e-signature.

Thanks.



WEINBERG WHEELER
HUDGINS GUNN & DIAL
TRIAL LAWYERS

LITIGATION DEPARTMENT
OF THE YEAR ALM'S DAILY REPORT
2020 - 2019 - 2018 - 2017 - 2016 - 2014

Marjan Hajimirzaee, Attorney
Weinberg Wheeler Hudgins Gunn & Dial
6385 South Rainbow Blvd. | Suite 400 | Las Vegas, NV
89118
D: 702.938.3823 | F: 702.938.3844
www.wwhgd.com | vCard

From: Whitbeck, Johana [mailto:Johana.Whitbeck@lewisbrisbois.com]
Sent: Monday, January 25, 2021 2:28 PM
To: Dale Hayes Jr; Liane K Wakayama; Michel, Carol; Hajimirzaee, Marjan
Cc: Jordan, Erin; Daor, Joshua; 'Julia Rodionova'; Cvetovich, Amy L.; Pierce, Kelly L.
Subject: Stewart v. Nguyen - Proposed Order re Def Nguyen's Partial MTD

This Message originated outside your organization.

Counsel,

Please review the attached order and advise if we may use your electronic signature for filing with the court.

Thank you.



LEWIS
BRISBOIS

Johana Whitbeck
Legal Secretary to
S. Brent Vogel
Erin E. Jordan

Katherine J. Gordon
johana.whitbeck@lewisbrisbois.com
Direct: 702.693.4328 / Fax: 702.893.3789

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV 89118 | LewisBrisbois.com

Representing clients from coast to coast. View our locations nationwide.

The information contained in this message may contain privileged client confidential information. If you have received this message in error, please delete it and any copies immediately.

Whitbeck, Johana

From: Dale Hayes Jr <dhayes@hwlawnv.com>
Sent: Friday, January 29, 2021 8:48 AM
To: Whitbeck, Johana; Liane K Wakayama
Cc: Vogel, Brent; Jordan, Erin; Daor, Joshua; Julia Rodionova
Subject: [EXT] RE: Stewart v. Nguyen - Proposed Order re Def Nguyen's Partial MTD

External Email

Yes, you are authorized to affix my electronic signature to the proposed order. thanks.



Dale A. Hayes, Jr., Esq.
4735 S. Durango Drive, Suite 105
Las Vegas, Nevada 89147
(f) (702) 655-1047
(t) (702) 656-0808
dhayes@hwlawnv.com
www.hwlawnv.com

Pursuant to IRS Circular 230, any tax information or written tax advice contained herein (including any attachments) is not intended to be and can neither be used by any person for the purpose of avoiding tax penalties nor used to promote, recommend or market any tax-related matter addressed herein.

DO NOT read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication contains confidential and/or privileged information intended only for the addressee. If you have received this communication in error, please call us (collect) immediately at (702) 656-0808 and ask to speak to the sender of the communication. Also please e-mail the sender and notify the sender immediately that you have received the communication in error. Thank you. HAYES | WAKAYAMA - Attorneys at Law

From: Whitbeck, Johana <Johana.Whitbeck@lewisbrisbois.com>
Sent: Friday, January 29, 2021 8:45 AM
To: Dale Hayes Jr <dhayes@hwlawnv.com>; Liane K Wakayama <lkw@hwlawnv.com>
Cc: Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Jordan, Erin <Erin.Jordan@lewisbrisbois.com>; Daor, Joshua <Joshua.Daor@lewisbrisbois.com>; Julia Rodionova <julia@hwlawnv.com>
Subject: Stewart v. Nguyen - Proposed Order re Def Nguyen's Partial MTD
Importance: High

Mr. Hayes,

May use your electronic signature for the attached order for filing with the court

Thank you.



Johana Whitbeck

Legal Secretary to

S. Brent Vogel

Erin E. Jordan

Katherine J. Gordon

johana.whitbeck@lewisbrisbois.com

Direct: 702.693.4328 / Fax: 702.893.3789

6385 South Rainbow Blvd., Suite 600, Las Vegas, NV 89118 | LewisBrisbois.com

Representing clients from coast to coast. View our locations nationwide.

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Estate of Connie Stewart,
Plaintiff(s)

CASE NO: A-20-811421-C

7 vs.

DEPT. NO. Department 3

8
9 Minh Nguyen, M.D.,
Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order Denying Motion was served via the court's electronic eFile
system to all recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 2/11/2021

16 Carol Michel

cmichel@wwhgd.com

17 Kelly Pierce

kpierce@wwhgd.com

18 Raiza Anne Torrenueva

rtorrenueva@wwhgd.com

19 Douglas Cohen

dcohen@wrslawyers.com

20 Jennifer Finley

jfinley@wrslawyers.com

21 S. Vogel

brent.vogel@lewisbrisbois.com

22 Theresa McCracken

tmccracken@wrslawyers.com

23 Johana Whitbeck

johana.whitbeck@lewisbrisbois.com

24 Dale Hayes, Jr.

dhayes@hwlawnv.com

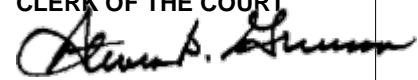
25 Josephine Groh

26 jgroh@wwhgd.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Amy Cvetovich	acvetovich@wwhgd.com
Flor Gonzalez-Pacheco	FGonzalez-Pacheco@wwhgd.com
Kelly Gaez	kgaez@wwhgd.com
Marjan Hajimirzaee	mhajimirzaee@wwhgd.com
Liane Wakayama	lkw@hwlawnv.com
Julia Rodionova	julia@hwlawnv.com
Erin Jordan	Erin.Jordan@lewisbrisbois.com
Joshua Daor	joshua.daor@lewisbrisbois.com
Jeremy Holmes	jholmes@hwlawnv.com

EXHIBIT 16



HAYES | WAKAYAMA
DALE A. HAYES, JR., ESQ.
Nevada Bar No. 9056
LIANE K. WAKAYAMA, ESQ.
Nevada Bar No. 11313
JEREMY D. HOLMES, ESQ.
Nevada Bar No. 14379
4735 S. Durango Drive, Ste. 105
Las Vegas, Nevada 89147
(702) 656-0808 – Telephone
(702) 655-1047 – Facsimile
dhayes@hwlawNV.com
lkw@hwlawNV.com
jholmes@hwlawNV.com
Attorneys for Plaintiffs

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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,

Case No.: A-20-811421-C
Dept. No.: III

FIRST AMENDED COMPLAINT

JURY TRIAL DEMAND

Arbitration Exemption Requested:
Medical Malpractice/Wrongful Death,
Automatically Exempt from ADR

Plaintiffs,
vs.

MINH NGUYEN, M.D. AND EMIL MORNEAULT, RPH; and DOES 1-5 and ROE ENTITIES 1-5,

Defendants.

FIRST AMENDED COMPLAINT AND JURY DEMAND

Plaintiffs, the Estate of Connie Stewart, the Estate of Gary Stewart, Patricia Ann Adams as Trustee of The Stewart Family Trust, Patricia Ann Adams, Gary Linck Stewart, Jr., Mary Kay Fallon and Elizabeth A. Hodge by and through their attorneys of record, the law firm of HAYES WAKAYAMA, hereby allege and complain as follows:

PARTIES

1. At all times relevant herein, Gary Stewart (“Decedent”) was a resident of Clark County, Nevada.

2. At all times relevant herein, decedent Connie Stewart (“Connie”) was a resident of Clark County, Nevada.

3. On October 19, 2020, PATRICIA ANN ADAMS was duly appointed as Special Administrator of the ESTATE OF CONNIE STEWART. On October 21, 2020, Letters of Special Administration were issued to her.

4. On March 1, 2021, PATRICIA ANN ADAMS was duly appointed as Special Administrator of the ESTATE OF GARY STEWART. On March 4, 2021, Letters of Special Administration were issued to her.

5. Plaintiff PATRICIA ANN ADAMS AS SPECIAL ADMINISTRATOR OF THE ESTATE OF GARY STEWART will hereinafter be referred to as “the Decedent’s Estate.”

6. Plaintiff PATRICIA ANN ADAMS AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CONNIE STEWART will hereinafter be referred to as “Connie’s Estate.”

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.

8. Plaintiff, PATRICA ANN ADAMS, (“Adams”) is and was at all times relevant herein, a resident of Clark County, Nevada.

9. Plaintiff, GARY LINCK STEWART, JR. (“Stewart”) is and was at all times relevant herein, a resident of Clark County, Nevada.

10. Plaintiff, MARY KAY FALLON (“Fallon”) is and was at all times relevant herein, a resident of Livingston County, Michigan.

11. Plaintiff, ELIZABETH A. HODGE (“Hodge”) is and was at all times relevant herein, a resident of Clark County, Nevada.

12. Defendant, MINH NGUYEN, M.D. (“Nguyen”), is and was at all times relevant herein a provider of health care in Clark County, Nevada pursuant to NRS 41A.017 and at all material times was Decedent’s physician in Clark County, Nevada.

13. Defendant, EMIL MORNEAULT, RPh (“Morneault”), is and was at all times relevant herein a pharmacist for Decedent in Clark County, Nevada.

14. The names and capacities, whether individuals, corporate, associate or otherwise of Defendants named herein as DOE and ROE CORPORATION are unknown or not yet confirmed. Upon information and belief, said DOE and ROE CORPORATION Defendants are responsible for damages suffered by Plaintiffs and, therefore, Plaintiffs sues said Defendants by such fictitious names. Plaintiffs will ask leave to amend this Complaint to show the true names and capacities of each DOE and ROE CORPORATION Defendant at such time as the same has been ascertained.

JURISDICTION AND VENUE

15. The Eighth Judicial District Court, Clark County, Nevada, has original jurisdiction over this matter pursuant to Nev. Const. art. VI, § 6(1) as “[t]he District Courts . . . of this State have original jurisdiction in all cases excluded by law from the original jurisdiction of justices’ courts.” This case is excluded by law from the original jurisdiction of the justices’ courts pursuant to NRS 4.370 as the action concerns recovery on a contract for an amount in excess of \$15,000.00.

16. Venue is proper in the Eighth Judicial District Court, Clark County, Nevada, pursuant to NRS 13.040 because Defendants provides the relevant services and professional services in Clark County, Nevada and also reside in Clark County, Nevada.

THE PARTIES

17. On January 31, 2007, Gary Stewart (“Decedent”) and his wife, Connie Stewart (“Connie”), created the Trust.

18. The Trust named both Decedent and Connie as trustees and Stewart and Adams as co-alternate or co-successor trustees.

19. Decedent was born on October 21, 1938.

20. Decedent passed away on March 5, 2019.

21. Decedent died as a result of the negligence, professional negligence and/or wrongful conduct of Defendants.

22. As a result, Connie initiated the instant action on February 28, 2020, asserting negligence, professional negligence and wrongful death theories of relief.

23. On June 9, 2020, Connie passed away.

24. On October 21, 2020, Adams was issued Letters of Special Administration and was appointed as the Special Administrator of Connie's Estate.

25. On March 4, 2021, Adams was issued Letters of Special Administration and was appointed as the Special Administrator of Decedent's Estate.

26. On November 25, 2020, via stipulation and order, the Connie's Estate was substituted into this lawsuit in the place of Connie.

27. As both Decedent and Connie have passed away, Stewart and Adams are the Co-Trustees for the Trust.

28. Stewart, Adams, Fallon and Hodge are siblings and the surviving children/heirs of Decedent.

GENERAL ALLEGATIONS

29. Nguyen is a provider of health care in Clark County, Nevada.

30. Pursuant to NRS 41A.017, and at all material times herein, Nguyen was Decedent's physician in Clark County, Nevada.

31. At all material times herein, Morneault was a pharmacist for Decedent in Clark County, Nevada.

32. On February 13, 2019, Decedent was admitted to Encompass Health Rehabilitation Hospital of Henderson.

33. The facility was provided with a list of all three of Decedent's anti-seizure medications at the time of his admission.

34. At the time of his admission, the History and Physical Exam by Nguyen includes the diagnosis of seizures both under "Chief Complaint" and "History of the Present Illness."

35. Despite the clear diagnosis of seizures, not only were two of the three appropriate antiseizure medications not prescribed to Decedent, the only one of the three anti-seizure medications that is on Decedent's orders (Depakote (Divalproex) Delayed Release Tablet 125 mg) was discontinued by Nguyen on February 16, 2019.

36. The order to discontinue was approved by Morneault, Decedent's pharmacist.

37. Nguyen also ordered a laboratory test for adequacy of the valproate (Divalproex) level even though the patient was not ordered any anti-seizure medication, and the lab result on February 15, 2019, shows a low level 25.7 (with an acceptable therapeutic range of 50-100).

38. Despite the foregoing *unacceptably* low level, Defendants failed to address it and further continued to fail to provide Decedent with any necessary medications.

39. On February 21, 2019, Decedent seized and required emergency transfer to St. Rose Dominican Hospital.

40. The Encompass Health Rehabilitation Hospital of Henderson covering physician, Olumide Olagunju M.D., wrote: "Patient had multiple witnessed seizure episode, given ativan, sent to ER for further evaluation, somebody discontinue valproic acid?"

41. At St. Rose Dominican Hospital, Decedent was found to have aspirated during the seizure, with 0 therapeutic levels of seizure medication, and subsequently required intubation. As a result, Decedent died on March 5, 2019.

42. Defendant's acts in failing to provide Decedent his known and necessary medication regiment constitutes simple negligence. *See Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263 (2020).

43. Defendant's acts in absent mindedly discontinuing one appropriate medication constitutes simple negligence. *See Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263 (2020).

44. "Common knowledge" establishes that Defendants' acts and omissions constitute negligence. It does not take an expert to know that failing to fill and administer known prescription medications is negligence. *See Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263 (2020).

45. Defendants' conduct in failing to provide *known* necessary medications, discontinuing one *known* necessary medication and further failing to administer any medications at all despite knowledge of an existing condition *with required medications* does not raise questions of mental judgment beyond the realm of common knowledge and experience. *See Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263 (2020).

46. 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 (NRS 41.085).

47. The Defendants caused Connie *and now the Estate* to suffer loss of probable support, companionship, society, mental anguish, pain and suffering, comfort and consortium and costs and attorney's fees because of her beloved husband's wrongful death (NRS 41.085).

48. The Defendants caused Stewart, Adams, Fallon and Hodge to suffer loss of probable support, companionship, society, mental anguish, pain and suffering, comfort and consortium and costs and attorney's fees because of their beloved father's wrongful death (NRS 41.085).

49. The Declaration of expert, Diana Koin, M.D., (**Exhibit 1**), details the allegations of Defendants' professional negligence, negligence, abuse, neglect and/or punitive conduct and is incorporated herein.

50. The Defendants' negligent medication errors violated State and/or Federal Statutes and these errors are negligence *per se*.

51. Pursuant to NRS 41.1395, Gary Stewart was an older and vulnerable person who was neglected and/or abused by Defendants who acted recklessly and caused him physical and mental pain and suffering and death as stated above and in the incorporated declaration of Diana Koin, M.D.

52. Defendants acted with a conscious disregard because they had knowledge of the probable harmful consequences of their wrongful acts and exhibited a willful and deliberate failure to act to avoid those consequences.

53. Defendants acted with malice, express or implied, because they engaged in conduct which was despicable conduct and which was engaged in with a conscious and obvious disregard of Decedent's rights, health and safety. Defendants acted with oppression because it engaged in despicable conduct that subjected Decedent to cruel and unjust hardship with a conscious disregard of his rights, health and safety.

FIRST CLAIM FOR RELIEF
(Negligence – All Plaintiffs v. Defendants)

54. Plaintiffs repeat and reallege the paragraphs as though fully stated herein.

55. Defendants had a duty to use reasonable care and consider the health and safety of others in the conduct of their business and affairs.

56. Defendants breached that duty as set forth herein.

57. Plaintiffs' simple negligence claim is supported by the recent decision of *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263 (2020).

58. As a direct and proximate cause of Defendants' actions, Plaintiffs have been damaged in an amount in excess of \$50,000.00.

59. Decedent was 80 years old at all relevant times herein and was therefore an "older person" as defined by NRS 41.1395(4)(d). Defendants' unlawful conduct described herein caused Decedent/Plaintiffs damages and Decedent/Plaintiffs are therefore entitled to two times their actual damages pursuant to NRS 41.1395(1).

60. Defendants' conduct towards Decedent/Plaintiffs was reckless, oppressive and/or with malice, and Decedent/Plaintiffs are therefore entitled to their attorney's fees and costs pursuant to NRS 41.1395(2).

61. As a direct and proximate result of the aforesaid acts of Defendants, it has become necessary for Plaintiffs to secure the services of an attorney, and Plaintiffs are entitled to recover attorney's fees and costs incurred herein as special damages.

SECOND CLAIM FOR RELIEF
(Professional Negligence (Medical Malpractice) – All Plaintiffs v. Defendants)

62. Plaintiffs repeat and reallege the paragraphs as though fully stated herein.

63. As providers of health care, Defendants had a duty to provide professional medical services to Decedent. More specifically, Defendants had the duty to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care.

64. Defendants breached their duty as outlined herein and in Dr. Koin's attached Declaration.

65. As an additional direct and proximate cause of Defendants' actions, Plaintiffs have been damaged in an amount in excess of \$50,000.00.

66. Decedent was 80 years old at all relevant times herein and was therefore an "older person" as defined by NRS 41.1395(4)(d). Defendants' unlawful conduct described herein caused Decedent/Plaintiffs damages and Decedent/Plaintiffs are therefore entitled to two times their actual damages pursuant to NRS 41.1395(1).

67. Defendants' conduct towards Decedent/Plaintiffs was reckless, oppressive and/or with malice, and Decedent/Plaintiffs are therefore entitled to their attorney's fees and costs pursuant to NRS 41.1395(2).

68. As a direct and proximate result of the aforesaid acts of Defendants, it has become necessary for Plaintiffs to secure the services of an attorney, and Plaintiffs are entitled to recover attorney's fees and costs incurred herein as special damages.

THIRD CLAIM FOR RELIEF
(Wrongful Death – NRS 41.085 - Stewart, Adams, Fallon, Hodge and Decedent's Estate v. Defendants)

69. Plaintiffs repeat and reallege the paragraphs as though fully stated herein.

70. Defendants committed wrongful and/or neglectful acts against Decedent.

71. Defendants' wrongful and/or neglectful acts caused Decedent's death.

72. Plaintiffs Stewart, Adams, Fallon, Hodge and Decedent's Estate are either the heirs, as defined by NRS 41.085(1) of Decedent, or the representative of Decedent's Estate.

73. As a direct and proximate cause of Defendants' actions, Plaintiffs have been damaged in an amount in excess of \$50,000.00.

74. Decedent was 80 years old at all relevant times herein and was therefore an “older person” as defined by NRS 41.1395(4)(d). Defendants’ unlawful conduct described herein caused Decedent/Plaintiffs damages and Decedent/Plaintiffs are therefore entitled to two times their actual damages pursuant to NRS 41.1395(1).

75. Defendants’ conduct towards Decedent/Plaintiffs was reckless, oppressive and/or with malice, and Decedent/Plaintiffs are therefore entitled to their attorney’s fees and costs pursuant to NRS 41.1395(2).

76. As a direct and proximate result of the aforesaid acts of Defendants, it has become necessary for Plaintiffs to secure the services of an attorney, and Plaintiffs are entitled to recover attorney’s fees and costs incurred herein as special damages.

FOURTH CLAIM FOR RELIEF
(Negligence *per se* – All Plaintiffs v. Morneault)

77. Plaintiffs repeat and reallege the paragraphs as though fully stated herein.

78. At all times relevant herein, Morneault violated NRS 639.210.

79. The violation of NRS 639.210 by Morneault was the proximate and legal cause of Plaintiffs/Decedent’s injuries as alleged herein.

80. Plaintiffs/Decedent belonged/belong to the class of persons that NRS 639.210 was intended to protect.

81. The injuries sustained by Plaintiffs/Decedent as set forth herein were and are the type against which NRS 639.210 was intended to protect.

82. As a direct and proximate cause of Defendants’ actions, Plaintiffs have been damaged in an amount in excess of \$50,000.00.

83. Decedent was 80 years old at all relevant times herein and was therefore an “older person” as defined by NRS 41.1395(4)(d). Defendants’ unlawful conduct described herein caused Decedent/Plaintiffs damages and Decedent/Plaintiffs are therefore entitled to two times their actual damages pursuant to NRS 41.1395(1).

84. Defendants' conduct towards Decedent/Plaintiffs was reckless, oppressive and/or with malice, and Decedent/Plaintiffs are therefore entitled to their attorney's fees and costs pursuant to NRS 41.1395(2).

85. As a direct and proximate result of the aforesaid acts of Defendants, it has become necessary for Plaintiffs to secure the services of an attorney, and Plaintiffs are entitled to recover attorney's fees and costs incurred herein as special damages.

JURY DEMAND

Plaintiffs hereby demand a jury on all claims.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief against Defendants:

1. Compensatory damages in excess of \$50,000.00, according to proof at trial;
2. Special damages in excess of \$50,000.00, according to proof at trial;
3. For two times the actual damages incurred pursuant to NRS 41.1395(1);
4. For an award of reasonable attorney fees and costs of suit pursuant to NRS 41.1395(2);
5. Punitive and exemplary damages in an amount to be determined at trial;
6. Interest from the time of service of this complaint as allowed by NRS 17.130;

///

///

///

///

///

///

///

///

///

DATED this 19th day of March, 2021.

By /s/ Dale A. Hayes, Jr., Esq.
DALE A. HAYES, JR., ESQ.
Nevada Bar No. 9056
LIANE K. WAKAYAMA, ESQ.
Nevada Bar No. 11313
JEREMY D. HOLMES, ESQ.
Nevada Bar No. 14379
4735 S. Durango Drive, Suite 105
Las Vegas, Nevada 89147
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **FIRST AMENDED COMPLAINT** was submitted electronically for filing and service with the Eighth Judicial District Court on the 19th day of March, 2021. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹

Joshua Daor	joshua.daor@lewisbrisbois.com
Erin Jordan	Erin.Jordan@lewisbrisbois.com
S. Brent Vogel	brent.vogel@lewisbrisbois.com
Johana Whitbeck	johana.whitbeck@lewisbrisbois.com
Amy Cvetovich	acvetovich@wwhgd.com
Kelly Gaez	kgaez@wwhgd.com
Flor Gonzalez-Pacheco	FGonzalez-Pacheco@wwhgd.com
Josephine Groh	jpgroh@wwhgd.com
Marjan Hajimirzaee	mhajimirzaee@wwhgd.com
Carol Michel	cmichel@wwhgd.com
Kelly Pierce	kpierce@wwhgd.com
Raiza Anne Torrenueva	rtorrenueva@wwhgd.com

/s/ Emmanuel Hernandez
An employee of Hayes Wakayama

¹ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).