

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. **Electronically Filed**
Sep 17 2021 02:31 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS
VOL. 2**

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2021, a true and correct copy of **PETITIONER’S APPENDIX VOL. 2 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
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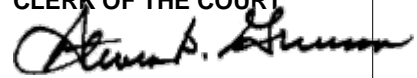
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January 31, 2007, in her capacity as
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

NOTICE OF ENTRY OF ORDER

Plaintiffs,

vs.

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

Defendants.

///

///

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NOTICE OF ENTRY OF ORDER

Please take notice that an Order Granting Plaintiffs' Motion for Leave to Amend Complaint was entered in the above-captioned matter on the 31st day of March, 2021, a copy of which is attached hereto.

Dated this 1st day of April, 2021.

HAYES | WAKAYAMA

By /s/ Dale A. Hayes, Jr., Esq.
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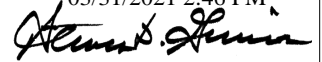
I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 1st day of April, 2021. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹

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/s/ Julia Rodionova

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).


CLERK OF THE COURT

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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

**ORDER GRANTING PLAINTIFFS’
MOTION FOR LEAVE TO AMEND
COMPLAINT**

Plaintiffs,

vs.

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

Defendants.

ORDER GRANTING PLAINTIFFS’ MOTION FOR LEAVE TO AMEND COMPLAINT

On December 21, 2020, Plaintiffs filed their Motion for Leave to Amend Complaint (hereinafter “the Motion”). On January 4, 2021, Defendants MINH NGUYEN, M.D. and EMIL MORNEAULT, RPH both filed separate Oppositions to the Motion. On January 25, 2021,

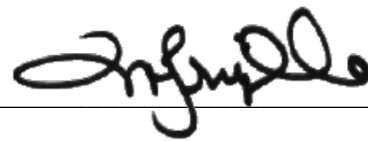
Plaintiffs filed their Reply in Support of Motion for Leave to Amend Complaint. The Court set this matter to be considered on its February 4, 2021, chambers calendar. On its February 4, 2021, chambers calendar the Court, having considered the briefs, pleadings, papers on file in this matter and good cause appearing therefore, hereby orders:

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Leave to Amend Complaint is GRANTED.

Dated this 31st day of March, 2021

IT IS SO ORDERED.



978 E68 5606 5A21

Monica Trujillo

~~District Court Judge~~

Approved as to Form and Content:

**LEWIS BRISBOIS BISGAARD & SMITH
LLP**

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

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Respectfully submitted by:

HAYES WAKAYAMA

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To: Dale Hayes Jr; Vogel, Brent; 'Michel, Carol'; MHajimirzaee@wwhgd.com
Cc: Julia Rodionova
Subject: RE: Proposed Order re 2/4/2021 Hearing

Categories: Red Category

You may use my e-signature.

Thanks,
Erin



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Sent: Wednesday, March 24, 2021 11:45 AM
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Subject: RE: Proposed Order re 2/4/2021 Hearing

Yes, you may affix my e-signature.

Thanks.



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

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA
4

5
6 Patricia Adams, 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 Order Granting Motion was served via the court's electronic eFile
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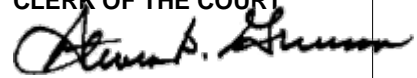
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DISTRICT COURT

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

HEARING REQUESTED

**DEFENDANT EMIL MORNEAULT,
RPH'S MOTION TO DISMISS IN PART
PLAINTIFFS' FIRST AMENDED
COMPLAINT**

///

///

///





1 Defendant Emil Morneault, RPH (“Morneault”), by and through its attorneys Carol P.
2 Michel, Esq. and Marjan Hajimirzaee, Esq., of the law firm of Weinberg Wheeler Hudgins Gunn
3 & Dial, LLC, hereby files this Motion to Dismiss In Part Plaintiffs’ First Amended Complaint
4 pursuant to NRCP 12(b)(5). Certain claims set forth in the First Amended Complaint must be
5 dismissed for failure to state a claim upon which relief can be granted. This Motion is based on
6 the following Memorandum of Points and Authorities, all pleading and filings of record, and any
7 oral argument the Court may allow.

8
9
10 DATED this 2nd day of April, 2021.

11 /s/ Carol P. Michel

12 Carol P. Michel, Esq.

13 Marjan Hajimirzaee, Esq.

14 Josephine E. Groh, Esq.

15 WEINBERG, WHEELER, HUDGINS,

16 GUNN & DIAL, LLC

17 6385 S. Rainbow Blvd., Suite 400

18 Las Vegas, NV 89118

19 *Attorneys for Defendant Emil Morneault, RPH*



MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION AND FACTUAL BACKGROUND

This action arises from the care decedent Gary Stewart (“Decedent”) received at Encompass Health Rehabilitation Hospital of Henderson (“Encompass”). As stated in Plaintiffs’ First Amended Complaint (“FAC”), Decedent was initially admitted to Encompass on February 13, 2019. FAC ¶ 32. While at Encompass, Defendant Dr. Nguyen allegedly discontinued Decedent’s seizure medication, and the order to discontinue was allegedly approved by Defendant Morneault. FAC ¶¶ 35-36. Plaintiffs further allege that Decedent seized and required emergency transfer to St. Rose Dominican Hospital, where he was allegedly found to have aspirated during the seizure, with 0 therapeutic levels of seizure medication, and subsequently required intubation. FAC ¶ 41. Plaintiffs allege that as a result of Defendants’ actions Decedent died on March 5, 2019. *Id.*

Plaintiffs allege causes of action for 1) Negligence, 2) Professional Negligence (Medical Malpractice), 3) Wrongful Death – NRS 41.085, and 4) Negligence per se. All of Plaintiffs’ claims arise from the rendering of professional services, through the care of Decedent. Accordingly, the one-year statute of limitations pursuant to NRS 41A.097 applies.

Decedent died on March 5, 2019. On February 28, 2020, Connie Stewart (“Connie”) filed the initial Complaint in this matter 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* Plaintiff’s Complaint, filed February 28, 2020, ¶ 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. 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. Subsequently, the Special Administrator was granted leave to file an



1 amended complaint. On March 19, 2021, Plaintiffs filed their First Amended Complaint which
2 names six new plaintiffs, including the personal representative of the Estate of Gary Stewart: 1)
3 Patricia Ann Adams, in her individual capacity, 2) Gary Linck Stewart, Jr., 3) Mary Kay Fallon,
4 4) Elizabeth A. Hodge, 5) Patricia Ann Adams as Special Administrator of the Estate of Gary
5 Stewart, and 6) Patricia Ann Adams as the trustee of THE STEWART FAMILY TRUST as
6 plaintiffs (collectively, the “new Plaintiffs”). Plaintiffs’ FAC must, therefore, have been filed by
7 March 4, 2020 to timely assert the claims. It was not filed until March 19, 2021.

8 Thus, Defendant Morneault moves for dismissal of all but the claims originally asserted
9 by Connie in the Complaint for professional negligence. The new claims set forth in Plaintiffs’
10 FAC are barred by NRS 41A.097. Additionally, all of Plaintiffs’ claims for negligence per se
11 must be dismissed because it is not an independent cause of action. Finally, the trustee of the
12 Stewart Family Trust (“Trust”) is not a proper party to this action and cannot maintain a separate
13 independent claim under NRS 41.085. Accordingly, the matter must be partially dismissed for a
14 failure to state a claim upon which relief can be granted.

15 LEGAL STANDARD

16 Pursuant to NRCP 12(b)(5), “[a] court can dismiss a complaint for failure to state a claim
17 upon which relief can be granted if the action is barred by the statute of limitations.” *Bemis v.*
18 *Estate of Bemis*, 114 Nev. 1021, 1024, 967 P.2d 437, 439 (1998). The sole issue in a motion to
19 dismiss is whether the allegations set forth a valid claim for relief. *Vacation Village, Inc. v.*
20 *Hitachi America, Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994) (“This court’s task is to
21 determine whether . . . the challenged pleading sets forth allegations sufficient to make out the
22 elements of a right to relief.” (internal quotations omitted)). In making this determination, the
23 court must construe the allegations liberally, accepting them as true and drawing all reasonable
24 inferences in favor of the non-moving party. *Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d
25 966, 967 (1997). However, only “fair” inferences arising from the pleadings must be accepted
26 by the court. *Id.* “Dismissal is proper where the allegations are insufficient to establish the
27 elements of a claim for relief.” *Rocker v. KPMG LLP*, 122 Nev. 1185, 1191, 148 P.3d 703, 707
28 (2006), *abrogated on other grounds by Buzz Stew, LLC v. North Las Vegas*, 124 Nev. 224, 181

1 P.3d 670 (2008).

2 Pursuant to NRCP 12(b)(5), “[a] court can dismiss a complaint for failure to state a claim
3 upon which relief can be granted if the action is barred by the statute of limitations.” *Bemis v.*
4 *Estate of Bemis*, 114 Nev. 1021, 1024, 967 P.2d 437, 439 (1998).

5 ARGUMENT

6 I. All Of The New Plaintiffs’ Claims Sound in Professional Negligence.

7 NRS 41A.097 explicitly imposes a one-year period for all actions for “injury or death”
8 caused by alleged professional negligence. In *Massey v. Litton*, 99 Nev. 723, 669 P.2d 248
9 (1983), the Nevada Supreme Court held that a plaintiff “discovers” his injury “when he knows
10 or, through the use of reasonable diligence, should have known of facts that would put a
11 reasonable person on inquiry notice of his cause of action.” 99 Nev. at 728, 669 P.2d at 252. The
12 focus is on knowledge of or access to facts rather than on the discovery of legal theories. *Id.*
13 citing to *Graham v. Hanse*, 180 Cal.Rptr. 604, 609-610 (1982).) Since all of the new Plaintiffs’
14 claims are subsumed within the professional negligence claim, the NRS 41A.097 period of
15 limitations applies to all their claims. The claims are barred by the one-year statute of limitations
16 and the Court should dismiss the new Plaintiffs’ claims for failure to state a claim. The only
17 remaining claim being that of Connie as heir as asserted in the Complaint.

18 Plaintiffs had actual notice of their cause of action and were under an obligation to bring
19 suit within one year. Although Connie filed a timely suit on February 28, 2020, the remaining
20 Plaintiffs did not. They waited until March 19, 2021 – two years later. As the new Plaintiffs
21 failed to bring suit within the requisite one year statute of limitations, Plaintiffs’ negligence and
22 wrongful death claims are time-barred by NRS 41A.097(2)(a) and must be dismissed.

23 A. The new Plaintiffs’ claims are barred by the one-year statute of limitations and 24 must be dismissed for failure to state a claim.

25 This is a straightforward professional negligence case concerning the death of Decedent.
26 Plaintiffs allege that Defendants breached the standard of care by allegedly failing to properly
27 continue Decedent’s seizure medication. Plaintiffs use artful pleading in the FAC in an attempt
28 to downplay their professional negligence claim as ones for ordinary negligence, negligence per

se, and wrongful death. However, Plaintiffs' claims clearly fall within the scope of NRS 41A.097 because the gravamen of Plaintiffs' claims are based upon professional negligence rather than ordinary negligence or negligence per se.

"In determining which statute of limitations correctly applies to any cause of action, the Nevada Supreme Court has consistently held that it is the nature of the cause of action, and not how it is styled in the Complaint, that governs which statute of limitation applies. *See Meadows v. Sheldon Pollack Corp.*, 92 Nev. 636, 556 P.2d 546 (1976) (suit to recover personal injury damages sustained in fall of elevator against the corporation who installed the elevator, sounded in tort, not contract, because "the gravamen of his cause of action is in tort to recover damages for personal injuries"); *see also Allred v. Paredes-Dr.*, 2016 WL 4943440 at *19 (Nev. Dist. Ct. July 28 2016) (holding chapter 41A includes claims regarding "medical diagnosis, care, or treatment of a patient"); *contra Szymborski v. Spring Mountain Treatment Ctr.*, 403 P.3d 1280, 1286 (Nev. 2017) ("*Szymborski*") 403 P.3d at 1286 (finding the plaintiff's claim to be ordinary negligence rather than professional negligence, as the allegations surrounded the nonmedical function of the discharging of a patient).

In *Szymborski*, the Supreme Court determined that "[a] claim is grounded in professional malpractice and must adhere to NRS 41A.071 where the facts underlying the claim involve treatment or judgment and the standards of care pertaining to the medical issue require explanation to the jury from a medical expert at trial." "When the duty owing to the plaintiff by the defendant arises from the physician-patient relationship or is substantially related to medical treatment, the breach thereof gives rise to an action sounding in medical malpractice as opposed to simple negligence." *Id.* (internal citations omitted; *see also Lewis v. Renown Regional Medical Center*, 134 Nev. 973, 432 P.3d 201 (2018) (affirming the district court's dismissal of plaintiff's claims because the claim for abuse and neglect sounded in professional negligent and were time barred.) A claim sounds in "professional negligence" if the claim arises out of "the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." *See* NRS 41A.015 (emphasis added). Further, the Nevada Supreme Court held in an



unpublished disposition, *Zhang v. Barnes*, 382 P.3d 878, 2016 WL 4926325 (September 12, 2016), wherein the Supreme Court relied on *Tam v. Eighth Jud. Dist. Ct.* and its broad definition of “professional negligence” that encompassed the term “medical malpractice”. *Id* at 5, citing to *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. 792, 803 (2015). The Court concluded a “case-by-case analysis of whether claims asserted by a plaintiff are grounded in professional negligence” must be undertaken to determine if NRS 41A statutes apply. *Zhang*, 2016 WL 4926325 at 6.

Similarly, claims for negligent training and supervision have been addressed by the Supreme Court in the context of professional negligence. *See Fierle v. Perez*, 125 Nev. 728, 738, 219 P.3d 906, 912 (2009) overruled on other grounds by *Egan v. Chambers*, 129 Nev. Adv. Op. 25, 299 P.3d 364, 367 (2013) (The Supreme Court affirmed the dismissal of a negligent training and supervision claim for the failure to comply with the affidavit requirement of NRS 41A.) Furthermore, the Nevada Supreme Court added that:

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

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

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



1 ensure the competence of the medical staff constituted a negligent act or omission “in the
2 rendering of professional services,” and was “inextricably interwoven” with the kind of
3 professional and diagnostic responsibilities typically involved in professional negligence actions.
4 *Id.* at 1040-50 (citing *Hedlund v. Superior Court*, 34 Cal. 3d 695, 703-04 (1983). Ultimately, the
5 court held “the competent selection and review of medical staff is precisely the type of
6 professional service a hospital is licensed and expected to provide... [And] inadequate fulfillment
7 of that responsibility constitutes ‘professional negligence’ involving conduct necessary to the
8 rendering of professional services within the scope of the services a hospital is licensed to
9 provide.” *Id.* at 1050-51; see also *So v. Shin*, 212 Cal.App.4th 652, 666-67 (2013) (holding that a
10 hospital’s credentialing decisions “directly related to the professional services provided by a
11 health care provider acting in its capacity as such” and were “an ordinary and usual part of
12 medical professional services,” and were therefore based in professional negligence)
13 (citing *Cent. Pathology Serv. Med. Clinic, Inc. v. Superior Ct.*, 3 Cal.4th 191, 193 (1992)).

14 While here, Plaintiffs’ FAC is based on negligence, negligence per se and wrongful
15 death, rather than negligent hiring, the analysis is the same. Morneault’s alleged purported failure
16 to provide the proper treatment, care, and/or medication to Decedent constituted a negligent act
17 or omission in the rendering of professional services that are interwoven with the kind of
18 responsibilities involved in professional negligence actions. All of Plaintiffs’ claims against
19 Morneault are “rooted” in the alleged professional negligence. Plaintiffs cannot attempt to avoid
20 the statute of limitations and statutory cap provided by NRS 41A by alleging ordinary
21 negligence, negligence per se and wrongful death. There is no allegation that Morneault
22 performed any nonprofessional services that would open him up to ordinary tort liability.
23 Morneault acted within the scope of his professional healthcare-based employment. He is not
24 subject to other forms of tort liability when he acted within the scope of his professional
25 employment. The FAC is not based on the performance of non-medical services that would
26 support a claim for ordinary negligence, negligence per se or wrongful death. The claims involve
27 Morneault’s professional judgment and purported treatment of Decedent that are grounded in

28 ///

///

professional negligence.¹ Consequently, because the “gravamen” of Plaintiffs’ allegations against Defendant Morneault sound in professional negligence, rather than ordinary negligence, negligence per se, and wrongful death, they are subject to the one year statute of limitations as set forth in NRS 41A.091(2)(a) and must be dismissed.

B. Negligence Per Se Is Not A Separate Cause of Action.

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.). As such all of Plaintiffs’ purported claims for negligence per se must be dismissed, including Connie’s claim.

C. 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 bifurcated. The act also separately describes the types of damages available to the heirs and the estate respectively. Here, Plaintiffs’ FAC names Decedent’s heirs, the special administrator of his estate, and the successor trustee of The Stewart Family Trust (“Trust”). However, the trustee is not a proper party to this action and cannot maintain a separate independent claim under NRS 41.085. NRS 41.085; *see also Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014) (“The NRS 41.085 statutory scheme creates two separate

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



wrongful death claims, one belonging to the heirs of the decedent and the other belonging to the personal representative of the decedent ...”). The trustee does not have standing to file a wrongful death action pursuant to NRS 41.085, and her claims must be dismissed.

CONCLUSION

All of the claims asserted by the new Plaintiffs fail as a matter of law and should be dismissed. Defendant Morneault further seeks dismissal of the claims for Negligence Per Se because Negligence Per Se is not a separate cause of action. Defendant Morneault also requests that the claims of the Trustee be dismissed because the Trustee lacks standing to bring such claims. Defendant Morneault respectfully submits the only surviving claims should be those asserted by and on behalf of Connie for professional negligence as asserted in the original Complaint.

DATED this 2nd day of April, 2021.

/s/ Carol P. Michel

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April, 2021, a true and correct copy of the foregoing **DEFENDANT EMIL MORNEAULT, RPH'S MOTION TO DISMISS IN PART PLAINTIFFS' FIRST AMENDED 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:

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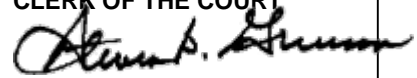
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EXHIBIT 19



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8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

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

16 Plaintiffs,

17 vs.

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

20 Defendants.
21

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

**DEFENDANT MINH NGUYEN, M.D.'S
MOTION TO DISMISS FIRST AMENDED
COMPLAINT**

HEARING REQUESTED

22 Defendant Minh Nguyen M.D., by and through his attorneys of record, S. Brent Vogel,
23 Esq. and Erin E. Jordan, Esq. of LEWIS BRISBOIS BISGAARD & SMITH LLP, hereby files this
24 Motion to Dismiss First Amended Complaint.

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 2nd day of April, 2021.

4 LEWIS BRISBOIS BISGAARD & SMITH LLP

5
6 By /s/ Erin E. Jordan

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

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. FACTUAL BACKGROUND**

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

23 This wrongful death action was first filed by Gary Stewart's wife, Connie Stewart, who
24 filed an individual heir wrongful death claim only. Mrs. Stewart has since passed away, and the
25 Plaintiff was changed to Patricia Adams on behalf of Connie Stewart's Estate. The caption was
26 changed by agreement of all the parties after Connie Stewart passed away. Thus, prior to the
27 filing of the First Amended Complaint, this case contained only Connie Stewart's individual heir
28 wrongful death claim brought as a survival claim.

Thereafter, Plaintiff filed a Motion for Leave to Amend the Complaint asking this Court
for leave 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

1 Family Trust as plaintiffs. This Motion was granted under the liberal NRCP 15 standard for
2 amending pleadings.

3 However, the claims in Plaintiffs' First Amended Complaint are barred by the statute of
4 limitations and NRS 41.085. Now that the First Amended Complaint has been filed, all claims
5 except for Connie Stewart's heir claim brought as a survival action, should be dismissed pursuant
6 to the NRCP 12 Motion to Dismiss standard.

7 **II. ARGUMENT**

8 **a. Standard of Review**

9 Defendant brings this Motion to Dismiss pursuant to NRCP 12(b)(5), based upon
10 Plaintiffs' failure to state a claim for which relief may be granted. A Plaintiff's claim must be
11 dismissed pursuant to NRCP 12(b)(5) if the plaintiff is entitled to no relief under any set of facts
12 which could be proven in support of the claim. *Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev.
13 163 (1965); *Edgar v. Wagner*, 101 Nev. 226, (1985).

14 It is proper to dismiss a claim pursuant to NRCP 12(b)(5) if that claim is barred by the
15 statute of limitations, as the Plaintiff is not entitled to relief regardless of whether any facts are
16 proven. *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1024 (1998) ("A court can dismiss a complaint
17 for failure to state a claim upon which relief can be granted if the action is barred by the statute of
18 limitations.").

19 The analysis of this Motion requires the Court to determine if the Plaintiffs have stated a
20 claim for relief pursuant to NRCP 12(b)(5). In this case, that entails an analysis of whether the
21 new claims by six new Plaintiffs were filed in violation of the statute of limitations. This is a
22 different analysis than was done by this Court previously, when it granted the Plaintiffs' Motion to
23 Amend. In that instance, the Court simply had to determine whether justice required allowing
24 amendment and was instructed by NRCP 15 that leave should be freely given. The fact that this
25 Court granted Plaintiffs' Motion to Amend does not constitute a finding that the claims would be
26 within the statute of limitations when they were filed.

27 ...

28 ...

1 **b. Wrongful Death Claims**

2 There was no remedy for wrongful death in the common law. *Pitman v. Thorndike*, 762 F.
3 Supp. 870, 871 (D.C. Nev. 1991) (“the common law provided no wrongful death action”).
4 Therefore, Nevada’s statutory remedy for wrongful death, NRS 41.085, is a wrongful death
5 Plaintiff’s exclusive remedy. *Id.* (“Nevada’s statutory remedy is exclusive.”); *Wells v. Shoemaker*,
6 64 Nev. 57, 66 (1947) (“The common law afforded no remedy in damages for a wrongful death.
7 Whatever standing Plaintiff has in the present case must be found in the statutes of Nevada. The
8 remedy, being wholly statutory, is exclusive. The statute provides the only measure of damages,
9 and designates the only person who can maintain such an action.”). Therefore, Nevada law is
10 clear that Plaintiffs bringing claims for what they deem to be the wrongful death of another person
11 are limited to a claim for wrongful death pursuant to NRS 41.085.

12 Wrongful death is a statutory claim and Nevada’s wrongful death sets forth the only parties
13 that may bring a wrongful death claim and the damages those parties are entitled to claim. A
14 wrongful death claim may only be brought on behalf of an heir of the decedent or the estate of the
15 decedent. NRS 41.085(2) (“When the death of any person, whether or not a minor, is caused by
16 the wrongful act or neglect of another, the **heirs of the decedent** and the **personal**
17 **representatives of the decedent** may each maintain an action for damages against the person who
18 caused the death.”) (emphasis added). An individual heir Plaintiff may seek damages for 1) grief
19 or sorrow; 2) loss of probable support; 3) companionship, society, comfort and consortium, and 4)
20 damages for pain, suffering or disfigurement of the decedent. The estate of the decedent
21 (“personal representative of the decedent”) may seek damages for 1) special damages, such as
22 medical expenses, which the decedent incurred or sustained before the decedent’s death, and
23 funeral expenses; and 2) penalties, including, but not limited to, exemplary or punitive damages,
24 that the decedent would have recovered if the decedent had lived. NRS 41.085.

25 A wrongful death “heir” who may bring a wrongful death claim is defined as a person who
26 would inherit from the decedent if the decedent died intestate per NRS Chapter 134. NRS
27 41.085(1) (“As used in this section, “heir” means a person who, under the laws of this State,
28

1 would be entitled to succeed to the separate property of the decedent if the decedent had died
2 intestate.”). Those are the only parties that may bring a claim for wrongful death.

3 At the time of Mr. Stewart’s death, March 5, 2019, his heirs were his wife, Connie Stewart,
4 and his children, Gary Stewart, Jr., Patricia Adams, Mary Kay Fallon, and Elizabeth Hodge. NRS
5 134.040(2).

6 NRS 134.040 Surviving spouse and issue.

7 ...
8 2. If the decedent leaves a surviving spouse and more than one child
9 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.

10 However, the *only* cause of action that was brought when this action was filed was an
11 individual heir claim by Connie Stewart for her grief or sorrow, loss of probable support,
12 companionship, society, comfort and consortium, and damages for pain, suffering or
13 disfigurement of the decedent. As an heir claim, Mrs. Stewart’s claim necessarily excluded
14 damages for medical expenses or funeral expenses. NRS 41.085(4). None of Gary Stewart’s
15 other NRS 41.085 heirs, timely filed a claim within a year of his death.

16 When Mrs. Stewart passed away, the Estate of Connie Stewart was substituted as the
17 Plaintiff to pursue her wrongful death heir claim as a survival action. NRS 41.100(1) (“Except as
18 otherwise provided in this section, no cause of action is lost by reason of the death of any person,
19 but may be maintained by or against the person’s executor or administrator.”).

20 The Plaintiffs’ Amended Complaint added wrongful death claims made by heirs Patricia
21 Adams, Gary Stewart, Jr., Mary Fallon and Elizabeth Hodge. The Amended Complaint also
22 added a fugitive claim by improper Plaintiff the Family Trust, which is not an heir under NRS
23 41.085. Lastly, the Plaintiffs’ Amended Complaint added an untimely wrongful death estate claim
24 for the first time (Estate of Gary Stewart), over two years after Gary Stewart’s death.

25 **c. The Claims Against Dr. Nguyen are for Professional Negligence and Subject to**
26 **NRS 41A.097**

27 A claim is a professional negligence claim that is subject to NRS 41A.097 if it is related to
28 medical diagnosis, judgment, or treatment. *Deboer v. Senior Bridges of Sparks Family Hospital,*

1 *Inc.*, 282 P.3d 727 (Nev. 2012). (“Savage’s complaint was grounded in ordinary negligence, as it
2 was not related to medical diagnosis, judgment, or treatment. As such, the district court erred in
3 branding Savage’s complaint as a medical malpractice claim.”). Here, Plaintiffs allege that Dr.
4 Nguyen fell below the standard of care by prescribing the incorrect seizure medication regime for
5 him. Amended Complaint, ¶¶ 35-39.

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

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

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

13 NRS 41A.017 “Provider of health care” defined. [Effective January 1, 2020.]
14 “Provider of health care” means a physician licensed pursuant to chapter 630 or
15 633 of NRS, physician assistant, dentist, licensed nurse, dispensing optician,
16 optometrist, registered physical therapist, podiatric physician, licensed
17 psychologist, chiropractor, doctor of Oriental medicine, holder of a license or a
18 limited license issued under the provisions of chapter 653 of NRS, medical
laboratory director or technician, licensed dietitian or a licensed hospital, clinic,
surgery center, physicians’ professional corporation or group practice that
employs any such person and its employees.

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

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

27 Allegations of breach of duty involving medical judgment, diagnosis, or treatment
28 indicate that a claim is for medical malpractice. ... By extension, if the jury can
only evaluate the plaintiff’s claims after presentation of the standards of care by a

1 medical expert, then it is a medical malpractice claim. ... If, on the other hand, the
2 reasonableness of the health care provider's actions can be evaluated by jurors on
3 the basis of their common knowledge and experience, then the claim is likely
based in ordinary negligence.

4 ...
The distinction between medical malpractice and negligence may be subtle in
5 some cases, and parties may incorrectly invoke language that designates a claim
6 as either medical malpractice or ordinary negligence, when the opposite is in fact
7 true. ... Given the subtle distinction, a single set of circumstances may sound in
8 both ordinary negligence and medical malpractice, and an inartful complaint will
likely use terms that invoke both causes of action, particularly where, as here, the
9 plaintiff is proceeding pro se in district court. Therefore, we must look to the
gravamen or "substantial point or essence" of each claim rather than its form to
see whether each individual claim is for medical malpractice or ordinary
negligence.

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

11 The *Curtis* case does not change this analysis. The *Curtis* case allowed for a simple
12 negligence claim in the limited circumstance where one patient's medication was given to another
13 patient, not to the alleged incorrect prescription of medication. *Estate of Curtis v. S. Las Vegas*
14 *Med. Inv'rs, LLC*, 466 P.3d 1263 (Nev. 2020). The administration of one prescription to the
15 incorrect patient is fundamentally different than a physician using his education, training and
16 experience to order medications, which necessarily includes medical diagnosis and judgment. The
17 claim against Dr. Nguyen is for professional negligence wrongful death, despite Plaintiffs' efforts
18 to complicate and obfuscate this case unnecessarily.

19 Perhaps most importantly, the Plaintiffs admit that their claim is for professional
20 negligence wrongful death by attaching a NRS 41A.071 affidavit to the Amended Complaint.

21 **d. The Individual Plaintiffs' Claims are Barred by the Statute of Limitations.**

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

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

27 Wrongful death claims accrue on the date of death. *Gilloon v. Humana, Inc.*, 100 Nev. 518, 519-
28 20 (1984) ("In an action for wrongful death, the injury contemplated by Nev. Rev. Stat. § 41A.097

1 is the death of the malpractice victim and the ... period of limitation begins to run from the time of
2 death or the discovery thereof.”). The individual Plaintiffs’ wrongful death claims accrued on the
3 date of Gary Stewart’s death. Thus, their wrongful death actions accrued on March 5, 2019.
4 Amended Complaint, ¶ 20. Thus, their claims filed on March 19, 2021 were filed over two years
5 after the statute of limitations had expired.

6 The Estate of Gary Stewart’s claims are also time-barred under the same analysis.

7 **e. The Family Trust Is Not a Proper Party Pursuant to NRS 41.085**

8 Wrongful death is a statutory claim and Nevada’s wrongful death sets forth the only parties
9 that may bring a wrongful death claim. NRS 41.085(2) (“When the death of any person, whether
10 or not a minor, is caused by the wrongful act or neglect of another, the **heirs of the decedent** and
11 the **personal representatives of the decedent** may each maintain an action for damages against
12 the person who caused the death.”) (emphasis added).

13 Thus, the Family Trust is not a proper party to this case pursuant to NRS 41.085, and all
14 claims by the Family Trust should be dismissed.

15 **III. CONCLUSION**

16 Therefore, in accordance with the above authorities, Defendant Dr. Nguyen respectfully
17 requests that this Court dismiss Plaintiffs’ Amended Complaint.

18 DATED this 2nd day of April, 2021.

19 LEWIS BRISBOIS BISGAARD & SMITH LLP

20
21 By /s/ Erin E. Jordan

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1 **CERTIFICATE OF SERVICE**

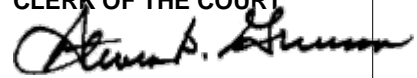
2 I hereby certify that on this 2nd day of April, 2021, a true and correct copy
3 of **DEFENDANT MINH NGUYEN, M.D.'S MOTION TO DISMISS FIRST AMENDED**
4 **COMPLAINT** was served by electronically filing with the Clerk of the Court using the Odyssey
5 E-File & Serve system and serving all parties with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

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EXHIBIT 20



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**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

**PLAINTIFFS' OPPOSITION TO
DEFENDANT EMIL MORNEAULT,
RPH'S MOTION TO DISMISS IN PART
PLAINTIFFS' FIRST AMENDED
COMPLAINT**

Plaintiffs,
vs.

Date of Hearing: May 4, 2021
Time of Hearing: 9:00 AM

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

Defendants.

**PLAINTIFFS' OPPOSITION TO DEFENDANT EMIL MORNEAULT, RPH'S MOTION
TO DISMISS IN PART PLAINTIFFS' FIRST AMENDED COMPLAINT**

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 counsel of record, the law firm of Hayes Wakayama, hereby respectfully submit their Opposition to Defendant Emil Morneault, RPH's Motion to Dismiss in Part Plaintiffs' First Amended Complaint ("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 of counsel entertained at the time of hearing this matter.

DATED this 19th day of April, 2021.

HAYES | WAKAYAMA

By /s/ Dale A. Hayes, Jr., Esq.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Defendant Emil Morneault, RPH's ("Morneault") Motion is largely a copied and pasted regurgitation of the same arguments that Morneault made when opposing Plaintiffs' Motion to Amend. While Morneault does make some minor changes, by and large he has presented this Court with the same legal arguments and positions that this Court **just** rejected. Not only is Morneault's attempt to reargue what this Court has already decided barred by the *law of the case* doctrine, but it is similarly barred by EDCR 2.24(a). Absolutely nothing has changed in this case since the Court's **recent** rejection of Morneault's identical arguments. Morneault's instant Motion is, in truth, a motion for reconsideration of this Court's **recent** decision on Plaintiffs' Motion for Leave to Amend. Rather than file a timely motion for reconsideration, Morneault has instead decided to simply reargue the exact same arguments in a near identical context. Indeed, Morneault even regurgitates the argument that The Stewart Family Trust ("Trust") lacks standing to file a

wrongful death action *despite the fact that Plaintiffs clearly pointed out that the Trust was and is not listed as a plaintiff to this claim* in the prior proceeding. Such conduct is not proper and serves no purpose other than to waste the Court and Plaintiffs' resources by having to respond to the exact same arguments twice. For these reasons, Morneault's Motion should be denied.

II. LEGAL STANDARD.

A. *LAW OF THE CASE* DOCTRINE AND RECONSIDERATION.

"The law of the case doctrine is a judicial invention designed to aid in the efficient operation of court affairs." *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990). Under the law of the case doctrine, "a court is generally precluded from reconsidering an issue previously **decided by the same court**, or a higher court in the identical case." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) (emphasis added). This doctrine has developed to "maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." 18B Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4478, at 637–38 (2002). For the *law of the case* doctrine to apply, the issue can either be explicitly decided or decided by necessary implication. *Recontrust Co. v. Zhang*, 130 Nev. Adv. Op. 1, 317 P.3d 814, 818 (2014) (internal citations omitted). A Court abuses its discretion when applying the *law of the case* doctrine to bar re-argued claims only if (1) the first decision was clearly erroneous; (2) an intervening change in the law occurred; (3) the evidence on remand was substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result. *Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005).

EDCR 2.24 governs the rehearing and reconsideration of previously decided issues. Pursuant to EDCR 2.24(a), "[n]o motion[] once heard and disposed of may be renewed in the same cause, **nor may the same matters therein embraced be reheard**, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties." (emphasis added). Further, under EDCR 2.24(b), a party seeking reconsideration "must file a motion for such relief within 14 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order." Finally, the standard for reconsideration is heavy. "A district court may reconsider a previously decided issue if substantially different evidence is subsequently

introduced or the decision is clearly erroneous.” *Masonry & Tile Contractors Ass’n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (citing *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976)).

B. DISMISSAL STANDARD.

The standard of review 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 v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997). 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).

III. LAW AND ARGUMENT.

Morneault’s instant Motion is nearly identical to his January 4, 2021 Opposition to Plaintiffs’ Motion for Leave to Amend. This Court rejected Morneault’s Opposition and the arguments set forth therein. Nothing has changed in this lawsuit since this Court’s previous ruling. No discovery¹ has taken place and no new evidence has been brought to light. This reality is made obvious by Morneault’s copying and pasting of his previous argument into his instant Motion and presenting no new arguments for the Court’s consideration. First, Morneault’s Motion should be denied pursuant to the *law of the case* doctrine as well as EDCR 2.24. Next, given that Morneault’s Motion simply regurgitates the same arguments from its Opposition to Plaintiffs’ Motion to

¹ Although Morneault has propounded his first set of written discovery upon Plaintiffs, Plaintiffs have yet to response to the same.

1 Amend, Morneault's Motion should be denied for the same reasons such arguments were rejected
2 when the Court granted Plaintiffs' Motion to Amend. There is absolutely no valid reason for this
3 Court to change its previous rulings on these **recently** litigated issues. Plaintiffs' claims were
4 timely and Morneault's Motion should be denied.

5 **A. MORNEAULT'S MOTION SHOULD BE DENIED UNDER THE *LAW OF***
6 ***THE CASE DOCTRINE.***

7 Despite this Court ruling on these *exact same issues* just weeks ago when considering
8 Morneault's Opposition to Plaintiffs' Motion for Leave to Amend, Morneault has regurgitated his
9 arguments in the instant Motion to Dismiss. The *law of the case* doctrine exists to prevent the re-
10 litigation of issues that have already been decided and to maintain efficiency in litigation by
11 preserving the resources of both the Courts and the parties. "One of the principal purposes of the
12 law of the case doctrine is to conserve judicial resources that would otherwise be consumed by
13 relitigating issues that have already been decided." *Rodriguez v. City of Colton*, 631 F. App'x 474,
14 475 (9th Cir. 2016) (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815–16,
15 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)). There is simply no legitimate reason to submit the
16 exact same arguments mere weeks after this Court ruled upon the same.

17 There have been no developments in this case since the last time these arguments were
18 heard. Although one party has propounded one set of written discovery in this case, no responses
19 have been served and there has been no change in the applicable law governing this Court's prior
20 ruling. The *law of the case* doctrine applies whenever the *same* or higher court has previously
21 decided a particular issue. *See Lummi Indian Tribe*, 235 F.3d at 452 ("[A] court is generally
22 precluded from reconsidering an issue previously **decided by the same court**, or a higher court in
23 the identical case.") (emphasis added). In this case, the *law of the case* doctrine operates to bar
24 Morneault from asserting the same arguments made in two separate proceedings only weeks apart.
25 Plaintiffs filed a Motion to Amend their pleading pursuant to NRCP 15. In response, Morneault
26 opposed the filing of Plaintiffs' proposed amended complaint with specific arguments that this
27 Court **just** rejected. Just 8 weeks later, Morneault asks this Court to dismiss Plaintiffs' amended
28 complaint for the exact same rejected reasons. Morneault's conduct is vexatious and wasteful.

1 His Motion *and accompanying arguments* should be denied for the same reasons as they were just
2 8 weeks ago.

3 **B. MORNEAULT’S MOTION IS BARRED BY EDCR 2.24.**

4 EDCR 2.24 prohibits the re-litigation of issues that have already been decided except in
5 very specific circumstances. Morneault’s Motion is a copied and pasted restatement of the same
6 exact arguments he made in his Opposition to Plaintiffs’ Motion for Leave to Amend. The Court
7 rejected Morneault’s arguments at that time, and Morneault is barred from bringing those
8 arguments again absent first obtaining leave of court via appropriate motion practice. The only
9 proper way for Morneault to have re-argued these same points would have been to file a motion
10 for reconsideration or rehearing. Morneault did not do this. Pursuant to EDCR 2.24(b), a party
11 has fourteen (14) days after notice of entry of an order has been filed in which to request
12 reconsideration or rehearing of the decided matter. More than fourteen days have passed since the
13 Court’s Order Granting Plaintiffs’ Motion for Leave to Amend was filed and Notice of Entry was
14 served, rendering Morneault’s ability to seek such reconsideration untimely if he were to attempt
15 to do so now. Even if Morneault were to claim that his instant Motion should be considered a
16 motion for reconsideration (which it should not), he fails to make any arguments or present any
17 evidence that would render reconsideration proper. *See Masonry & Tile Contractors Ass’n of S.*
18 *Nevada*, 113 Nev. at 741, 941 P.2d at 489 (holding that reconsideration is proper if substantially
19 different evidence is subsequently produced or the prior holding was clearly erroneous).

20 Instead of availing himself of the proper means by which to ask this Court to revisit its
21 previous ruling, Morneault has simply regurgitated the same arguments, forcing Plaintiffs to re-
22 spond to the same. While Plaintiffs do not wish to seek sanctions, Morneault’s conduct is clearly
23 sanctionable under EDCR 7.60(b)(3) as it “[s]o multiplies the proceedings in a case as to increase
24 costs unreasonably and vexatiously.” Indeed, the only differences between Morneault’s arguments
25 in his instant Motion and those in his Opposition are two new paragraphs and some slight re-
26 organization of the Opposition’s arguments (with no new substantive arguments). Such a baseless
27 regurgitation of previously rejected arguments should not be condoned by the Court, and
28 Morneault’s Motion should be denied for this reason alone.

C. MORNEAULT'S *ONE-YEAR LIMITATION* (PROFESSIONAL NEGLIGENCE) ARGUMENT IS ERROENOUS.

Turning to the merits of the arguments that Morneault now raises for the second time in 8 weeks, Morneault conflates the legal doctrines of medical malpractice claims with wrongful death and negligence claims while erroneously stating that they are the same. The limitation period set forth in NRS § 41A.097 applies *only* to claims relating to assertions of professional negligence or other forms of medical malpractice. Chapter 41A is itself titled “Actions for Professional Negligence.” Plaintiffs’ other claims of negligence, negligence *per se* and wrongful death are based on theories of simple negligence in accordance with the decisions reached in several recent Nevada Supreme Court decisions. *See Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263, 1267 (2020); *see also Szyborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 644, 403 P.3d 1280, 1286 (2017). In those cases, the Nevada Supreme Court found that claims against medical professionals whose negligence was obvious, basic, and rooted in common knowledge, could be pursued as simple negligence claims, rather than professional negligence. That is exactly what Plaintiffs have alleged in this case:

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).²

² See Plaintiffs’ March 19, 2021, First Amended Complaint on file herein at ¶¶ 42-45.

1 For purposes of this proceeding, Plaintiffs' foregoing allegations must be accepted as true.
2 *Simpson*, 113 Nev. at 190, 929 P.2d at 967.

3 Plaintiffs' wrongful death, negligence *per se* and negligence claims are being asserted
4 alongside the medical malpractice claim as it has yet to be determined whether the Defendants'
5 negligence was professional negligence or simple negligence. Such alternative pleading is
6 expressly permitted under NRCP 8(d)(2), which states, in relevant part: "[a] party may set out two
7 or more statements of a claim or defense alternatively or hypothetically, either in a single count or
8 defense or in separate ones." This case has just begun. Morneault's second attempt at barring
9 such alternative pleading is beyond premature. Even the language cited by Morneault in his
10 Motion supports this: "[a] claim is grounded in professional malpractice and must adhere to NRS
11 41A.071 where the facts underlying the claim involve treatment or judgment and the standards of
12 care pertaining to the medical issue **require explanation to the jury from a medical expert at**
13 **trial.**"³ If, instead, "the reasonableness of the health care provider's actions can be evaluated by
14 jurors on the basis of their common knowledge and experience, then the claim is likely based in
15 ordinary negligence." *Id.* at 642, 403 P.3d at 1285.

16 Despite Defendants' status as medical professionals, Plaintiffs have alleged that their
17 conduct can be characterized as simple negligence as is permitted by *Szyborski* and *Curtis*.
18 Further, discovery has barely begun in this case rendering any determination concerning the
19 ultimate facts wholly premature. Significantly, Morneault asks this Court to ignore the applicable
20 standard of review. Morneault is arguing that the allegations in **Plaintiffs'** Amended Complaint
21 should be construed in the manner that Morneault wishes, rather than in a light most favorable to
22 Plaintiffs. *See Simpson*, 113 Nev. at 190, 929 P.2d at 967. Plaintiffs have alternatively alleged
23 that Morneault engaged in simple negligence, rather than professional negligence, and that
24 allegation must be accepted as true. *See Szyborski*, 133 Nev. at 644, 403 P.3d at 1286 ("We note
25 that there are allegations in Szyborski's first claim that could involve medical diagnosis,

26
27 ³ *See Morneault's Motion on file herein at 6:16-19 (quoting Szyborski, 133 Nev. at 648, 403 P.3d at 1288)*
28 (emphasis added).

1 treatment, and judgment. Regardless, at this stage of the proceedings this court must determine
2 whether there is any set of facts that, if true, would entitle Szymborski to relief and not whether
3 there is a set of facts that would not provide Szymborski relief.”).

4 Accordingly, the applicable statute of limitations for the negligence, negligence *per se* and
5 wrongful death claims are contained in NRS § 11.190(4)(e). Pursuant to NRS § 11.190(4)(e), “an
6 action to recover damages for injuries to a person or for the death of a person caused by the
7 wrongful act or neglect of another” is subject to a two-year statute of limitations. As such, the
8 negligence, negligence *per se* and wrongful death claims are subject to the same two-year statute
9 of limitation. *See Parker v. Chrysler Motors Corp.*, 88 Nev. 560, 561, 502 P.2d 111, 112 (1972)
10 (holding “an action to recover damages for wrongful death must be commenced within two
11 years.”). Because the statute of limitation is two years and has not expired in this case, *all* of
12 Plaintiffs’ claims were timely.

13 **D. PLAINTIFFS ARE PERMITTED TO ARGUE ALTERNATIVE THEORIES**
14 **OF LIABILITY UNDER NRCP 8(d)(2).**

15 Morneault next repeats an argument from his Opposition but this time frames it as a
16 standalone argument in the Motion, while still copying and pasting the exact same language
17 previously used. Morneault ignores that the allegations underlying the negligence and negligence
18 *per se* causes of action are different, which distinguishes these claims from those made in *Munda*
19 and *Cervantes*. Further, if the Court believes that this is not the case, NRCP 8(d)(2) still permits
20 a party to assert alternative theories of liability and statements of claim at the same time. Once
21 more, it is important to remember that discovery has just begun, and Plaintiffs’ claims may change
22 as the case progresses. If Plaintiffs’ negligence *per se* claim ultimately reveals itself to be
23 redundant or unnecessary it can be disposed of at a later date. Currently, however, such
24 determinations cannot be made, and Plaintiffs’ claims should not be dismissed at this time.

25 **E. MORNEAULT’S ARGUMENT CONCERNING THE TRUST IS**
26 **ERRONEOUS.**

27 Morneault’s next argument is, once again, regurgitated from his Opposition and is also
28 perhaps the most baffling. In his prior Opposition, Morneault argued that the Trust lacked standing

1 to bring a wrongful death claim under NRS § 41.085. In response to this, Plaintiffs pointed out
2 that the Trust was not listed as a plaintiff to that claim, rendering that argument moot and frivolous.
3 Nevertheless, despite Plaintiffs explicitly pointing this out to Morneault, he raises the same exact
4 argument, word for word, in his instant Motion.

5 Once again, the Trust was *not* included as a plaintiff on the wrongful death claim in
6 Plaintiffs' proposed First Amended Complaint.⁴ Decedent's Will is a pour-over Will as it
7 bequeaths his estate to the Trust. The individual plaintiffs, in turn, are the beneficiaries of the
8 Trust. The Trust is simply listed in this action as the Trust is the beneficiary of the Estate due to
9 the decedent's pour-over Will. Including the Trust as a plaintiff was/is merely a thorough
10 formality. Moreover, the issue is irrelevant and moot as including the Trust would not permit a
11 double recovery. Notwithstanding the same, the First Amended Complaint does not list the Trust
12 as a plaintiff under the wrongful death claim. Morneault's argument is therefore erroneous as it is
13 predicated upon a false foundation, *i.e.*, that the Trust is seeking relief for wrongful death.

14 **F. AS IT RELATES TO PLAINTIFFS' PROFESSIONAL NEGLIGENCE**
15 **CLAIM, AND A ONE-YEAR LIMITATION PERIOD, AT LEAST ONE**
16 **HEIR'S CLAIMS WOULD RELATE BACK TO THE INITIAL FILING.**

17 While Plaintiffs maintain that they have properly asserted four separate theories of relief,
18 even if the Court were inclined to accept Morneault's position, at least one of the Plaintiff heirs'
19 professional negligence claim would relate back to the initial filing date and therefore be timely.
20 *Time-barred* claims asserted by new plaintiffs relate back to the original complaint unless the
21 amended claims "seek[] to enforce an independent right or to impose greater liability against the
22 defendants." *San Diego Gas & Elec. Co. v. Superior Court*, 53 Cal. Rptr. 3d 722, 725 (2007), *as*
23 *modified on denial of reh'g* (Feb. 21, 2007) (citing *Bartalo v. Superior Court*, 124 Cal. Rptr. 370,
24 375 (Ct. App. 1975)). As this Court is aware, this lawsuit was initially filed by Connie Stewart,
25 Decedent's surviving wife and heir. Because substituting one heir in to prosecute a professional
26

27
28 ⁴ See Plaintiffs' March 19, 2021, First Amended Complaint on file herein at 8:19-20.

negligence claim will not “enforce an independent right or impose greater liability against the defendants,” the claim would relate back and be timely. *See id.*

IV. CONCLUSION.

Based on the foregoing, Plaintiffs respectively request that the arguments set forth in Morneault’s instant Motion, *once again*, be denied for the second time in 8 weeks.

DATED this 19th day of April, 2021.

HAYES | WAKAYAMA

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CERTIFICATE OF SERVICE

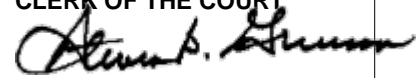
I hereby certify that the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANT EMIL MORNEAULT, RPH'S MOTION TO DISMISS IN PART PLAINTIFFS' FIRST AMENDED COMPLAINT** was submitted electronically for filing and service with the Eighth Judicial District Court on the 19th day of April, 2021. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:⁵

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/s/ Julia Rodionova
An employee of Hayes Wakayama

⁵ 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 21



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**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

**PLAINTIFFS' OPPOSITION TO
DEFENDANT MINH NGUYEN, M.D.'S
MOTION TO DISMISS FIRST AMENDED
COMPLAINT**

Plaintiffs,

vs.

Date of Hearing: May 4, 2021
Time of Hearing: 9:00 AM

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

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANT MINH NGUYEN, M.D.'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

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 counsel of record, the law firm of Hayes Wakayama, hereby respectfully submit their Opposition to Defendant Minh Nguyen, M.D.’s Motion to Dismiss First Amended Complaint (the “Opposition”). This Opposition is made and based upon the pleadings and papers on file herein, the following Memorandum of Points and Authorities, the Declaration of Patti Adams, the attached exhibits, and any argument of counsel entertained at the time of hearing this matter.

DATED this 19th day of April, 2021.

HAYES | WAKAYAMA

By /s/ Dale A. Hayes, Jr., Esq.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

In his Motion, Defendant Minh Nguyen, M.D. (“Nguyen”) argues out of both sides of his mouth. Out of one side of his mouth, Nguyen reiterates the same arguments this Court recently rejected from his Opposition to Plaintiffs’ Motion for Leave to Amend and, out of the other side, argues that this Court’s granting of that Motion to Amend does not mean that the asserted claims are proper. This argument is absurd. This Court would not permit amendment of claims if the new claims were improper or barred. The Court necessarily had to decide the merits of Nguyen’s prior Opposition when making its decision, rendering Nguyen’s instant arguments invalid and barred. Nguyen also argues that Plaintiffs’ claims are time-barred. This is simply not true. Plaintiffs only learned of the negligence that led to the death of Gary Stewart (“Stewart” or “Decedent”) after their attorney, who was initially hired simply to obtain medical records that

Defendants refused to provide, brought in a physician to review those records, and opine on whether Decedent’s physicians were negligent on or about February 28, 2020. Accordingly, none of Plaintiffs’ claims for relief *accrued* until months after Decedent’s death.

Even if the March 5, 2019 accrual date argued by Nguyen were proper, which it is not, Plaintiffs’ claims were still timely as their Motion for Leave to Amend was filed less than two years from that date. While this issue does not appear to have been addressed in Nevada, across the country courts have recognized that limitation periods will be tolled when an amendment is sought prior to the limitation period expiring. In such cases the amended complaint is deemed filed within the applicable limitation period. Further, a majority of courts have also held that, when the proposed amended complaint is attached to the motion to amend as an exhibit, the amended complaint is deemed filed as of the date that the motion to amend is filed. Accordingly, because Plaintiffs’ Amended Complaint was properly filed within the applicable limitation period and Nguyen’s remaining arguments have already been addressed and rejected by this Court, Nguyen’s Motion should be denied.

II. LEGAL STANDARD.

A. *LAW OF THE CASE* DOCTRINE AND RECONSIDERATION.

“The law of the case doctrine is a judicial invention designed to aid in the efficient operation of court affairs.” *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990). Under the law of the case doctrine, “a court is generally precluded from reconsidering an issue previously **decided by the same court**, or a higher court in the identical case.” *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) (emphasis added). This doctrine has developed to “maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.” 18B Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4478, at 637–38 (2002). For the *law of the case* doctrine to apply, the issue can either be explicitly decided or decided by necessary implication. *Recontrust Co. v. Zhang*, 130 Nev. Adv. Op. 1, 317 P.3d 814, 818 (2014) (internal citations omitted). A Court abuses its discretion when applying the *law of the case* doctrine to bar re-argued claims only if (1) the first decision was clearly erroneous; (2) an intervening change in the law occurred; (3) the evidence

on remand was substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result. *Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005).

EDCR 2.24 governs the rehearing and reconsideration of previously decided issues. Pursuant to EDCR 2.24(a), “[n]o motion[] once heard and disposed of may be renewed in the same cause, **nor may the same matters therein embraced be reheard**, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties.” (emphasis added). Further, under EDCR 2.24(b), a party seeking reconsideration “must file a motion for such relief within 14 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order.” Finally, the standard for reconsideration is heavy. “A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous.” *Masonry & Tile Contractors Ass’n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (citing *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976)).

B. DISMISSAL STANDARD.

The standard of review 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 v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997). 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). Finally, when matters outside the pleadings are considered by the Court in a dismissal proceeding, the motion should be

1 treated “as one for summary judgment.” *Stevens v. McGimsey*, 99 Nev. 840, 841, 673 P.2d 499,
2 500 (1983).

3 **III. LAW AND ARGUMENT.**

4 Nguyen’s arguments in his Motion are mostly identical to the arguments he recently raised
5 in his Opposition to Plaintiffs’ Motion for Leave to Amend. This Court rejected Nguyen’s
6 Opposition and the arguments set forth therein. Nothing has changed in this lawsuit since this
7 Court’s previous ruling. No discovery¹ has taken place, no new evidence has been brought to light
8 and there has been no change in the governing law. Aside from regurgitating the arguments this
9 Court just rejected from the motion for leave proceedings, Nguyen’s only new argument is that
10 Plaintiffs’ claims are time barred under the two-year statute of limitation. Nguyen asserts a claim
11 accrual date of March 5, 2019, the date of Decedent’s passing, in support of his *new* limitation
12 argument. This proffered accrual date is incorrect for numerous reasons. As set forth more
13 thoroughly below, Encompass Health Rehabilitation Hospital of Henderson (“Encompass”) and
14 Defendants ignored Plaintiffs requests for an explanation and further refused to provide Plaintiffs
15 with Decedent’s medical records for months and months. Plaintiffs are not medical professionals.
16 Even if Plaintiffs were medical professionals, they certainly could not know that negligence caused
17 their father’s death without any explanation from his attending physicians or his medical records.
18 Plaintiffs’ claims accrued sometime between July 25, 2019, and February 28, 2020. July 25, 2019
19 is the date Defendants finally turned over Decedent’s medical records and February 28, 2020 is
20 the date upon which Plaintiffs Chapter 41A expert was able to officially opine that Defendants’
21 conduct and negligence caused Decedent’s death. Prior to this date, Plaintiffs, who are not doctors,
22 had no way of knowing what caused Decedent’s death, including whether the negligence of
23 Nguyen and Morneault was the cause. Accordingly, because Plaintiffs’ First Amended Complaint
24 was filed (March 19, 2021) well before July, 2021, Plaintiffs’ claims are timely.

25
26
27 ¹ Although Defendant Emil Morneault RPH, has propounded his first set of written discovery upon
28 Plaintiffs, Plaintiffs have yet to response to the same. Nguyen, on the other hand, has not performed any
discovery in this case.

Next, even if Defendants' concealment and secrecy were disregarded and March 5, 2019 was the accrual date, which it is not, amended complaints are deemed filed as of the day the motion to amend is filed. Plaintiffs filed their Motion to Amend on December 21, 2020. Next, statutes of limitation are tolled while courts consider motions to amend. Accordingly, Nguyen's *new* limitation argument fails as a matter of law. Finally, just like Morneault's regurgitated arguments from the *recent* motion for leave proceedings, Nguyen's remaining arguments are barred by both the *law of the case* doctrine as well as EDCR 2.24. For these reasons, Nguyen's Motion should be denied.

Nguyen's arguments should be rejected for the following reasons: (1) Plaintiffs' claims did not accrue until, at the very earliest, July 25, 2019; (2) Plaintiffs' timely filing of their Motion for Leave to Amend tolled the relevant limitation periods; (3) because Plaintiffs attached their proposed amended complaint to their Motion for Leave to Amend, Plaintiffs' First Amended Complaint was deemed filed as of the date of filing their Motion; (4) the *law of the case* doctrine operates to bar every one of Nguyen's arguments except his *new* limitation argument (discussed *infra*); (5) EDCR 2.24 bars reconsideration of every one of Nguyen's arguments except his *new* limitation argument (discussed *infra*); (6) Nguyen's wrongful death claim relative to the Trust was already addressed and determined to be erroneous; (7) Nguyen's regurgitated *one-year limitation* arguments were similarly rejected by this Court just 8 weeks ago; and (8) even if Nguyen's proffered limitation deadline were accurate, at least one of the Plaintiffs' claims relates back to the initial filing date.

A. PLAINTIFFS' CAUSES OF ACTION DID NOT ACCRUE UNTIL, AT THE VERY EARLIEST, JULY 25, 2019.

Nguyen correctly points out that the limitation period for a professional negligence claim is one year. NRS § 41A.097(2). However, Nguyen glosses over the significance of the accrual date in analyzing a limitations argument. The relevant language from Chapter 41A provides as follows:

[e]xcept as otherwise provided in subsection 3, an action for injury or death against a provider of health care may not be commenced more than . . . 1 year after the plaintiff discovers or through the use of reasonable diligence should

1 **have discovered the injury**, whichever occurs first . . . NRS § 41A.097(2)
2 (emphasis added).

3 Significantly, subsection 3's exception provides as follows:

4 [t]his time limitation is tolled for any period during which the provider of health
5 care has concealed any act, error or omission upon which the action is based and
6 which is known or through the use of reasonable diligence should have been known
7 to the provider of health care. NRS § 41A.097(3).

8 Decedent was 80 years old with a seizure history when he was admitted to Encompass on
9 February 13, 2019.² While an admitted patient at Encompass, Decedent had a seizure on February
10 21, 2019.³ On March 5, 2019, Decedent passed away.⁴ As testified to by Decedent's daughter,
11 Patti Adams ("Adams"), Decedent's family was promised an investigation and an explanation as
12 to what happened to their father.⁵ Nguyen advised Adams that he would personally perform an
13 inquiry into the issue and thereafter provide Adams and her family with an explanation.⁶ Despite
14 Adams repeated follow-up calls to Nguyen, Nguyen refused to take her calls and refused to call
15 her back.⁷ Moreover, when family members visited Encompass to collect Decedent's belongings,
16 nobody from Encompass would communicate with them at all.⁸ In short, Encompass and
17 Defendants refused to provide Decedent's family members (Plaintiffs) with any information
18 concerning the cause of Decedent's death.⁹

19
20

² Declaration of Patricia Ann Adams ("Adams Decl."), attached hereto as **Exhibit 1**, at ¶¶ 3-4.

21 ³ *Id.*, at ¶ 6.

22 ⁴ *Id.*, at ¶ 7.

23 ⁵ *Id.*, at ¶¶ 8-9.

24 ⁶ *Id.*, at ¶ 9.

25 ⁷ *Id.*

26 ⁸ *Id.*, at ¶ 10.

27 ⁹ *Id.*, at ¶ 11.

1 Plaintiffs are not doctors.¹⁰ Plaintiffs do not practice in the health care industry.¹¹ Because
2 of Defendants' silence and refusal to provide Decedent's medical records, Plaintiffs immediately
3 retained attorney Doug Cohen, Esq.¹² Doug Cohen is not a doctor. Plaintiffs were forced to seek
4 a court order to obtain Decedent's medical records, which was entered on June 26, 2019.¹³
5 Plaintiffs did not receive a complete set of Decedent's medical records until July 25, 2019.¹⁴ Mr.
6 Cohen then hired a medical professional, Diana Koin, MD, to review Decedent's medical
7 records.¹⁵ On February 28, 2020, Dr. Koin completed a Declaration wherein she opined that
8 Defendants' committed negligence that caused Decedent's death.¹⁶ Therefore, Plaintiffs did not
9 learn of Defendants' reckless and negligent conduct until approximately February 28, 2020.¹⁷ In
10 fact, the earliest Plaintiffs could have known about Defendants' misconduct would have been
11 sometime after July 25, 2019, the date upon which Plaintiffs finally received their father's medical
12 records.

13 The general rule concerning statutes of limitation is that a cause of action accrues when the
14 wrong occurs and a party sustains injuries for which relief could be sought. *Petersen v. Bruen*,
15 106 Nev. 271, 274, 792 P.2d 18, 20 (1990) (citing *Siragusa v. Brown*, 114 Nev. 1384, 1392, 971
16 P.2d 801, 806 (1998)). However, Nevada recognizes an exception to the general rule "in the form
17 of the so-called 'discovery rule.'" *Id.*

18 Under the discovery rule, the statutory period of limitations is tolled until the
19 injured party discovers **or reasonably should have discovered facts supporting**
20 **a cause of action.** *Id.* (emphasis added).

21 ¹⁰ See **Ex. 1**, at ¶¶ 12-13.

22 ¹¹ *Id.*

23 ¹² *Id.*, at ¶ 14.

24 ¹³ *Id.*, at ¶ 15; a true and correct copy of the June 26, 2019 Order is attached hereto as **Exhibit 2**.

25 ¹⁴ See **Ex. 1**, at ¶ 16-17.

26 ¹⁵ *Id.*, at ¶ 18.

27 ¹⁶ *Id.*, at ¶ 19.

28 ¹⁷ *Id.*, at ¶¶ 20-22.

The “discovery rule” also applies in wrongful death/medical malpractice cases.

[W]e conclude that the two-year statutory period for wrongful death medical malpractice actions does not begin to run until the plaintiff discovers or reasonably should have discovered the legal injury, i.e., both the fact of death and the negligent cause thereof. *Pope v. Gray*, 104 Nev. 358, 362, 760 P.2d 763, 765 (1988).

Next, **and dispositive of Nguyen’s Motion,**

[w]hen the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of a cause of action **is a question of fact for the trier of fact.** *Siragusa*, 114 Nev. at 1393, 971 P.2d at 807 (internal citations omitted) (emphasis added)).

Moreover, cases involving doctor-patient and confidential/fiduciary relationships provide additional grounds for protecting claimants under the “discovery rule.” Indeed, where a confidential relationship exists, the confiding party does not have a duty to make an inquiry to discover that the confidential relationship has been abused during the continuation of the relationship. *Maltas v. Maltas*, 197 F. Supp. 2d 409, 428 (D. Md. 2002).

[C]ourts have relied on the nature of the relationship between defendant and plaintiff to explain application of the delayed accrual rule. The rule is generally applicable to confidential or fiduciary relationships. The fiduciary relationship carries a duty of full disclosure, and application of the discovery rule prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure. *Evans v. Eckelman*, 265 Cal. Rptr. 605, 608–09 (Ct. App. 1990) (superseded by statute) (internal citations omitted).

[T]he importance of the relationship between defendant and plaintiff [is that] . . . the defendant has been in a far superior position to comprehend the act and the injury [and] . . . the defendant had reason to believe the plaintiff remained ignorant he had been wronged. *Id.*

Nevada has recognized that the physician-patient relationship is “fiduciary in nature.” *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983) (citation omitted). “The physician-patient relationship is based on trust and confidence. Society has placed physicians in an elevated position of trust, and, therefore, the physician is obligated to exercise utmost good faith.” *Hoopes v. Hammargren*, 102 Nev. 425, 431, 725 P.2d 238, 242 (1986). Application of the delayed discovery rule would serve to prevent the abuser from using the patient’s *or in this case patient’s survivor’s* ignorance and trust to conceal the primary tort. *Maltas*, 197 F. Supp. 2d at 428. In other words,

Defendants and Encompass had the fiduciary obligation to inform Decedent's wife and his children (Plaintiffs) of their misconduct.

As set forth above, Plaintiffs entrusted their father with Defendants. While he was under Defendants' professional care, Plaintiffs' father died. Plaintiffs are not doctors nor mind readers. They lacked both the expertise as well as the information necessary to even suspect Defendants of misconduct. Worse, when they contacted Defendants and made inquiries, Defendants first promised an explanation and thereafter went silent on Plaintiffs. Plaintiffs were completely in the dark as it relates to the negligence and misconduct of Defendants. Plaintiffs then exercised diligence in retaining a law firm and medical professional to review Decedent's medical records. Because of Defendants' bad faith silence and *hide-the-ball*, Plaintiffs did not receive Decedent's medical records until July 25, 2019 and did not learn of Defendants' negligence and misconduct until approximately February 28, 2020. Accordingly, any applicable limitation period would not have triggered in this matter until February 28, 2020. At the very earliest, Plaintiffs could not have known of Defendants' misconduct and negligence until July 25, 2019.

B. EVEN IF THE APPLICABLE LIMITATION PERIOD ACCRUED ON MARCH 5, 2019, PLAINTIFFS' AMENDED COMPLAINT WAS TIMELY FILED NONETHELESS.

Plaintiffs filed their Motion for Leave to Amend in this matter on December 21, 2020, well before Nguyen's proffered March 5, 2021, "two-year" deadline. Nguyen filed an opposition to Plaintiffs' Motion on January 4, 2021 and argued the same arguments he currently regurgitates in his Motion to Dismiss. Plaintiffs filed their Reply on January 25, 2021. On February 4, 2021, the Court issued a Minute Order ruling that Plaintiffs' Motion was granted. After the Court granted Plaintiffs' Motion, Plaintiffs retained the undersigned to seek letters of administration for Gary Stewart's Estate. The probate court issued the letters on March 4, 2021. Plaintiffs then filed their First Amended Complaint on March 19, 2021. The Court's formal order granting Plaintiffs' Motion to Amend was filed on March 31, 2021.

While Nguyen did not address the fact that Plaintiffs' Motion for Leave to Amend was pending and an order had not formally been entered at the time of his proffered two-year deadline,

1 this fact is particularly relevant under the facts at bar. Nguyen was placed on actual notice of
2 Plaintiffs' amended claims as of December 21, 2020, when Plaintiffs filed their Motion for Leave
3 to Amend which included a copy of Plaintiffs' First Amended Complaint. In the event that the
4 Court determines that Defendants' *hide-the-ball* conduct did not operate to delay the accrual of the
5 applicable limitation periods, Plaintiffs' March 19, 2021, First Amended Complaint was timely
6 nonetheless as Plaintiff's Motion was filed before Nguyen's proffered deadline.

7 **1. Courts Routinely Hold that Filing A Motion to Amend Tolls the Statute**
8 **of Limitations.**

9 Although Nevada courts have never ruled on the issue, "[a] number of courts have
10 addressed the situation where the petition for leave to amend the complaint has been filed prior to
11 the expiration of the statute of limitations, while the entry of the court order and the filing of the
12 amended complaint have occurred after the limitations period has expired." *Mayes v. AT&T*
13 *Information Sys., Inc.*, 867 F.2d 1172, 1173 (8th Cir. 1989) (citing *Rademaker v. E.D. Flynn Export*
14 *Co.*, 17 F.2d 15, 17 (5th Cir. 1927); *Longo v. Pennsylvania Elec. Co.*, 618 F. Supp. 87, 89 (W.D.
15 Pa. 1985), *aff'd*, 856 F.2d 183 (3d Cir. 1988); *Eaton Corp. v. Appliance Valves Co.*, 634 F. Supp.
16 974, 982–83 (N.D. Ind. 1984), *aff'd on other grounds*, 790 F.2d 874 (Fed. Cir. 1986); *Gloster v.*
17 *Pennsylvania R.R.*, 214 F. Supp. 207, 208 (W.D. Pa. 1963)). "In such cases, the amended
18 complaint is deemed filed within the limitations period." *Id.*; *accord Pimentel v. Cty. Of Fresno*,
19 No. 1:10-cv-01736, 2011 WL 350288, at 4 (E.D. Cal. Feb 2, 2011).

20 Further, "[p]ursuant to California law, the filing of a motion to amend along with a
21 proposed amended complaint tolls the statute of limitations." *Pimentel*, 2011 WL 350288, at *4
22 (citing *Wallis v. Southern Pac. Transportation Co.*, 61 Cal. App. 3d 782, 787, 132 Cal. Rptr. 631
23 (Cal. Ct. App. 1976)). The Seventh Circuit has agreed and found that "[a]s a party has no control
24 over when a court renders its decision regarding the proposed amended complaint," it follows that
25 the statute of limitations shall be tolled when a motion for leave to amend is filed. *Moore v.*
26 *Indiana*, 999 F.2d 1125, 1131 (7th Cir. 1993). Other courts across the country have also reached
27 the same conclusion. *See Stafford v. Clark Const. Co.*, 901 F. Supp. 232 (E.D. Tex. 1995); *Heinly*
28 *v. Queen*, 146 F.R.D. 102, 104 (E.D. Pa. 1993).

The underlying rationale for these holdings is an inherent notion of fairness and justice. Those same principles are certainly embraced by Nevada courts and Nevada law. NRCP 15(a) allows amendment as of right within a certain time period and instructs courts to permit amendment “freely” where “justice so requires.” Furthermore, the Nevada Supreme Court has endorsed the view that “NRCP 15(a) requires courts to err on the side of caution and permit amendments that appear arguable or even borderline, because denial of a proposed pleading amendment amounts to denial of the opportunity to explore any potential merit it might have had.” *Gardner on Behalf of L.G. v. Eighth Judicial Dist. Court in & for County of Clark*, 133 Nev. 730, 732, 405 P.3d 651, 654 (2017) (quoting *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 292, 357 P.3d 966, 975 (Nev. App. 2015)). In fact, the Nevada Supreme Court has expanded on the foregoing principles¹⁸ even further than the foregoing cases, permitting a plaintiff to amend even though it filed the relevant motion *after* the statute of limitations had run. [I]n *Tehansky v. Wilson*, the Nevada Supreme Court allowed the plaintiff to amend to correct a non-jurisdictional and inadvertent defect in the complaint “in the interest of justice.” 83 Nev. 263, 264, 428 P.2d 375, 375 (1967) (quotation omitted).

In this case, Plaintiffs’ Motion for Leave to Amend was filed on December 21, 2020. A formal order granting that Motion was not filed until March 31, 2021. While the Court did issue a minute order on February 4, 2021, indicating it was granting the Motion for Leave to Amend, under Nevada law a minute order is not considered a true “order” and is not effective for “any purpose.” *Rust v. Clark County Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) (“The

¹⁸ The Nevada Supreme Court is clear that “good public policy dictates that cases be adjudicated on their merits.” *Scrimmer v. Eighth Jud. Dist. Ct.*, 116 Nev. 507, 516-17, 998 P.2d 1190, 1196 (2000) (quoting *Kahn v. Orme*, 108 Nev. 510, 516, 835 P.2d 790, 794. “It is the policy of this state that cases be heard on the merits, whenever possible.” *Schulman v. Eongberg-Whitney Elec.*, 98 Nev. 226, 645 P.2d 434 (1982); see also *Stoecklein v. Johnson Elec.*, 109 Nev. 268, 849 P.2d 305 (1993) (reaffirming this basic policy); *Kahn*, 108 Nev. 510, 835 P.2d 790 (defining the limits to the policy); *Yochum v. Davis*, 98 Nev. 484, 653 P.2d 1215 (1982); *Banks v. Heater*, 95 Nev. 610, 600 P.2d 245 (1979) (upholding trial court’s decision to set aside default judgment so case could be heard on its merits); *Hotel Last Frontier Corp. v. Frontier Properties*, 79 Nev. 150, 380 P.2d 293 (1963) (stating that “[i]n the normal course of events, justice is best served by such a policy”); *Hotels El Rancho v. Pray*, 64 Nev. 22, 176 P.2d 236 (1947) (“as far as possible, [courts] should lean toward a hearing of the case upon its merits”); *In re I McGregor*, 56 Nev. 407, 48 P.2d 418 (1935) (it is the policy of the law that cases should be disposed of on their merits whenever possible).

district court's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective for any purpose . . .”). As such, because the First Amended Complaint was filed on March 19, 2021, during the time in which the statute of limitations was tolled, Plaintiffs’ amended pleading is clearly timely. Moreover, even if Nguyen were to argue that the tolling analysis should only consider the February 4, 2021, date due to the minute order, Plaintiffs’ claims would still be timely. At the time this Court issued the minute order, Plaintiffs’ Motion for Leave to Amend had been pending before this Court for 46 days. Using the minute order date, the applicable statute of limitation would have been tolled for 46 days, and the First Amended Complaint was filed, as Nguyen alleges, only 14 days past his proffered deadline. Due to the tolling of the statute of limitation, Plaintiffs actually had until April 20, 2021, 46 days after March 5, 2021, to timely add these new claims.

2. **Numerous Courts Have Held that An Amended Complaint is Deemed Filed the Date the Motion to Amend is Filed.**

Next, an amended complaint is actually deemed filed at the time the plaintiff files its motion to amend. *See Nett v. Bellucci*, 437 Mass. 630, 643–44, 774 N.E.2d 130, 140 (2002) (“We adopt the more accurate formulation that the filing of the motion to amend actually commences the new action for these purposes, with the motion to amend ‘stand[ing] in the place of’ the amended complaint.”); *Greenfield Hill Invs., LLC v. Miller*, 2005 WL 827017, at *3 (R.I. Super. Apr. 8, 2005), *aff’d*, 934 A.2d 223 (R.I. 2007) (“[T]he amended complaint is deemed filed when the motion to amend is filed.”); *Toy v. Katz*, 961 P.2d 1021, 1037 (Ct. App. 1997), *disapproved of on other grounds by Sholem v. Gass in & for County of Maricopa*, 248 Ariz. 281 (2020) (filing motion to amend “constituted commencement of the action”); *Totura & Co. v. Williams*, 754 So. 2d 671, 679 (Fla. 2000) (action “deemed commenced” by filing motion to amend because motion “was sufficient to stand in place of an amended complaint”); *Mauney v. Morris*, 316 N.C. 67, 71, 340 S.E.2d 397 (1986) (filing of motion to amend “is sufficient to start the action”); *Frazier v. East Tenn. Baptist Hosp., Inc.*, 55 S.W.3d 925, 930 (Tenn. 2001) (motion “stands in the place of the actual amended complaint”); *Children's Store v. Cody Enters., Inc.*, 154 Vt. 634, 641, 580 A.2d 1206 (1990) (action “commenced” by filing motion to amend). Pursuant to the foregoing, the First

1 Amended Complaint was filed on December 21, 2020, *the date Plaintiffs filed their Motion for*
2 *Leave to Amend*. December 21, 2020 is well before the March 5, 2021 date that Nguyen proffers
3 as the final day to bring any claims subject to a two-year statute of limitation. Under the foregoing
4 analysis, Plaintiffs' claims are also clearly timely.

5 As set forth above, under established Nevada precedent, all applicable statutes of limitation
6 were tolled while Defendants played *hide the ball* from Plaintiffs. However, even if Defendants
7 had not caused such tolling to occur, the relevant governing law further provides that the applicable
8 statutes of limitation should be tolled when a motion to amend is filed prior to the expiration of
9 the applicable limitation period, and that amended complaints should be deemed filed on the date
10 the motion to amend is filed. Either way, Plaintiffs' claims are clearly timely.

11 **C. NGUYEN'S MOTION SHOULD BE DENIED UNDER THE *LAW OF THE***
12 ***CASE DOCTRINE*.**

13 Despite this Court ruling on the remaining issues raised in Nguyen's Motion just weeks
14 ago when considering Nguyen's Opposition to Plaintiffs Motion for Leave to Amend, Nguyen
15 regurgitated the same arguments in his instant Motion to Dismiss. The *law of the case* doctrine
16 exists to prevent the re-litigation of issues that have already been decided and to maintain
17 efficiency in litigation by preserving the resources of both the Courts and the parties. "One of the
18 principal purposes of the law of the case doctrine is to conserve judicial resources that would
19 otherwise be consumed by relitigating issues that have already been decided." *Rodriguez v. City*
20 *of Colton*, 631 F. App'x 474, 475 (9th Cir. 2016) (citing *Christianson v. Colt Indus. Operating*
21 *Corp.*, 486 U.S. 800, 815–16, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)). There is simply no
22 legitimate reason to submit the exact same arguments mere weeks after this Court already ruled
23 upon those issues.

24 There have been no developments in this case since the last time these arguments were
25 heard. Although written discovery has been propounded, no responses have been made and there
26 has been no change in the applicable law governing this Court's decision. The *law of the case*
27 doctrine applies whenever the **same** or higher court has previously decided a particular issue. *See*
28 *Lummi Indian Tribe*, 235 F.3d at 452 ("[A] court is generally precluded from reconsidering an

issue previously **decided by the same court**, or a higher court in the identical case.”) (emphasis added). In this case, the *law of the case* doctrine operates to bar Nguyen from asserting the same arguments made in two separate proceedings just weeks apart. Plaintiffs filed a Motion to Amend their pleading pursuant to NRCP 15. In response, Nguyen opposed the filing of Plaintiffs’ proposed amended complaint with specific arguments that this Court **just** rejected. Just 8 weeks later, Nguyen asks this Court to dismiss Plaintiff’s amended complaint for the same rejected reasons. Nguyen’s conduct is vexatious and wasteful. His Motion *and accompanying arguments* should be denied for the same reasons as they were just 8 weeks ago.

D. NGUYEN’S MOTION IS BARRED BY EDCR 2.24.

EDCR 2.24 prohibits the re-litigation of issues that have already been decided except in very specific circumstances. Much of Nguyen’s Motion is a copied and pasted restatement of the same exact arguments he made in his Opposition to Plaintiffs’ Motion for Leave to Amend. The Court rejected Nguyen’s arguments at that time, and Nguyen is barred from bringing those arguments again absent first obtaining leave of court via appropriate motion practice. The only proper way for Nguyen to have re-argued these same points would have been to file a motion for reconsideration or rehearing. Nguyen did not do this. Pursuant to EDCR 2.24(b), a party has fourteen (14) days after notice of entry of an order has been filed in which to request reconsideration or rehearing of the decided matter. More than fourteen days have passed since the Court’s Order Granting Plaintiffs’ Motion for Leave to Amend was filed and Notice of Entry was served, rendering Nguyen’s ability to seek such reconsideration untimely if he were to attempt to do so now. Even if Nguyen were to claim that his instant Motion should be considered a motion for reconsideration (which it should not), he fails to make any arguments or present any evidence that would render reconsideration proper. *See Masonry & Tile Contractors Ass’n of S. Nevada*, 113 Nev. at 741, 941 P.2d at 489 (holding that reconsideration is proper if substantially different evidence is subsequently produced or the prior holding was clearly erroneous).

Instead of availing himself of the proper means by which to ask this Court to revisit its previous rulings, Nguyen has simply regurgitated the same arguments under a different brief and forced Plaintiffs to waste their time responding to the previously rejected arguments once more.

1 While Plaintiffs do not wish to seek sanctions, Nguyen's conduct is clearly sanctionable under
2 EDCR 7.60(b)(3) as it "[s]o multiplies the proceedings in a case as to increase costs unreasonably
3 and vexatiously." Even if Nguyen were to claim that his Motion should be considered a motion
4 for reconsideration (which it should not), he fails to make any arguments or present any evidence
5 that would render reconsideration proper. *See Masonry & Tile Contractors Ass'n of S. Nevada*,
6 113 Nev. at 741, 941 P.2d at 489 (holding that reconsideration is proper if substantially different
7 evidence is subsequently produced or the prior holding was clearly erroneous). Such a baseless
8 regurgitation of previously rejected arguments should not be condoned by the Court, and Nguyen's
9 Motion should be denied for these reasons alone.

10 **E. FOR THE SECOND TIME, THE TRUST DID NOT BRING A WRONGFUL**
11 **DEATH CLAIM.**

12 For the second time in 8 weeks, Nguyen argues that the Stewart Family Trust (the "Trust")
13 cannot bring a wrongful death claim. This argument was *also* recently **and needlessly** addressed
14 and disposed of. In Nguyen's Opposition to Plaintiff's Motion for Leave to Amend, Nguyen
15 argued that the Trust lacked standing to bring a wrongful death claim. In response, Plaintiffs
16 pointed out that the Trust was not listed as a plaintiff to that claim, rendering that argument moot
17 and frivolous. Nevertheless, despite Plaintiffs explicitly pointing this out to Nguyen just weeks
18 ago, he raises the same exact argument once more in his instant Motion. The remaining Plaintiffs
19 are proper claimants by the express text of NRS § 41.085, which includes heirs and the estate of
20 the decedent. *See* NRS § 41.085 ("the heirs of the decedent and the personal representatives of
21 the decedent may each maintain an action for damages against the person who caused the death. .
22 . .").

23 Once again, the Trust was **not** included as a plaintiff on the wrongful death claim in the
24 proposed First Amended Complaint.¹⁹ Decedent's Will is a pour-over Will as it bequeaths his
25 estate to the Trust. The individual Plaintiffs, in turn, are the beneficiaries of the Trust. The Trust
26 is simply listed in this action as the Trust is the beneficiary of the Estate due to the Decedent's

27 _____
28 ¹⁹ *See* Plaintiffs' First Amended Complaint on file herein at 8:19-20.

1 pour-over Will. Including the Trust as a plaintiff was/is merely a formality. Moreover, the issue
2 is irrelevant and moot as including the Trust does not permit a double recovery. Notwithstanding
3 the same, the First Amended Complaint does not list the Trust as a plaintiff under the wrongful
4 death claim. Nguyen's argument is therefore erroneous as it is predicated upon a false foundation,
5 *i.e.*, that the Trust is seeking relief for wrongful death.

6 **F. NGUYEN'S REGURGITATED ONE-YEAR LIMITATION**
7 **(PROFESSIONAL NEGLIGENCE) ARGUMENT IS ERROENOUS.**

8 Nguyen's remaining argument is that the newly pled claims are subject to the one-year
9 statute of limitations set forth by NRS § 41A.097. This argument was also recently made and
10 rejected by this Court in the previous amendment proceedings. It is clear that Nguyen, once again,
11 conflates the medical malpractice statute with Nevada law concerning wrongful death and
12 negligence claims. The limitation period set forth in NRS § 41A.097 applies *only* to claims of
13 professional negligence or other forms of medical malpractice. Chapter 41A is itself titled
14 "Actions for Professional Negligence." Plaintiffs' other claims of negligence, negligence *per se*
15 and wrongful death are based on statutory law and theories of simple negligence in accordance
16 with the decisions reached in several recent Nevada Supreme Court decisions. *See Estate of Curtis*
17 *v. S. Las Vegas Med. Inv'rs, LLC*, 136 Nev. Adv. Op. 39, 466 P.3d 1263, 1267 (2020); *see also*
18 *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 644, 403 P.3d 1280, 1286 (2017).
19 In those cases, the Nevada Supreme Court found that claims against medical professionals whose
20 negligence was obvious, basic, and rooted in common knowledge, could be pursued as simple
21 negligence claims, rather than professional negligence. That is exactly what Plaintiffs have alleged
22 in this case:

23 42. Defendant's acts in failing to provide Decedent his known and necessary
24 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).

25 43. Defendant's acts in absent mindedly discontinuing one appropriate
26 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).

27 44. "Common knowledge" establishes that Defendants' acts and omissions
28 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).²⁰

For purposes of this proceeding, Plaintiffs' foregoing allegations must be accepted as true. *Simpson*, 113 Nev. at 190, 929 P.2d at 967.

Plaintiffs' wrongful death, negligence and negligence *per se* claims are being asserted alongside the medical malpractice claim as it has yet to be determined whether the Defendants' negligence was professional negligence or simple negligence. Such alternative pleading is expressly permitted under NRCP 8(d)(2), which states, in relevant part: "[a] party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones." This case has just begun. Nguyen's second attempt at barring such alternative pleading **within 8 weeks** is beyond premature. Even the cases cited by Nguyen in his Motion supports this: "[a] claim is grounded in professional malpractice and must adhere to NRS 41A.071 where the facts underlying the claim involve treatment or judgment and the standards of care pertaining to the medical issue **require explanation to the jury from a medical expert at trial.**" *Szymborski*, 133 Nev. at 648, 403 P.3d at 1288 (emphasis added). If, instead, "the reasonableness of the health care provider's actions can be evaluated by jurors on the basis of their common knowledge and experience, then the claim is likely based in ordinary negligence." *Id.* at 642, 403 P.3d at 1285.

Despite Defendants' status as medical professionals, Plaintiffs have alleged that their conduct can be characterized as simple negligence as is permitted by *Szymborski* and *Curtis*. Further, discovery has barely begun in this case rendering any determination concerning the ultimate facts wholly premature. Significantly, Nguyen asks this Court to ignore the applicable

²⁰ See Plaintiffs' March 19, 2021, First Amended Complaint on file herein at ¶¶ 42-45.

standard of review. Nguyen is arguing that the allegations in *Plaintiffs'* First Amended Complaint should be construed in the manner that Nguyen wishes, rather than in a light most favorable to Plaintiffs. *See Simpson*, 113 Nev. at 190, 929 P.2d at 967. Plaintiffs have alternatively alleged that Nguyen engaged in simple negligence, rather than professional negligence, and that allegation must be accepted as true. *See Szymborski*, 133 Nev. at 644, 403 P.3d at 1286 ("We note that there are allegations in Szymborski's first claim that could involve medical diagnosis, treatment, and judgment. Regardless, at this stage of the proceedings this court must determine whether there is any set of facts that, if true, would entitle Szymborski to relief and not whether there is a set of facts that would not provide Szymborski relief."). Nguyen also makes the argument that Plaintiffs have conceded that they are claiming only professional negligence by attaching a NRS § 41A.071 affidavit to their Complaint. This is completely false. As they are expressly permitted to do by Rule 8, Plaintiffs are alleging alternative theories of relief (professional negligence, negligence *per se*, wrongful death and simple negligence), and the fact that an affidavit was submitted to support the professional negligence claim does not void Plaintiffs' remaining claims for relief.

Accordingly, the applicable statute of limitations for Plaintiffs' negligence, negligence *per se* and wrongful death claims are contained in NRS § 11.190(4)(e). 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, the negligence, negligence *per se* and wrongful death claims are subject to the same two-year statute of limitation. *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."). Because the statute of limitation is two years and had not expired in this case, **all** of Plaintiffs' claims were timely.

G. EVEN IF NGUYEN WERE CORRECT AND A ONE-YEAR LIMITATION PERIOD APPLIED TO ALL OF PLAINTIFFS' CLAIMS, AT LEAST ONE HEIR'S CLAIMS WOULD RELATE BACK TO THE INITIAL FILING.

While Plaintiffs maintain that they have properly asserted four separate theories of relief, even if the Court were inclined to accept Morneault's position, at least one of the Plaintiff heirs'

professional negligence, wrongful death, and simple negligence claims would relate back to the initial filing date and therefore be timely. *Time-barred* claims asserted by new plaintiffs relate back to the original complaint unless the amended claims “seek[] 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)). As this Court is aware, this lawsuit was initially filed by Connie Stewart, Decedent’s surviving wife and heir. Connie initially filed all of the same claims currently being asserted by Decedent’s other heirs. Because substituting one heir in to prosecute the same professional negligence, wrongful death, and simple negligence claims previously asserted by a different heir will not “enforce an independent right or impose greater liability against the defendants,” the claims of at least one heir would all relate back and be timely. *See id.*

IV. CONCLUSION.

Based on the foregoing, Plaintiffs’ respectively request that the arguments set forth in Morneault’s instant Motion, *once again*, be denied for the second time in 8 weeks. As it relates to Nguyen’s *new* limitation argument,

DATED this 19th day of April, 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 Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANT MINH NGUYEN, M.D.'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** was submitted electronically for filing and service with the Eighth Judicial District Court on the 19th day of April, 2021. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:²¹

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

²¹ 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

DECLARATION OF PATRICIA ANN ADAMS

Patricia Ann Adams, declares as follows:

1. I am over the age of 18 years and have personal knowledge of the facts stated herein, except for those stated upon information and belief, and as to those, I believe them to be true. I am competent to testify as to the facts stated herein in a court of law and will so testify if called upon.

2. I am the Special Administrator of the Estate of Gary Stewart and the daughter of Gary Stewart ("Stewart").

3. On or around February 13, 2019, my father was admitted to Encompass Health Rehabilitation Hospital of Henderson ("Encompass") following a minor back procedure in order to receive more physical therapy than could be offered at home.

4. Stewart was 80 years old with a seizure history when he was admitted to Encompass.

5. Dr. Minh Nguyen ("Dr. Nguyen") and Emil Morneault, RPH ("Morneault") were my father's treating physician and pharmacist at Encompass.

6. On February 21, 2019, while being treated at Encompass, my father suffered a seizure and was transported to the emergency room of the St. Rose Dominican Hospital.

7. My father passed away just a couple weeks later on March 5, 2019.

8. On or about February 21, 2019, I received a telephone call from a representative of Encompass who advised me that my father had suffered a seizure and was being rushed to the hospital. The representative from Encompass could not answer my questions as to how the seizure occurred and stated that the doctor would be giving me a call.

9. On the same date, Dr. Nguyen called and advised me that he would personally perform an investigation into what had transpired and thereafter provide my family and I with an explanation. Despite my repeated follow-up calls to Dr. Nguyen, Dr. Nguyen refused to take my calls and refused to call me back.

///

10. Moreover, when my brother Gary visited Encompass to collect my father's belongings, nobody from Encompass would communicate with him at all. I demanded my father's medical records but Encompass refused to provide me or anybody else in the family with the same.

11. In short, Encompass and Defendants refused to provide me or my family members (Plaintiffs) with any information concerning the cause of my father's death and further refused to provide us with his medical records.

12. I am not a doctor or medical professional.

13. None of the other named Plaintiffs are doctors or medical professionals.

14. My family then immediately hired an attorney so we could obtain my father's medical records. My mother retained attorney Doug Cohen, Esq.

15. Encompass continued to refuse to provide my father's medical records forcing our attorney to seek a court order. We obtained an order from the court directing Encompass to produce my father's medical records on June 26, 2019.

16. On July 17, 2019, Mr. Cohen sent another request to Encompass for the medical records along with the court order.

17. We did not receive a complete set of my father's medical records until approximately July 25, 2019.

18. Mr. Cohen then hired a medical professional, Diana Koin, MD, to review my father's medical records.

19. On February 28, 2020, Dr. Koin completed a Declaration wherein she opined that Defendants' committed negligence and that their misconduct and negligence caused my father's death.

20. Therefore, my family (Plaintiffs in this matter) did not learn of Defendants' reckless and negligent conduct until approximately February 28, 2020.

///

///

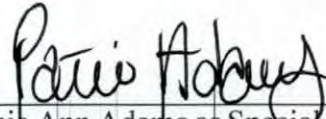
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1 21. Prior to February 28, 2020, I did not have an understanding that a legitimate claim
2 for medical malpractice existed.

3 22. Encompass and Defendants kept their misconduct and negligence secret from us
4 for nearly one year.

5 Pursuant to NRS § 53.045, I declare under penalty of perjury under the laws of the State of
6 Nevada that the foregoing is true and correct.

7 DATED this 19 day of April, 2021.

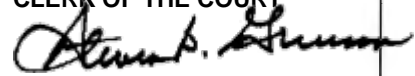


Patricia Ann Adams as Special Administrator
of the Estate of Gary Stewart

Exhibit 2

ORIGINAL

Electronically Filed
6/26/2019 4:35 PM
Steven D. Grierson
CLERK OF THE COURT



1 **ORDR**
2 **WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP.**
3 c/o DOUGLAS COHEN, ESQ.
4 Nevada Bar No.: 1214
5 3556 E. Russell Road, Second Floor
6 Las Vegas, Nevada 89120
7 (702) 341-5200/Fax: (702) 341-5300
8 Dcohen@wrslawyers.com

9 *Attorney for Petitioner, Patricia Ann Adams*

10 **EIGHTH JUDICIAL DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 In the Matter of the Estate of:

13 **GARY STEWART,**

14 Deceased.

Case No.: P-19-099521-E

Dept. No.: PC-1

15 **EX PARTE ORDER TO RELEASE MEDICAL RECORDS**

16 The Court, upon reading the verified ex-parte petition of Patricia Ann Adams, and good
17 cause appearing therefore:

18 **IT IS HEREBY ORDERED** that the following officers of

19 *(List names & addresses of all medical facilities and doctors from whom you are seeking records).*

<u>Medical Facility</u>	<u>Address</u>
Encompass Health Rehabilitation Hospital of Henderson	10301 Jeffreys Street, Henderson, NV 89052
Dignity Health- St. Rose Dominican Siena Campus	3001 St. Rose Pkwy., Henderson, NV 89052
Jacobs Medical Associates	1389 Galleria Drive, Suite 100, Henderson, NV 89014
Nevada Neurological Care Edgar Evangelista M.D.	6040 Badura Avenue, Suite 120, Las Vegas, NV 89118
Synergy Physical Therapy at Horizon Ridge	1710 W. Horizon Ridge Pkwy., #110, Henderson, NV 89012
Sunrise Hospital and Medical Center	3186 S. Maryland Pkwy., LV, NV 89109

20 ///

21 ///

1 shall release Decedent's medical records to Patricia Ann Adams of 1633 Cowboy Chaps Place,
2 Henderson, Nevada 89002.

3 DATED this 25 day of June, 2019.

4
5 
6 DISTRICT COURT JUDGE 

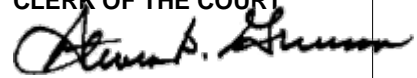
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16
17
18 Respectfully submitted,

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

20 
21 By: _____
22 c/o Douglas Cohen, Esq.
23 Nevada Bar No.: 1214
24 3556 E. Russell Road, Second Floor
25 Las Vegas, Nevada 89120
26 (702) 341-5200/Fax: (702) 341-5300
27 Dcohen@wrslawyers.com

28 *Attorney for Petitioner, Patricia Ann Adams*

EXHIBIT 22



1 **RIS**

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

4 cmichel@wwhgd.com

5 Marjan Hajimirzaee, Esq.
6 Nevada Bar No. 11984

7 mhajimirzaee@wwhgd.com

8 Josephine E. Sansone, Esq.
9 Nevada Bar No. 14209

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11 WEINBERG, WHEELER, HUDGINS,
12 GUNN & DIAL, LLC

13 6385 S. Rainbow Boulevard, Suite 400
14 Las Vegas, Nevada 89118

15 Telephone: (702) 938-3838

16 Facsimile: (702) 938-3864

17 *Attorneys for Defendant Emil Morneault, RPH*

18 **DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

20 PATRICIA ANN ADAMS, individually, in her
21 capacity as Trustee of THE STEWART
22 FAMILY TRUST dated January 31, 2007, in
23 her capacity as Special Administrator of the
24 ESTATE OF CONNIE STEWART and in her
25 capacity as Special Administrator of the
26 ESTATE OF GARY STEWART; GARY
27 LINCK STEWART, JR., an individual; MARY
28 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

**REPLY IN SUPPORT OF DEFENDANT
EMIL MORNEAULT, RPH'S MOTION
TO DISMISS IN PART PLAINTIFFS'
FIRST AMENDED COMPLAINT**

**Hearing Date: May 4, 2021
Hearing Time: 9:00 a.m.**

///

///

///





1 Defendant Emil Morneault, RPH (“Morneault”), by and through his attorneys Carol P.
2 Michel, Esq. and Marjan Hajimirzaee, Esq., of the law firm of Weinberg Wheeler Hudgins Gunn
3 & Dial, LLC, hereby submits his Reply in support of his Motion to Dismiss In Part Plaintiffs’
4 First Amended Complaint pursuant to NRCP 12(b)(5). This Reply is based on the following
5 Memorandum of Points and Authorities, all pleading and filings of record, and any oral argument
6 the Court may allow.

7
8 DATED this 26th day of April, 2021.

9
10 /s/ Carol P. Michel

11 Carol P. Michel, Esq.

12 Marjan Hajimirzaee, Esq.

13 Josephine E. Sansone, Esq.

14 WEINBERG, WHEELER, HUDGINS,

15 GUNN & DIAL, LLC

16 6385 S. Rainbow Blvd., Suite 400

17 Las Vegas, NV 89118

18 *Attorneys for Defendant Emil Morneault, RPH*



MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs continue to attempt to circumvent the statute of limitations for their professional negligence claim by pleading it as ordinary negligence and wrongful death. All of Plaintiffs' claims arise from the rendering of professional services which required the exercise of medical judgment (i.e. the alleged failure to continue to prescribe and the wrongful discontinuance of decedent Gary Stewart's ("Decedent") seizure medication). Accordingly, the one-year statute of limitations pursuant to NRS 41A.097 applies to Plaintiffs' action and the First Amended Complaint is thus time barred and otherwise does not state a claim for relief.

Additionally, Plaintiffs' arguments regarding motions to reconsider and the law of the case doctrine are a red herring. The standard and analysis on a motion to dismiss is different than that on a motion to amend. The Court did not have to analyze the substance of Plaintiffs' allegations on the motion to amend. Rather, the Court analyzed whether the amendment was proposed for an improper purpose and whether it would cause prejudice. Simply because the Motion to Amend was granted does not mean the claims are valid.

ARGUMENT

I. PLAINTIFFS' NEGLIGENCE CLAIMS ARE BARRED BY THE ONE-YEAR STATUTE OF LIMITATIONS PURSUANT TO NRS 41A.097.

When analyzing the Complaint before this Court, Plaintiffs cannot escape the reality of the nature of the allegations. Plaintiffs' claims do not sound in ordinary negligence as they would like this Court to believe. Rather, these claims are for professional negligence as defined in Chapter 41A and are therefore time-barred pursuant to NRS 41A.097.

In determining which statute of limitations correctly applies to any cause of action, the Nevada Supreme Court has held it is the nature of the cause of action which governs, not how it is styled in the complaint. *Meadows v. Sheldon Pollack Corp.*, 92 Nev. 636, 556 P.2d 546 (1976) (suit to recover personal injury damages sustained in fall of elevator against the corporation who installed the elevator, sounded in tort, not contract, because "the gravamen of his cause of action is in tort to recover damages for personal injuries"). Plaintiffs fail to rebut that the "gravamen"



of their claims are actually one for professional negligence.

A. All of Plaintiffs' Claims Directly Involve the Rendering of Medical Services

Plaintiffs heavily rely on the *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC* in an attempt to show that separate claims for ordinary negligence and professional negligence can be stated independently in a complaint. 136 Nev. Adv. Op. 39, 466 P.3d 1263 (2020). While that proposition is generally true, the Court must still analyze whether the gravamen of Plaintiffs' claims are based upon professional negligence.

In *Curtis*, the Nevada Supreme Court held allegations that a nurse administered morphine to a resident when in fact the morphine had been prescribed for another patient was a claim for ordinary, rather than professional negligence. 136 Nev. Adv. Op. 39, 466 P.3d 1263 (2020). The Supreme Court determined that while “administering medication constitutes medical treatment,” an allegation that the medication was administered to the wrong patient is an allegation of ordinary negligence that requires no expert testimony. *Id.* at 1269 (emphasis added). Specifically, the Court found “the prescribing physician made the medical decision that required professional judgment as to what medication [decedent] required,” but [the nurse’s] administration of another patient’s prescribed medication did not require any similar judgment call. *Id.* (emphasis added).

Here, Plaintiffs’ entire First Amended Complaint revolves around Defendants’ purported failure to continue to prescribe and the wrongful discontinuance Decedent’s seizure medications, which required the exercise of medical judgment:

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...was **discontinued** by Nguyen on February 16, 2019.

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

See First Amended Complaint at p. 35-36 (emphasis added); *see also* Opp. 7:16-26. The issue here is whether Defendants were negligent in failing to prescribe two medications and discontinuing one of Decedent’s medications. These are allegations of professional negligence as defined in Chapter 41A and consistent with the Supreme Court’s ruling in *Curtis* because they



involved a medical decision that required professional judgment and are therefore time-barred pursuant to NRS 41A.097.

B. *Szyborski v. Spring Mountain Treatment Center* is Also Distinguishable from this Case

Plaintiffs also rely on *Szyborski v. Spring Mountain Treatment Center*. 133 Nev. 638, 403 P.3d 1280 (2017). The facts and circumstances of the conduct in *Szyborski* are remarkably different than the allegations in the present case. In *Szyborski*, the complaint alleged various claims, including ordinary negligence, relating to a mental health facility’s discharge of the plaintiff’s son, who vandalized the plaintiff’s home upon his release. *Id.* The Nevada Supreme Court initially noted whether a claim is classified as professional negligence depends on whether the allegations “involve medical diagnosis, judgment, or treatment.” *Id.* at 641-642, 1284. Any negligence claim that a jury cannot evaluate without a medical expert’s assistance in describing the standard of care is one for medical malpractice. *Id.* “When a plaintiff’s claim is for injuries resulting from negligent medical treatment, the claim sounds in medical malpractice. When a plaintiff’s claim is for injuries resulting from negligent acts that did not affect the medical treatment of a patient, the claim sounds in ordinary negligence.” *Id.* (internal citations omitted). If the duty owed to the plaintiff by the defendant arises from a physician-patient relationship or is related to medical treatment, the action sounds in medical malpractice as opposed to ordinary negligence. *Id.* (internal citations omitted).

Szyborski’s negligence claim surrounded the discharging of the plaintiff’s son from the facility without first informing the plaintiff. *Id.* at 644, 1285-1286. While the Court recognized there were facts which *could* involve medical diagnosis, treatment, and judgment, it ultimately found the allegations were based on nonmedical functions, including failing to verify whether or not the plaintiff’s son had his own apartment, arranging for the son’s transport to his father’s house but no further transport, and failing to notify the plaintiff of this plan despite knowledge of their tumultuous relationship. *Id.*

The allegations in *Szyborski*’s negligence claim are in stark contrast with the allegations of Plaintiffs’ claims here. Plaintiffs allege “Defendants’ wrongful and/or neglectful



1 acts caused Decedent's death. *See* FAC ¶ 71. The wrong allegedly committed by Defendants'
2 was the purported failure to prescribe two medications and discontinuation of another
3 medication. *See* FAC ¶¶ 35-46. Whether to prescribe and discontinue a medication clearly
4 involves the exercise of medical judgment or treatment as these are medical duties related to the
5 physician-patient relationship. *Szyborski*, 133 Nev. 638, 642, 403 P.3d 1280, 1284.

6 Additionally, the sole basis of the district court's dismissal of *Szyborski*'s Complaint
7 was the failure to attach a medical expert affidavit. Here, Defendant's Motion to Dismiss is
8 based on the one year statute of limitations for actions for professional negligence. *See* NRS
9 41A.097. As such, Plaintiffs' claims for ordinary negligence, negligence per se and wrongful
10 death sound in professional negligence, as they involve medical judgment or treatment and are
11 thus barred by the one year statute of limitations.

12 **II. PLAINTIFFS' NEGLIGENCE AND NEGLIGENCE PER SE CAUSES OF**
13 **ACTION ARE BASED ON THE SAME ALLEGATIONS.**

14 In the General Allegations of their First Amended Complaint, Plaintiffs claim that
15 "Defendants' negligent medication errors violated State and/or Federal Statutes and these errors
16 are negligence per se." *Id.* at ¶ 50. Further, they claim that the alleged failure to prescribe two
17 medications and the alleged discontinuation of one medication resulted in Decedent's death. *Id.*
18 at ¶¶ 35-46. These allegations are all repeated and realleged in Plaintiffs' First and Fourth
19 Claims for Relief for Negligence and Negligence Per Se, respectively. *Id.* at ¶¶ 54, 77. Yet
20 Plaintiffs boldly argue that "the allegations underlying the negligence and negligence *per se*
21 causes of actions are different[.]" *See* Opposition, 9:16-17. A plain reading of Plaintiffs' First
22 Amended Complaint proves otherwise.

23 Additionally, Plaintiffs argue that they are permitted to argue alternative theories of
24 liability under NRCp 8(d)(2). However, the negligence per se "alternative theory of liability"
25 constitutes duplicative and unnecessary verbiage that adds nothing of substance to either the First
26 Claim for Relief alleging simple negligence or the Complaint's general prayer of damages. The
27 negligence per se claim is legally subsumed by the negligence claim. Put another way, the First
28 Claim for Relief already impliedly asserts any legal theory of negligence that might apply to the



facts of this action. For these reasons, Plaintiffs' negligence per se claim should be dismissed.

III. THE NEW PLAINTIFFS' PROFESSIONAL NEGLIGENCE CLAIM DOES NOT RELATE BACK TO THE FILING OF THE ORIGINAL COMPLAINT

Plaintiffs' citation to a single California case regarding the relation-back doctrine is bewildering because the California Court of Appeal in *San Diego Gas & Elec. Co. v. Superior Court* prohibited the exact thing Plaintiffs are attempting to do here. 146 Cal.App.4th 1545, 53 Cal. Rptr. 3d 722 (2007), as modified on denial of reh'g (Feb. 21, 2007). In *San Diego Gas & Elec. Co.*, relatives of soldiers who were killed in a helicopter accident brought suit, alleging various survivorship and wrongful death claims. On the eve of trial, the plaintiffs sought to file an amended complaint adding wrongful death claims by the widow of one of the soldiers, who had not joined earlier arguing that the claim was not time barred because it related back to the original complaint. The Court of Appeal held that relation-back doctrine did not apply to save claims of the decedent's widow after the statute of limitations had expired. *Id.* The Court determined that "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." *Id.* at 1550. Similarly, here, the relation-back doctrine does not save the untimely claims of the new Plaintiffs as they seek to enforce an independent right and to impose greater liability against Defendant. *Id.* As such, Defendant respectfully requests that his Motion to Dismiss be granted.

IV. PLAINTIFFS' MERITLESS ARGUMENTS REGARDING THE ORDER ON THE MOTION TO AMEND SHOULD BE DISREGARDED.

Plaintiffs devote a large part of their Opposition discussing the principles of the law of the case doctrine and motions to reconsider pursuant to EDCR 2.24, which are completely irrelevant here. Plaintiffs' Motion to Amend was based on Rule 25 of the Nevada Rules of Civil Procedure. Based on Plaintiffs' own papers, "amendments to pleadings should be granted liberally unless there is an improper purpose or unfair prejudice." *See* Plaintiff's Motion for Leave to Amend Complaint, 2:27-28. Accordingly, on the Motion to Amend the Court was only required to determine 1) whether there was a declared reason of improper purpose for the



1 amendment, and 2) whether the amendment would cause unfair prejudice. *Id.* at 3:18-6:23. On
2 the Motion to Amend the Court did not have to consider whether the allegations of the proposed
3 amendment involved allegations of medical judgment. Additionally, the Court decided the
4 Motion to Amend in-chambers without argument from counsel.

5 As Plaintiffs point out in their Opposition, the dismissal standard under NRCP 12(b)(5) is
6 very different. *See* Opposition 4:5-16. On a motion to dismiss, “[t]he Court must determine
7 whether the Complaint sets forth allegations sufficient to ‘give fair notice of the nature and basis
8 of a legally sufficient claim and the relief requested.’” *Id.* at 4:16-26 (internal citations omitted).
9 This requires the Court to determine whether Plaintiffs’ claims are time barred, which is a
10 completely different analysis. As such, Plaintiffs’ arguments regarding the law of the case
11 doctrine and motions to reconsider simply do not apply to Defendant’s Motion to Dismiss.
12 Plaintiffs’ attempt to distract from the substantive law addressing their defective claims should
13 not be countenanced.

14 CONCLUSION

15 Based on the foregoing, Defendant respectfully requests that his Motion to Dismiss be
16 granted. The only surviving claims should be those asserted by and on behalf of Connie Stewart
17 for professional negligence as asserted in the original Complaint.

18
19 DATED this 26th day of April, 2021.

20 /s/ Carol P. Michel

21 Carol P. Michel, Esq.

22 Marjan Hajimirzaee, Esq.

23 Josephine E. Sansone, Esq.

WEINBERG, WHEELER, HUDGINS,

GUNN & DIAL, LLC

6385 S. Rainbow Blvd., Suite 400

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Attorneys for Defendant Emil Morneault, RPH



CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of April, 2021, a true and correct copy of the foregoing **REPLY IN SUPPORT OF DEFENDANT EMIL MORNEAULT, RPH'S MOTION TO DISMISS IN PART PLAINTIFFS' FIRST AMENDED 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:

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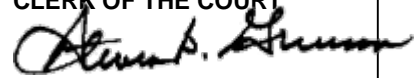
Attorneys for Defendant Minh Nguyen, M.D.

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

/s/ Kelly L. Pierce

An employee of WEINBERG, WHEELER
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EXHIBIT 23



1 **JOIN**
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13 *Attorneys for Defendant Minh Nguyen, M.D.*

8 DISTRICT COURT
9
10 CLARK COUNTY, NEVADA

11 PATRICIA ANN ADAMS, individually, in
12 her capacity as Trustee of THE STEWART
13 FAMILY TRUST dated January 31, 2007, in
14 her capacity as Special Administrator of the
15 ESTATE OF CONNIE STEWART and in her
16 capacity as Special Administrator of the
17 ESTATE OF GARY STEWART; GARY
18 LINCK STEWART, JR., an individual;
19 MARY KAY FALLON, an individual;
20 ELIZABETH A. HODGE, an individual,

21 Plaintiff,

22 vs.

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

26 Defendants.

Case No.: A-20-811421-C
Dept. No.: 3

**DEFENDANT MINH NGUYEN, M.D.'S
JOINDER TO REPLY IN SUPPORT OF
DEFENDANT EMIL MORNEAULT,
RPH'S MOTION TO DISMISS IN PART
PLAINTIFFS' FIRST AMENDED
COMPLAINT**

27 Defendant, MINH NGUYEN, M.D., by and through his attorneys, LEWIS BRISBOIS
28 BISGAARD & SMITH, LLP, hereby joins the Reply in Support of Defendant Emil Morneault,
RPH's Motion to Dismiss in Part Plaintiffs' First Amended Complaint ("Reply"), entered on the
Court's docket on April 26, 2021.

...

...

MINH NGUYEN, M.D. hereby joins and incorporates the arguments set forth in said Reply as though fully set forth herein.

DATED this 27th day of April, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Erin E. Jordan

S. BRENT VOGEL

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1 **CERTIFICATE OF SERVICE**

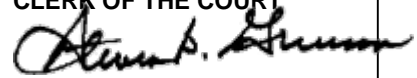
2 I hereby certify that on this 27th day of April, 2021, a true and correct copy of
3 **DEFENDANT MINH NGUYEN, M.D.'S JOINDER TO REPLY IN SUPPORT OF**
4 **DEFENDANT EMIL MORNEAULT, RPH'S MOTION TO DISMISS IN PART**
5 **PLAINTIFFS' FIRST AMENDED COMPLAINT** was served by electronically filing with the
6 Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-
7 address on record, who have agreed to receive electronic service in this action.

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By /s/ Elsa Amoroso
Elsa Amoroso, an Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

EXHIBIT 24



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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.: 3

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

**May 4, 2021
9:00 a.m.**

Defendant MINH NGUYEN M.D., by and through his attorneys of record, S. Brent Vogel,
Esq. and Erin E. Jordan, Esq. of LEWIS BRISBOIS BISGAARD & SMITH LLP, hereby files this
Reply in Support of Motion to Dismiss First Amended Complaint.

...

...

...

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 27th day of April, 2021.

4 LEWIS BRISBOIS BISGAARD & SMITH LLP

5
6 By /s/ Erin E. Jordan

7 S. BRENT VOGEL

8 Nevada Bar No. 6858

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

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. ARGUMENT**

17 Dr. Nguyen filed a Partial Motion to Dismiss seeking dismissal of time-barred claims by
18 new Plaintiffs Gary Stewart, Jr., Patricia Adams, Mary Kay Fallon, Elizabeth Hodge, the Estate of
19 Gary Stewart and the Stewart Family Trust pursuant to NRCP 12(b)(5) and NRS 41A.097.

20 This wrongful death action was first filed by Gary Stewart's wife, Connie Stewart, who
21 filed an individual heir wrongful death claim only. Mrs. Stewart has since passed away, and the
22 Plaintiff was changed to Patricia Adams on behalf of Connie Stewart's Estate. The caption was
23 changed by agreement of all the parties after Connie Stewart passed away. Thus, prior to the
24 filing of the First Amended Complaint, this case contained only Connie Stewart's individual heir
25 wrongful death claim brought as a survival claim. Now that the First Amended Complaint has
26 been filed, all claims except for Connie Stewart's heir claim brought as a survival action, should
27 be dismissed pursuant to the NRCP 12 Motion to Dismiss standard.

28 Plaintiffs filed an Opposition to Dr. Nguyen's Partial Motion to Dismiss in which they
made the following arguments: 1) Plaintiffs' claims did not accrue until an expert opined that Dr.
Nguyen was allegedly negligent on February 28, 2020; 2) Plaintiffs' claims are subject to a two
year statute of limitations; 3) the two year statute of limitations was tolled when the Motion to

1 Amend was filed; and 4) the law of the case doctrine warrants the denial of the Partial Motion to
2 Dismiss.

3 For the reasons set forth below, the Plaintiffs have failed to provide this Court with any
4 reason to deny Dr. Nguyen's Partial Motion to Dismiss.

5 **a. These Issues are Before the Court for the First Time**

6 The Plaintiffs' arguments regarding motions for reconsideration and the law of the case are
7 not applicable to the motion presently before the Court. The Plaintiffs' Motion to Amend was
8 decided pursuant to NRCp 15 and this Motion is brought pursuant to NRS 41A.097 and NRCp
9 12(b)(5). The Motion to Amend was decided by this Court on its chambers calendar, and the only
10 finding by this Court was that there was good cause to allow leave to amend the Complaint. The
11 Court did not address, nor rule upon, whether the claims were timely filed. The ruling on the
12 Motion to Amend also did not address the NRCp 12(b)(5) standard for failure to state a claim.

13 02/04/2021 3:00 AM

14 - Plaintiff's Motion for Leave to Amend Complaint came before this Court on the February 4, 2021 Chamber Calendar. The Court also reviewed Defendant
15 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

16 Additionally, Dr. Nguyen joined co-Defendant Morneault's Reply in Support of Motion to
17 Dismiss and hereby incorporates by reference his additional arguments regarding law of the case
18 and motions for reconsideration.

19 Dr. Nguyen's Partial Motion to Dismiss is not a motion for reconsideration and it is not
20 filed in violation of the law of the case doctrine as it presents issues that have not yet been decided
21 by this Court.

22 **b. Accrual of Professional Negligence Wrongful Death Claims**

23 Plaintiffs contend that their wrongful death claims did not accrue on the date of Gary
24 Stewart's death, March 5, 2019. Opposition, p. 5. They contend that their claims accrued on
25 either the day they obtained the medical records or the day that their expert opined that there was a
26 breach of the standard of care causing Mr. Stewart's death. Plaintiffs seem to be unfamiliar with
27 the well-established standard in Nevada professional negligence law that the statute of limitations
28 is not tolled until an expert affidavit is obtained. Nor is it tolled until medical records are received.

1 On page six of their opposition, Plaintiffs list eight arguments that must be accepted in order for
2 their claims to be found to be timely filed. Plaintiffs chose not to file their own wrongful death
3 claims or on behalf of the Estate of Gary Stewart within a year of his death. Their legal
4 gymnastics do not change the straightforward analysis that their claims are time-barred. And,
5 while Plaintiffs have changed attorneys since the original Complaint was filed, that does not
6 excuse their untimely filing or toll the statute of limitations.

7 Plaintiffs argue tolling in their Opposition, however, they do not plead it in their Amended
8 Complaint, as required. Therefore, that argument should not be considered by this Court.
9 Plaintiffs' are bound by the one year inquiry notice statute of limitations just like every other
10 professional negligence Plaintiff. The inquiry notice standard for the one year statute of
11 limitations pursuant to NRS 41A.097 is black letter law, although Plaintiffs seem to be unaware of
12 it. They even admit they had inquiry notice by demanding an investigation and explanation.
13 Opposition, p. 7.

14 Plaintiffs also go on a lengthy tangent in their Opposition regarding the general discovery
15 rule for statutes of limitations. However, the standards for professional negligence cases are
16 specific and tailored to these types of cases. Plaintiffs fail to mention *any* of the key cases'
17 holdings regarding this issue in their Opposition. The one year discovery statute of limitations
18 begins to run when the Plaintiff is on inquiry notice of his or her claim against the Defendant.
19 *Massey v. Litton*, 99 Nev. 723, (Nev. 1983) ("This statute of limitations begins to run when the
20 patient has before him facts which would put a **reasonable person** on inquiry notice of his
21 possible cause of action, whether or not it has occurred to the particular patient to seek further
22 medical advice; **the focus is on the patient's knowledge of or access to facts rather than on his**
23 **discovery of legal theories.**") (emphasis added). The Plaintiff only needs to be on notice that he
24 or she may want to investigate whether they have a claim for professional negligence for the one
25 year statute of limitations to begin to run. The Plaintiff does not need to have developed legal
26 theories or to have investigated their medical care fully for the one year statute of limitations to
27 begin to run. In fact, the contrary is true. *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 252-
28 53 (2012) ("A person is put on "inquiry notice" when he or she should have known of facts that

1 would lead an ordinarily prudent person to investigate the matter further. ... These facts need not
2 pertain to precise legal theories the plaintiff may ultimately pursue, but merely to the plaintiff's
3 general belief that someone's negligence may have caused his or her injury.") (internal citations
4 omitted). Inquiry notice must occur much earlier than when the expert affidavit is obtained, as
5 without inquiry notice to investigate, no affidavit would ever be requested. Plaintiffs' argument is
6 in direct contravention of Nevada law.

7 **However, this Court does not need to make the determination regarding whether that**
8 **constituted inquiry notice in this case in order to decide on Dr. Nguyen's Partial Motion to**
9 **Dismiss.** That is because in wrongful death professional negligence cases, the one year statute of
10 limitations accrues on the date of death. *Gilloon v. Humana, Inc.*, 100 Nev. 518, 519-20 (1984)
11 ("In an action for wrongful death, the injury contemplated by Nev. Rev. Stat. § 41A.097 is the
12 death of the malpractice victim and the ... period of limitation begins to run from the time of death
13 or the discovery thereof."). The individual Plaintiffs' wrongful death claims accrued on the date
14 of Gary Stewart's death. Thus, their wrongful death actions accrued on March 5, 2019. Amended
15 Complaint, ¶ 20. Thus, their claims filed on March 19, 2021 were filed well after the statute of
16 limitations had expired. The Estate of Gary Stewart's claims are also time-barred under the same
17 analysis.

18 **c. The Plaintiffs' Claims are for Professional Negligence Wrongful Death Only**

19 Defendant Dr. Nguyen relies upon his arguments in his Motion for Partial Summary
20 Judgment, as well as those in co-Defendant Dr. Morneault's Reply in Support of Motion for
21 Partial Summary Judgment, incorporated herein by reference per Dr. Nguyen's joinder, for this
22 issue.

23 **II. CONCLUSION**

24 The Plaintiffs and their attorneys decided to file only one claim following Gary Stewart's
25 death. That was an heir's claim on behalf of Connie Stewart. When the Plaintiffs changed
26 attorneys, they decided to attempt to file untimely claims on behalf of six additional Plaintiffs,
27 apparently disagreeing with their original attorneys' strategy for the case. This is not an excuse
28 for violating the statute of limitations. The analysis here is straightforward. Plaintiffs' claims are

1 for professional negligence under NRS 41A.015. The statute of limitations is one year and
2 wrongful death claims accrue on the date of death. NRS 41A.097. The Plaintiffs' new claims
3 were filed more than a year after Gary Stewart's death and are, therefore, barred by the statute of
4 limitations. Therefore, Defendant Dr. Nguyen respectfully requests that this Court follow well
5 established Nevada law and dismiss the new claims in Plaintiffs' Amended Complaint.

6 DATED this 27th day of April, 2021.

7 LEWIS BRISBOIS BISGAARD & SMITH LLP

8
9 By /s/ Erin E. Jordan

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

1 **CERTIFICATE OF SERVICE**

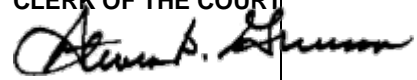
2 I hereby certify that on this 27th day of April, 2021, a true and correct copy
3 of **DEFENDANT MINH NGUYEN, M.D.'S REPLY IN SUPPORT OF MOTION TO**
4 **DISMISS FIRST AMENDED COMPLAINT** was served by electronically filing with the Clerk
5 of the Court using the Odyssey E-File & Serve system and serving all parties with an email-
6 address on record, who have agreed to receive electronic service in this action.

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15 By /s/ Elsa Amoroso
16 An Employee of
17 LEWIS BRISBOIS BISGAARD & SMITH LLP
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EXHIBIT 25



1 RTRAN

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3
4 DISTRICT COURT
5 CLARK COUNTY, NEVADA

6
7 PATRICIA ADAMS,

8 Plaintiff,

9 vs.

10 MINH NGUYEN, M.D.

11 Defendant.

CASE#: A-20-811421-C

DEPT. III

12
13 BEFORE THE HONORABLE MONICA TRUJILLO, DISTRICT COURT JUDGE
14 TUESDAY, MAY 11, 2021

15 **RECORDER'S TRANSCRIPT OF HEARING:**
16 **DEFENDANT EMIL MORNEAULT, RPH'S MOTION TO DISMISS IN**
17 **PART PLAINTIFFS' FIRST AMENDED COMPLAINT**
18 **DEFENDANT MINH NGUYEN, MD'S MOTION TO DISMISS FIRST**
19 **AMENDED COMPLAINT**

20 ALL APPEARANCES VIA BLUEJEANS:

21 For the Plaintiff:

DALE A. HAYES, JR., ESQ.

22 For Defendant Minh Nguyen, M.D.:

ERIN E. JORDAN, ESQ.

23 For the Defendant Emil Morneault, RPh:

MARJAN HAJIMIRZAEI, ESQ.

24
25 RECORDED BY: REBECA GOMEZ, COURT RECORDER

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Las Vegas, Nevada, Tuesday, May 11, 2021

[Case called at 9:42 a.m.]

THE COURT: Case number A-20-811421-C, Patricia Adams
versus Minh Nguyen.

Who's here on behalf of the plaintiffs?

MR. HAYES: Dale Hayes on behalf of the plaintiffs, Your
Honor. Good morning.

THE COURT: Good morning.

On behalf of defendants?

MS. JORDAN: Good morning, Your Honor, this is Erin
Jordan, I'm appearing on behalf of defendant Dr. Minh Nguyen.

THE COURT: Thank you.

MS. HAJIMIRZAE: Good morning, Your Honor, this is
Marjan Hajimirzaee appearing on behalf of defendant Emil Morneault.

THE COURT: Okay. We're also here on a few motions to
dismiss. And I'm going to begin with defendant Emil Morneault's motion
to dismiss in part plaintiffs' First Amended Complaint. I've reviewed the
motion, the opposition, and the reply.

Anything further, Ms. -- I'm going to mess up your last name,
Hajimirzaee, sorry.

MS. HAJIMIRZAE: That's all right, Your Honor. It's Marjan
Hajimirzaee.

I'm happy to address any questions that the Court has. I don't
want to regurgitate everything that's in our brief. But essentially our

1 argument here is that the claims made by the new plaintiffs are not one
2 for ordinary negligence as they imply in their opposition. This is not a
3 case like the *Curtis* matter or the *Szymborski* matter where we don't
4 [audio distortion] non-medical issues. The issues here directly relate to
5 the prescription, or failure to prescribe, and discontinuation of
6 medication, which required professional judgment. As a result, the one
7 year statute of limitations, pursuant to NRS 41A.097 applies, and that
8 date would accrue from the date of death, which here is March 5, 2019.

9 So, based on that, we would ask that the motion to dismiss be
10 granted. The only surviving claim should be that of decedent, Connie
11 Stewart, survival claim that was asserted for professional negligence
12 filed in February of 2020 in the original Complaint.

13 If the Court has any questions, I'll go ahead and address
14 those.

15 THE COURT: Thank you. I do not.

16 Mr. Hayes.

17 MR. HAYES: Yes, Your Honor.

18 Your Honor, I -- first I just want to start with the standard and
19 the reason why I want to start with the standard, for obvious reasons, is
20 not just because of how rigorous it is but because *Szymborski* and *Curtis*
21 both discussed it. In fact, *Szymborski* acknowledging, and this is a
22 quote from the case, We know that there are allegations in *Szymborski's*
23 first claim that could involve medical diagnosis treatment and judgment,
24 regardless at this stage of the proceedings this Court must determine
25 whether there's any set of facts that if true would entitle *Szymborski* to

1 relief and not whether there is a set of facts that would not provide
2 *Szymborski* relief.

3 So, I just want to emphasize that going in that we properly
4 alleged in our Complaint, Your Honor, factual allegations to establish
5 simple negligence.

6 And next, Your Honor, I wholeheartedly disagree with the
7 arguments of Dr. Morneault, as well as Dr. Nguyen, in the sense that
8 they're trying to take our allegations and twist them. Our allegations are
9 not that either one of these doctors made a conscience decision relative
10 to prescriptions. If that were the case, I would agree with them. Our
11 position is that they just carelessly didn't give them the medication they
12 were prescribed, which does make it simple negligence, Your Honor.

13 And if you read the *Curtis case*, the *Curtis case* specifically
14 acknowledges, you know, in adopting the common knowledge exception
15 to the medical affidavit requirement. It specifically discusses two cases
16 where the pharmacist filled the prescription with the wrong drug. And
17 they said, look, when you do that, that's not professional malpractice,
18 that's simple negligence.

19 This is our Supreme Court adopting and recognizing this case,
20 this is a quote: It does not take an expert to know that filling a
21 prescription with the wrong drug is negligence.

22 Now what we've alleged here, Your Honor, is that our client
23 showed up with his prescriptions, was diagnosed, you know, with a
24 seizure condition, needed these medications. We're not alleging any of
25 those acts are simple negligence. We're alleging the simple act of failing

1 -- forgetting to give him his medication, Your Honor, not giving him his
2 necessary life medication. How is that any different than the simple
3 negligence in *Curtis*?

4 And it's important to highlight, Your Honor, that in *Curtis* the
5 Supreme Court didn't just say, hey, look this is a rule, this is a dismissal
6 issue, we're going to send this back. They specifically found and I
7 quote, Your Honor. That admit -- and they acknowledged in their ruling
8 that administering medications constitutes medical treatment and
9 despite that finding they specifically stated, or held rather, that
10 administering medication to a patient that was prescribed to another
11 patient is simple negligence. And they did this within the context of
12 recognizing exactly what counsel just argued.

13 So, we were very careful with our allegations, Your Honor. I
14 would submit to you this is the poster child of a simple negligence claim.
15 We're not trying to stretch -- obviously, you know, there -- we understand
16 the difference between damage cap between 41A and simple
17 negligence, but, we're not trying to stretch a professional negligence
18 claim into simple negligence. These doctors, according to our doctors,
19 simply forgot in a careless fashion to give him his drugs. And that is
20 what simple negligence is and that in *Curtis* completely supports that,
21 Your Honor. That's exactly what happened in *Curtis*, they gave the
22 wrong patient somebody else's medication.

23 In this case, they didn't give us -- life necessary medication.
24 And we didn't allege -- they keep trying to pigeonhole us into, well, it's a
25 medical judgment is a medical judgment. We never alleged that they

1 made the decision to consciously, you know, discontinue this
2 medication, Your Honor, and that's that distinction.

3 And, notwithstanding that, both the *Curtis opinion* and, Your
4 Honor, and I'm going to botch this name, the *Szymborski* opinions, they
5 both highlighted the fact and recognized, look, we recognize
6 administering medications constitutes in medical treatment. But in these
7 instances, and in *Szymborski*, of course, they remanded it in light of the
8 standard. But in *Curtis* they specifically stated, we don't care, when you
9 give somebody somebody else's medication that's simple -- that's simple
10 negligence, that's not a doctor making a medical decision.

11 Then, Your Honor, I'll submit on that simply because that's all
12 that counsel argued. But we have quite a few arguments in our brief that
13 weren't addressed at all. I don't know if you want me to even get into
14 those, relative to tolling and also the whole notion of, you know, even if
15 you were inclined to rule in their favor, Your Honor, we think we have a
16 strong relation back argument relates to at least of one error on the
17 professional negligence claim, in the sense that they wouldn't create any
18 additional independent obligation or exposure.

19 And that -- and those arguments weren't addressed by Dr.
20 Morneault in his reply and I would submit they're being waived but
21 nonetheless I'll submit on that.

22 THE COURT: Okay. Thank you. No, the Court's prepared to
23 rule.

24 So, the Court finds that the claim set forth in the Amended
25 Complaint don't necessarily sound in professional negligence. It seems

1 like it's way too early to tell at this point. For example, it's unclear
2 whether a pharmacist following a doctor's order to stop providing
3 medication includes the determination that involves medical decision
4 and judgment. It could be ordinary negligence. So, the additional claims
5 don't fall within the one year statute of limitations.

6 With regard to the trustee lacking standing to assert a
7 wrongful death claim, it's clear that Adams is named as an individual in
8 the wrongful death claim not as a trustee.

9 Obviously, considering the motion to dismiss, the Court must
10 consider all factual allegations in the Complaint as true, and must only
11 grant a motion to dismiss if it finds that a plaintiff could prove no set of
12 facts that would entitle him or her to relief.

13 Here the Complaint is sufficiently pled. The claims are not
14 time-barred and it's too early in this case to determine whether or not the
15 allegations sound in professional negligence. Therefore, the motion to
16 dismiss is denied.

17 Mr. Hayes, please prepare the order, show it to opposing
18 counsel, and submit it to chambers.

19 MR. HAYES: Of course, Your Honor.

20 THE COURT: And moving on to defendant Minh Nguyen's
21 motion to dismiss First Amended Complaint. I reviewed the motion, the
22 opposition, the reply.

23 Anything further, Ms. Jordan?

24 MS. JORDAN: Yes, Your Honor.

25

1 Obviously, this motion has similarities to the motion you just
2 heard, so I noted some additional things that weren't discussed in
3 argument that I'd like to bring to your attention.

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

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

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

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

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

11 And again, I just want to emphasize that they have conceded
12 and emphasized that these claims against Dr. Nguyen are claims for
13 professional negligence that he decided which medication this patient
14 needed and which medications he didn't need.

15 And in fact plaintiff has, in some sense, I think, of course, if
16 anyone does focus on the part of the argument that's most beneficial to
17 him, that doesn't mention that we have an expert witness who has
18 opined that Dr. Nguyen's decision, whether or not to prescribe certain
19 medications, was a breach of the standard of care, not an accident.

20 And I'll submit on that.

21 Thank you for your time, Your Honor.

22 THE COURT: Thank you.

23 Mr. Hayes.

24 MR. HAYES: Yes, Your Honor.

25

1 Once again, Dr. Nguyen is trying to substitute our allegations
2 for their own perception of what happened here. We did not allege in
3 our Complaint, if you look at our simple negligence allegations, we were
4 very careful to allege simple negligence. We even cited to the case of
5 *Curtis*. We did not allege this was conscience prescription decision and
6 that swallows that argument entirely. Particularly in light of the standard,
7 you know, with Rule 15, with needing to accept our allegations as true
8 and accurate, Your Honor.

9 As it relates to us submitting the medical malpractice affidavit,
10 Your Honor, I'm sure you can read from some of these cases a lot --
11 these plaintiffs did -- Rule 8 specifically allows us to plead in the
12 alternative. We're allowed to say, hey, look this may have been medical
13 malpractice but it also may have been simple negligence.

14 If you read the *Curtis* and *Szymborski* opinions they highlight
15 how subtle the differences may be, Your Honor, and how they may not
16 be known at the beginning of the case, they may not be known until the
17 end of it. So, what happens to plaintiffs like my clients, Your Honor, they
18 run the risk of not getting the affidavit and having a whip prejudice
19 dismissal for doing that, or, you know, that's the whole reason we have
20 Rule 8, Your Honor, so we properly alleged both claims, *Curtis* shows
21 you can do that. So the fact that we submitted an affidavit has no
22 bearing on the issues in this case, Your Honor.

23 As it relates to their greater exposure, you know, Your Honor,
24 the statute specifically states, and when I say the statute I'm referring to
25 41A.035, that medical malpractice -- actually, non-economic damages

1 awarded must not exceed 350, regardless of the number of plaintiffs,
2 defendants or theories upon which liability may be based.

3 As far as her argument that the prior attorney made some
4 strategy, Your Honor, that has nothing to do with us. And more
5 importantly, Judge, the fact that -- and counsel didn't argue this in her
6 brief, or I'd be more prepared to address this, but the fact that the estate
7 of Gary Stewart, never brought a claim and counsel submits that in light
8 of that it was barred from -- they were barred from recovering medical
9 bills.

10 There were other claims asserted in this case, Your Honor,
11 from the inception, not just from when we got involved. If you read the
12 initial Complaint under Rule 8, they had the same four claims, simple
13 negligence, professional negligence, negligence per se, and wrongful
14 death. And under those other claims we can absolutely recover those
15 medical bill damages, Your Honor. So that argument is just -- it's asking
16 you, you know, just to look over here at the left hand and not forget
17 everything in the right hand. You just ruled that all those claims aren't
18 time-barred. So it does not expose our client any additional liability
19 because their client already has that liability.

20 And I'll submit on that, Judge.

21 THE COURT: Thank you.

22 Anything further on behalf of defendant?

23 MS. JORDAN: A few points, Your Honor.

24 I did mention in the brief that [audio distortion] regarding who
25 the plaintiff should be was a strategic decision that ends my brief.

1 I'm sorry, I have someone else working from home.

2 And as far as the additional exposure goes, the only way that
3 that argument succeeds, that adding these additional plaintiffs doesn't
4 add any additional exposure, is the assumption that the original plaintiffs
5 would fulfill the cap at 350, that's simply not accurate.

6 You also have loss of probable support, they've disclosed
7 documents from providers of benefits that this gentleman was receiving.
8 And so the loss of probable support would definitely expose us to
9 additional possible damages, as now we have five plaintiffs instead of
10 one.

11 And, I'll submit on that. Thank you, Your Honor.

12 THE COURT: Thank you.

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

18 THE CLERK: That will be May --

19 MR. HAYES: So, that's not for argument, Your Honor, just for
20 -- just to read the decision?

21 THE COURT: Just for decision, correct.

22 THE CLERK: -- that will be May 18th --

23 MS. JORDAN: Thank you, Your Honor.

24 THE CLERK: -- at 9:00 a.m.

25 THE COURT: Thank you.

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MS. JORDAN: Thank you, Your Honor.


THE COURT: Have a good day.

MR. HAYES: Thank you, Your Honor.

[Hearing concluded at 9:58 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.



Rebeca Gomez
Court Recorder/Transcriber

EXHIBIT 26

A-20-811421-C Patricia Adams, Plaintiff(s)
vs.
Minh Nguyen, M.D., Defendant(s)

May 25, 2021 09:00 AM Defendant Minh Nguyen, MD's Motion to Dismiss First Amended Complaint

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

COURT CLERK: Snow, Grecia

RECORDER: Gomez, Rebeca

REPORTER:

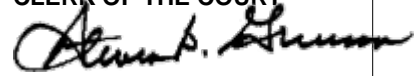
PARTIES PRESENT:

Dale A. Hayes, Jr.	Attorney for Plaintiff
Erin E. Jordan	Attorney for Defendant
Marjan Hajimirzaee	Attorney for Defendant

JOURNAL ENTRIES

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

EXHIBIT 27



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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

**NOTICE OF ENTRY OF
ORDER DENYING DEFENDANT MINH
NGUYEN, M.D.'S MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED
COMPLAINT**

Plaintiffs,

vs.

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

Date of Hearing: May 11, 2021
Time of Hearing: 9:00 a.m.

Defendants.

///

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**NOTICE OF ENTRY OF ORDER DENYING DEFENDANT MINH NGUYEN, M.D.'S
MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

Please take notice that an Order Denying Defendant Minh Nguyen, M.D.'s Motion to Dismiss Plaintiffs' First Amended Complaint was entered in the above-captioned matter on the 20th day of July, 2021, a copy of which is attached hereto.

Dated this 5th day of August, 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.
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Attorneys for Plaintiffs

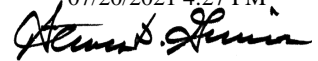
CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER DENYING DEFENDANT MINH NGUYEN, M.D.'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT** was submitted electronically for filing and service with the Eighth Judicial District Court on the 5th day of August, 2021. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹

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/s/ Julia Rodionova
An employee of Hayes Wakayama

¹ Pursuant to the Nevada Electronic Filing and Conversion Rules, Rule 9(c), each party who is a registered user with EFS consents to electronic service in accordance with NRCP 5(b)(2)(E).



CLERK OF THE COURT

HAYES | WAKAYAMA
DALE A. HAYES, JR., ESQ.
Nevada Bar No. 9056
LIANE K. WAKAYAMA, ESQ.
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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

ORDER DENYING DEFENDANT MINH NGUYEN, M.D.'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Date of Hearing: May 11, 2021

Time of Hearing: 9:00 a.m.

ORDER DENYING DEFENDANT MINH NGUYEN, M.D.'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

This matter, having come before the Court for hearing on May 11, 2021, at the hour of 9:00 a.m. on Defendant Minh Nguyen, M.D.'s Motion to Dismiss Plaintiffs' First Amended Complaint

1 filed on April 2, 2021 (“Nguyen’s Motion”). The Court took the matter under advisement and
2 continued the matter for a hearing on the Decision to May 18, 2021. The Court thereafter
3 continued the matter for a hearing on the Decision a second time to May 25, 2021. The Court,
4 having considered Nguyen’s Motion and related briefing, as well as the underlying papers and
5 pleadings, as well as the arguments of counsel, and good cause appearing therefore, FINDS and
6 ORDERS as follows:
7

8 1. The First Amended Complaint filed by the Plaintiffs in this matter on March 19,
9 2021 (hereinafter the “Complaint”) is sufficiently plead;

10 2. The accrual date for all causes of action was either July 25, 2019 or February 28,
11 2020;

12 3. No matter which date is used as the accrual date, the claims brought by the
13 Complaint are not time barred;

14 4. The Court finds that it is too early in this case to determine whether or not the
15 allegations sound in professional negligence or simple negligence; and

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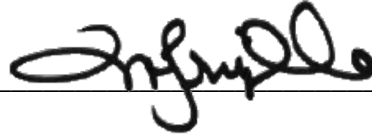
5. Nguyen's Motion is therefore DENIED.

ORDER

Based upon the foregoing, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Defendant Minh Nguyen, M.D.'s Motion to Dismiss Plaintiffs' First Amended Complaint is DENIED in its entirety.

IT IS SO ORDERED.

Dated this 20th day of July, 2021



Respectfully submitted by:
HAYES WAKAYAMA

Approved as to Form and Content:
5DA 23D E989 B2CD
LEWIS, BRISBOIS BISGAARD &
Monica Trujillo
SMITH
District Court Judge

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

DALE A. HAYES, JR., ESQ.
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Attorneys for Plaintiffs

By: /s/ S. Brent Vogel, Esq.


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M.D.*

From: Vogel, Brent <Brent.Vogel@lewisbrisbois.com>
Sent: Tuesday, June 1, 2021 2:39 PM
To: Amoroso, Elsa
Cc: Julia Rodionova; Stephanie Giraldo; Dale Hayes Jr; Jordan, Erin; Daor, Joshua
Subject: RE: Order re 5/11/2021 Hearing

Julia,

You may affix my e-signature to the order denying Dr. Nguyen's Motion to Dismiss. Thank you.



Brent Vogel  **ABOL**
Partner
Brent.Vogel@lewisbrisbois.com
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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Patricia Adams, 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 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: 7/20/2021

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