

**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.: 83523

District Court No. ~~Electronically Filed~~  
Dec 21 2021 01:59 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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**REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS**

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

STATE OF NEVADA     )  
  ) ss:  
COUNTY OF CLARK    )

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

1. I am an attorney of record for Petitioner and make this Affidavit pursuant to NRAP 21(a)(5).
2. The facts and procedural history contained in the foregoing Reply in Support of Petition for Writ of Mandamus and the following Memorandum of Points and Authorities are based upon my own personal knowledge as counsel for Petitioner. This Affidavit is not made by Petitioner personally because the salient issues involve procedural developments and legal analysis.
3. The contents of the foregoing Reply in Support of Petition for Writ of Mandamus and the following Memorandum of Points and Authorities are true and based upon my personal knowledge, except as to those matters stated on information and belief.
4. This Petition complies with NRAP 21(d) and NRAP 32(c)(2).

FURTHER YOUR AFFIANT SAYETH NAUGHT.

/s/ Erin E. Jordan  
ERIN E. JORDAN, ESQ.

No notarization required pursuant to NRS 53.045

## MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner filed his Petition for Writ of Mandamus with this Court challenging the Eighth Judicial District Court's denial of his Motion to Dismiss Plaintiff's First Amended Complaint. Plaintiff's First Amended Complaint added six new parties well after the statute of limitations had run and greatly expanded the potential liability of the Petitioner in this case. In his Petition, the Petitioner explained that 1) the Plaintiffs have brought claims for professional negligence wrongful death; 2) the new heir claims were filed in violation of the one year statute of limitations contained in NRS 41A.097; 3) the new estate claim was filed in violation of the one year statute of limitations contained in NRS 41A.097; and 4) the new family trust Plaintiff is an improper party to this wrongful death action.<sup>1</sup>

This Court directed an Answer to the Petition be filed. Real Parties in Interest, the Plaintiffs, filed an Answer in which they argued: 1) this Court should not entertain this Petition because Dr. Nguyen has an adequate remedy at law; 2) all Plaintiffs' claims were filed within the applicable statute of limitations; 3) Petitioner's argument regarding the impropriety of the family trust being a party is "erroneous"; and 4) Plaintiffs properly pled in the alternative such that the statute of limitations in NRS 41A.097 is not dispositive of all claims.

For the reasons set forth below, Real Parties in Interest, the Plaintiffs in the

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<sup>1</sup> Petitioner relies upon the argument contained in the Petition for Writ of Mandamus regarding

underlying action, have provided this Court with no reason to deny the Petition for Writ of Mandamus and Petitioner respectfully requests that this Court issue a Writ mandating that the Eighth Judicial District Court grant Petitioner's Motion to Dismiss Plaintiffs' First Amended Complaint.

**I. Plaintiff's Claims are For Professional Negligence Wrongful Death and Thus, Respondent Manifestly Abused its Discretion by Denying Dr. Nguyen's Motion to Dismiss Plaintiffs' First Amended Complaint.**

Plaintiffs argue that the claims in their First Amended Complaint are not solely claims for wrongful death professional negligence. Answering Brief, p. 8, 17. Plaintiffs contend that they properly plead claims in the alternative as they are allowed to by the Nevada Rules of Civil Procedure. *Id.* While Defendant Petitioner does not dispute that the Nevada Rules of Civil Procedure allow for pleading in the alternative, the Plaintiffs did not properly do so in their First Amended Complaint in this case.

An examination of the substance of the Plaintiffs' allegations against Dr. Nguyen shows that the claim that Plaintiffs are bringing against him is for professional negligence wrongful death. It is the substance of the allegations and the alleged wrongdoing that determines the type of claim before the Court and the proper statute of limitations. A claim is a professional negligence claim that is subject to NRS 41A.097 if it is related to medical diagnosis, judgment, or

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the issue of the Family Trust as Plaintiff.

treatment. *Deboer v. Senior Bridges of Sparks Family Hospital, Inc.*, 282 P.3d 727 (Nev. 2012) (“Savage’s complaint was grounded in ordinary negligence, as it was not related to medical diagnosis, judgment, or treatment. As such, the district court erred in branding Savage’s complaint as a medical malpractice claim.”). Arbitrary labels used to evade statutes of limitation and the non-economic damages cap for professional negligence claims do not change what the substance of the allegations is.

The determination of the nature of the claims brought by the Plaintiffs is critical to the determination regarding whether their claims were filed in violation of the statute of limitations. Petitioner is not arguing that Plaintiffs can never plead in the alternative or that a Plaintiff can never have both a negligence and professional negligence claim against a physician. Petitioner’s position is only that the claims brought against him in this case sound in professional negligence wrongful death only, based upon Plaintiff’s own factual allegations.

Here, Plaintiffs allege that Dr. Nguyen fell below the standard of care by prescribing the incorrect seizure medication regime for him and that he died as a result. Petitioner’s Appendix, No. 16, ¶¶ 35-39, pp. 155-166. This is undisputed. The only analysis that needs to be done is whether a physician’s ordering of a prescription medication for a patient requires medical diagnosis, judgment or treatment. The choice of what medications to give a patient for a condition

identified by a physician can only be characterized as an action requiring medical diagnosis, judgment or treatment.

Plaintiffs go so far as to contend that “this is not a professional negligence case” while labeling one of their claims as a claim for professional negligence. Opposition, pp. 2-3 (“This is not ‘a professional negligence case.’ While Real Parties have certainly alleged professional negligence as a potential theory of recovery, they have also alleged wrongful death and simple negligence theories of relief.”).

As Plaintiffs contend, the District Court was required to consider the allegations of the Plaintiffs as true while deciding whether to grant Petitioner’s Motion to Dismiss Plaintiff’s First Amended Complaint. Opposition, p. 19. This is critical. First, because the facts as pled by the Plaintiffs must be assumed to be true for the purposes of deciding the Motion to Dismiss, the District Court’s ruling that an issue of fact remained regarding whether the Plaintiffs brought claims for professional negligence or simple negligence must be incorrect. The determination of the gravamen of the Plaintiff’s claim is not an issue of fact for the jury. And, the District Court did not need to make any factual determinations when ruling on the NRCP 12(b)(5) motion because for the purposes of the motion, the Plaintiffs’ alleged facts are assumed to be true. Thus, the Plaintiffs are incorrect that the District Court made factual findings as alleged on page twenty and throughout



their Answering Brief, and the District Court abused its discretion by finding that the nature of the Plaintiffs' claims presented an issue of fact.

Plaintiffs alleged in their First Amended Complaint and attached NRS 41A.071 affidavit that Dr. Nguyen failed to give Gary Stewart the correct seizure medication and that he died as a result. This is a textbook claim for professional negligence and the one year statute of limitations in NRS 41A.097 and all other provisions of Chapter 41A of the Nevada Revised Statutes apply to their claims.

**II. The New Heir Claims and the New Estate Claim Were Filed in Violation of the One Year Statute of Limitations So Respondent Manifestly Abused its Discretion by Failing to Grant Petitioner's Motion to Dismiss First Amended Complaint**

In addition to their contention that their claims are not for professional negligence, Plaintiffs also argue that their claims were filed within the statute of limitations for professional negligence actions because Plaintiffs contend their professional negligence claims relate back to the original filing date (Answering Brief, p. 29), the accrual date of their wrongful death claims was not the date of Gary Stewart's death (Opposition, p. 23), issues of fact exist regarding the accrual date of their claims (Opposition, p. 12), the discovery rule saves their claims (Opposition, p. 23); and there was concealment such that their claims were timely (Opposition, p. 23). Plaintiffs argue that every exception that can apply to save a claim that was untimely filed exists in this one case. Plaintiffs' unwillingness or inability to choose one position illustrates that they only seek to preserve their

untimely claims, rather than explaining how their claims were actually timely.

First, the six new Plaintiffs' claims do not relate back to the original filing date because the new claims expose the Defendants to greater liability. Plaintiffs cite this rule. Answering Brief, p. 29. Plaintiffs contend that adding four new heir Plaintiffs, a new Estate Plaintiff and the Family Trust as a Plaintiff will not expose Defendants to greater liability than one heir claim alone. *Id.* This cannot be true. First, there is a new claim filed on behalf of the Estate of Gary Stewart. An Estate Plaintiff may seek the recovery of medical bills and punitive damages. NRS 41.085. These damages are not allowed to heir Plaintiffs. Thus, the addition of an Estate Plaintiff clearly exposes the Defendants to additional liability such that the claim does not relate back to the original filing date.

Additionally, the damages the heirs may recover are also delineated in NRS 41.085. Each heir may seek damages for grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering or disfigurement of the decedent. Now, with the addition of four new heirs, there are five total heirs (including the original heir claim brought by Connie Stewart and now pursued by her own estate<sup>2</sup>) seeking grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain,

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<sup>2</sup> The heir claim filed by Connie Stewart, and now pursued by her Estate, is not the subject of this Petition and was not challenged in front of the District Court. This Petition, if granted, is not dispositive of this entire matter, only of the claims of the six new Defendants.

suffering or disfigurement of the decedent. The addition of the additional parties greatly expands the potential exposure of the Defendants, and therefore, the new Plaintiffs' claims do not relate back to the original filing date.

Plaintiffs' arguments that the accrual date of their wrongful death claims was not the date of Gary Stewart's death (Opposition, p. 23) and issues of fact exist regarding the accrual date of their claims (Opposition, p. 12) also fail to save their claims. According to Plaintiffs' own allegations, and Plaintiff Patricia Adams' own sworn declaration, if one accepts all these facts as true, Plaintiffs' claims are still untimely. The facts, as admitted by Plaintiffs in their First Amended Complaint, sworn in Patricia Adams' Declaration and as repeated in their Answering Brief, establish that the new Plaintiffs' professional negligence wrongful death claims accrued at or near the time of Gary Stewart's death.

Mr. Stewart died on March 5, 2019 and Patricia Adams thereafter demanded an investigation from Dr. Nguyen. Answering Brief, pp. 4-5. Specifically, as attested to by Patricia Adams under penalty of perjury, Ms. Adams spoke to someone at the Encompass facility where Dr. Nguyen cared for Mr. Stewart on the date he seized and was transferred to the hospital. Petitioner's Appendix, No. 22, pp. 237. This occurred on February 21, 2019, prior to Mr. Stewart's death. *Id.* Ms. Adams contends that Petitioner spoke to her on that same day, February 21,

2019, and allegedly promised an investigation.<sup>3</sup> *Id.* Ms. Adams swore that she called Dr. Nguyen several times and he allegedly refused to speak to her. She did not identify the dates of these alleged calls. *Id.* Next, Plaintiff Gary Stewart visited Encompass to collect Gary Stewart’s belongings and Plaintiffs allege that staff at Encompass refused to speak with him. *Id.*, p. 238. Ms. Adams then demanded Mr. Stewart’s medical records. *Id.* Ms. Adams alleges that she sought information regarding the cause of her father’s death and that Encompass refused to give it. *Id.* Importantly, Ms. Adams swears in her Declaration that the “family then immediately” hired an attorney. *Id.* This statement is crucial as it shows that the new Plaintiffs, including Ms. Adams, Gary Stewart, Jr., Mary Kay Fallon, and Elizabeth Hodge, the Estate of Gary Stewart and the family trust all had inquiry notice of a possible claim.

In a professional negligence case, a potential Plaintiff’s legal injury accrues and they are deemed to have inquiry notice when that person has facts that would cause a reasonably prudent person to investigate further. The facts Plaintiffs have alleged are more than enough to constitute inquiry notice as those would cause a reasonable person to investigate further as contemplated by the *Winn* case. *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 252 (2012) (“While difficult to define in concrete terms, a person is put on inquiry notice when he or she should have

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<sup>3</sup> But for the rule that a wrongful death claim cannot accrue before the date of death, this also

known of facts that would lead an ordinarily prudent person to investigate the matter further.") (internal citations omitted and emphasis added). Here, not only did the Plaintiffs meet the objective standard of *Winn* and what would cause a reasonable person to investigate, the family actually did investigate, demand an investigation, and hire an attorney. All of this occurred before Plaintiffs obtained the medical records on July 25, 2019. This date, at the very latest, all of the Plaintiffs' claims for medical malpractice wrongful death accrued. From the date that they had Mr. Stewart's complete medical chart, again at the very latest, they had a year to determine whether to file suit. Only Connie Stewart filed suit within a year of July 25, 2019. In fact, Connie Stewart filed her Complaint shortly before the one year anniversary of Mr. Stewart's death, on February 28, 2020, a tacit admission that the accrual date was much earlier, on the date of Mr. Stewart's death, March 5, 2019.

However, for the sake of argument, and analyzing the facts provided by, alleged and sworn to by the Plaintiffs, their claims accrued no later than July 25, 2019. Therefore, the statute of limitations for their claims expired on July 25, 2020. The six new Plaintiffs' claims were not filed until March 19, 2021, well after the statute of limitations had expired. Plaintiffs' contention that they needed a sworn affidavit claiming that the Defendants were negligent before the cause of

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could have served as the accrual date for Plaintiffs' claims.

action even *accrued* is contrary to Nevada law and *Winn*.

Lastly, as explained in the Petition and above, *Winn* and *Massey* control the discovery rule for professional negligence actions, rather than the general discovery rule cases cited by the Plaintiffs. Answering Brief, p. 23.

### **III. The Issues Before This Court Are Appropriate for Writ Relief**

In this case, Dr. Nguyen does not have a plain, speedy, and adequate remedy in the ordinary course of the law and writ relief is appropriate. Plaintiffs contend that this case is not appropriate for writ relief because Dr. Nguyen has an adequate remedy in appeal should he not prevail at trial. Answering Brief, pp. 8, 13. This is simply not the case. This case is in the very earliest stages and improperly adding six parties to the case will change the entire course of litigation for this matter. *Humphries v. Eighth Judicial Dist. Court of State*, 129 Nev. 788, 791 (2013). The Court in *Humphries* explained why there was no plain, speedy and adequate remedy in the ordinary course of the law when such an error is made early in the proceedings.

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

*Id.* The *Humphries* Court relied upon an earlier decision that addressed the same issue. *Lund v. Eighth Judicial Dist. Court*, 127 Nev. 358, 363 (2011) (“Indeed,

when, as here, legal error leads the district court to decline to exercise discretion that it indisputably has regarding prospective additional parties, mandamus may lie, in the discretion of this court, to avert further avoidable error.”).

The Plaintiffs ask this Court to decline to apply *Humphries* as they contend that it does not apply. Answering Brief, pp. 14-15. Plaintiffs argue that because *Humphries* involved the addition of co-tortfeasors, rather than Plaintiffs as is the case here, the same analysis doesn’t apply. *Id.* However, the same considerations of costly lengthy litigation against six parties whose claims are barred by the statutes of limitation exist here as they did in *Humphries*.

#### IV. CONCLUSION

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

However, once Connie Stewart passed away, the Plaintiffs retained a new law firm and decided to file claims on behalf of the four new heirs, the Estate of Gary Stewart and the improper party The Stewart Family Trust. The statute of

limitations had already expired. Plaintiffs cannot evade the statute of limitations because they changed their mind about whether to file claims, or as a result of the unfortunate death of Connie Stewart.

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

Dated this 21<sup>st</sup> day of December, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

Bv /s/ Erin E. Jordan  
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## CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or imposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record be supported by reference to the page or transcript or appendix where the matter relied upon is found. In addition, I certify that this brief satisfied NRAP 32 with an approximate word count of 3,800 words, proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point type. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirement of the Nevada Rules of Appellate Procedure.

Dated this 21<sup>st</sup> day of December, 2021.

By: /s/ Erin E. Jordan  
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## CERTIFICATE OF MAILING

I hereby certify that on this 21<sup>st</sup> day of December, 2021, I served the foregoing REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS upon the following parties by placing a true and correct copy thereof in the United States Mail in Las Vegas, Nevada with first class postage fully prepaid:

The Honorable Monica Trujillo  
The Eighth Judicial District Court  
Regional Justice Center  
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capacity as Special Administrator of the  
ESTATE OF GARY STEWART; GARY  
LINCK STEWART, JR.; MARY KAY  
FALLON; ELIZABETH A HODGE*

/s/ Maria T. San Juan

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