

**In the Supreme Court 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 MONICA TRUJILLO,

*Respondents,*

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 Case No. 23-00110  
District Court Case No. 23-00110  
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**ANSWER TO PETITION FOR WRIT OF MANDAMUS**

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## VERIFICATION

1. I, the undersigned, declare as follows:
2. I am a lawyer duly admitted to practice before the courts of this State and I represent Real Party in Interest Emil Morneault, RPH in this proceeding.
3. I verify that I have read the Answer to Petition for Writ of Mandamus of Real Party in Interest Minh Nguyen, M.D. and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

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

Dated: November 23, 2021

/s/ Carol P. Michel

Carol P. Michel, Esq.

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WEINBERG, WHEELER, HUDGINS,

GUNN & DIAL, LLC

*Counsel for Real Party in Interest*

*Emil Morneault, RPH*

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

Real Party in Interest Emil Morneault, RPH hereby files his Answer to Dr. Nguyen's Petition for Writ of Mandamus as directed by the Court in its order of November 19, 2021. Dr. Morneault has brought his own Petition for Writ of Mandamus (Case No. 83699) on very similar grounds as Dr. Nguyen as to the majority of Plaintiffs' claims.

This wrongful death action was first filed by Gary Stewart's wife, Connie Stewart, who filed an individual heir wrongful death claim only. Mrs. Stewart has since passed away, and the Plaintiff was changed to Patricia Adams on behalf of Connie Stewart's Estate. Thus, prior to the filing of the First Amended Complaint, the case contained only Connie Stewart's individual heir wrongful death claim brought as a survival claim. Now that the First Amended Complaint has been filed, all claims except for Connie Stewart's heir claim brought as a survival action, should be dismissed. The statute of limitations contained in NRS 41A.097 applies to the wrongful death Plaintiffs who chose not to file a claim at the same time as wrongful death Connie Stewart, and instead chose to do so only after Mrs. Stewart passed away.

### **II. LAW AND ARGUMENT**

Dr. Nguyen filed a Motion to Dismiss appropriately seeking dismissal of

time-barred claims by new Plaintiffs Gary Stewart, Jr., Patricia Adams, Mary Kay Fallon, Elizabeth Hodge, the Estate of Gary Stewart and the Stewart Family Trust pursuant to NRCP 12(b)(5) and NRS 41A.097. For the reasons outlined herein and Dr. Nguyen's Petition, the district court incorrectly denied the Motion to Dismiss and a writ of mandamus should issue because Dr. Nguyen has no plain, speedy, or adequate remedy in the ordinary course of law. NRS 34.170; *Sims v. Eighth Judicial Dist. Court*, 206 P.3d 980, 982 (Nev. 2009); *Humphries v. Eighth Judicial Dist. Court of State*, 120 Nev. 788, 791 (2013).

#### **A. The Date Of Accrual Is Not A Fact-Intensive Inquiry**

Plaintiffs contend that their wrongful death claims did not accrue on the date of Gary Stewart's death, March 5, 2019, and that the accrual date is a fact intensive inquiry which is not appropriate for writ review. However, Plaintiffs are mistaken. The inquiry notice standard for the one-year statute of limitations pursuant to NRS 41A.097 is black letter law. *Massey v. Litton*, 99 Nev. 723, (Nev. 1983) ("This statute of limitations begins to run when the patient has before him facts which would put a **reasonable person** on inquiry notice of his possible cause of action, whether or not it has occurred to the particular patient to seek further medical advice; **the focus is on the patient's knowledge of or access to facts rather than on his discovery of legal theories.**") (emphasis added). The plaintiff only needs to be on notice that he or she may want to investigate whether they have a claim for

professional negligence for the one-year statute of limitations to begin to run. The plaintiff does not need to have developed legal theories or to have investigated their medical care fully for the one-year statute of limitations to begin to run. In fact, the contrary is true. *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 25253 (2012) (“A person is put on ‘inquiry notice’ when he or she should have known of facts that would lead an ordinarily prudent person to investigate the matter further. ... These facts need not pertain to precise legal theories the plaintiff may ultimately pursue, but merely to the plaintiff’s general belief that someone’s negligence may have caused his or her injury.”) (internal citations omitted). Inquiry notice must occur much earlier than when the expert affidavit is obtained, as without inquiry notice to investigate, no affidavit would ever be requested. Plaintiffs’ argument is in direct contravention of Nevada law.

Contrary to Plaintiffs’ assertions, neither this Court nor the district court need to make a determination regarding whether under the facts of this case there was inquiry notice. That is because in wrongful death professional negligence cases, the one-year statute of limitations accrues on the date of death. *Gilloon v. Humana, Inc.*, 100 Nev. 518, 519-20 (1984) (“In an action for wrongful death, the injury contemplated by Nev. Rev. Stat. § 41A.097 is the death of the malpractice victim and the ... period of limitation begins to run from the time of death or the discovery thereof.”). Thereby, the individual Plaintiffs’ wrongful death claims

accrued on the date of Gary Stewart's death, March 5, 2019. Their claims filed on March 19, 2021 were filed well after the statute of limitations had expired. The Estate of Gary Stewart's claims are also time-barred under the same analysis.

For these reasons, the district court incorrectly denied the Motion to Dismiss even though the new Plaintiffs' claims are barred by the statute of limitations. This was clearly erroneous, and a writ of mandamus should issue.

**B. The Plaintiffs' Claims Are For Professional Negligence Wrongful Death Only And Subject To NRS 41A.097**

A claim is a professional negligence claim that is subject to NRS 41A.097 if it is related to medical diagnosis, judgment, or treatment. *Deboer v. Senior Bridges of Sparks Family Hospital*, 282 P.3d 727 (Nev. 2012) ("Savage's complaint was grounded in ordinary negligence, as it was not related to medical diagnosis, judgment, or treatment. As such, the district court erred in branding Savage's complaint as a medical malpractice claim."). Here, Plaintiffs allege that defendants fell below the standard of care because "two of the three appropriate antiseizure medications [were] not prescribed to Decedent," Dr. Nguyen discontinued one of the three anti-seizure medications, which "was approved by Morneault," and despite ordering a laboratory test which, purportedly showed low levels of valproate, "Defendants failed to address it and further continued to fail to provide Decedent with any necessary medications." Petitioner's Appendix, No. 16, ¶¶ 35-39, pp.



155-166. Thus, a claim that defendants failed to use the reasonable care, skill or knowledge ordinarily used under the similar circumstances, is a claim for professional negligence. NRS 41A.015; NRS 41A.017.

Although Plaintiffs have attempted to avoid the provisions of NRS Chapter 41A by including other claims in their First Amended Complaint, and now for the first time argue that Dr. Nguyen “simply forgot to give Gary his medication” the claim available to them is professional negligence causing wrongful death alone. It is the substance of the allegations in a complaint that determine the nature of the claims therein, rather than any label or lack thereof included by the Plaintiffs.

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

### **III. CONCLUSION**

For the above reasons, as well as those set out in Dr. Nguyen’s Petition and

in Dr. Morneault's Petition for Writ of Mandamus (Case No. 83699), this Court should issue a writ and direct the district court to enter an order dismissing Plaintiffs' First Amended Complaint.

Dated: November 23, 2021

*/s/ Carol P. Michel*

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Carol P. Michel, Esq.

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## CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page and type volume limitations of NRAP 32(a)(7) as it is proportionately spaced, has a type face of 14 pointes or more and contains 1,410 words.

3. I further certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, and I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: November 23, 2021

*/s/ Carol P. Michel*

Carol P. Michel, Esq.

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## 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. There are no corporations named in this case.

Emil Morneault, RPH

Emil Morneault, RPH is represented by Carol P. Michel and Marjan Hajimirzaee of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC. Emil Morneault, RPH has not been represented by any other attorneys.

Dated: November 23, 2021

*/s/ Carol P. Michel*

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## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **ANSWER TO PETITION FOR WRIT OF MANDAMUS** was filed electronically with the Nevada Supreme Court on November 23, 2021. Electronic service of the foregoing shall be made in accordance with the Master Service List as follows:

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