IN THE SUPREME COURT OF THE STATE OF NEVADA

ESTATE OF REBECCA POWELL, through Brian Powell as Special Administrator; DARCI CREECY, individually; TARYN CREECY, individually; ISAIAH KHOSROF, individually; LLOYD CREECY, individually,

Appellants,

vs.

VALLEY HEALTH SYSTEM, LLC (doing business as "Centennial Hills Hospital Medical Center"),

Respondent.

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Appeal No. 84861

APPELLANTS' APPENDIX

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Respectfully submitted,

/s/ *Paul S. Padda*

Paul S. Padda, Esq.

Dated: January 30, 2023

CERTIFICATE OF SERVICE

Pursuant to the Nevada Rules of Appellate Procedure, I hereby certify that on this day, January 30, 2023, the foregoing document entitled **APPELLANTS' APPENDIX VOLUME 2** was filed with the Supreme Court of Nevada through its electronic filing system. Service of the foregoing document shall be made in accordance with the Master Service List upon all registered parties and/or participants and their counsel.

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DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF REBECCA POWELL, through BRIAN POWELL, as Special Administrator; DARCI CREECY, individually and as Heir; TARYN CREECY, individually and as an Heir; ISAIAH KHOSROF, individually and as an Heir; LLOYD CREECY, individually;, Plaintiffs, vs. VALLEY HEALTH SYSTEM, LLC (doing business as "Centennial Hills Hospital Medical Center"), a foreign limited liability company; UNIVERSAL HEALTH SERVICES, INC., a foreign corporation; DR. DIONICE S. JULIANO, M.D., an individual; DR. CONRADO C.D. CONCIO, M.D., an individual; DR. VISHAL S. SHAH, M.D., an individual; DOES 1-10; and ROES A-Z;, Defendants.	Case No. A-19-788787-C Dept. No.: 30 **VALLEY HEALTH SYSTEM, LLC AND UNIVERSAL HEALTH SERVICES, INC.'S MOTION FOR SUMMARY JUDGMENT BASED UPON THE EXPIRATION OF THE STATUTE OF LIMITATIONS** **HEARING REQUESTED**

COMES NOW, Defendants VALLEY HEALTH SYSTEM, LLC (doing business as "Centennial Hills Hospital Medical Center"), a foreign limited liability company; UNIVERSAL HEALTH SERVICES, INC., a foreign corporation (collectively "CHH") by and through their

counsel of record S. Brent Vogel, Esq., and Adam Garth, Esq., of the Law Firm LEWIS BRISBOIS BISGAARD & SMITH, LLP, and hereby move the court for an order granting summary judgment due to the expiration of the statute of limitations as contained in NRS 41A.097, necessitating dismissal of the instant case.

CHH makes and bases this motion upon the papers and pleadings on file in this case, the Memorandum of Points and Authorities submitted herewith, and any arguments adducted at the hearing of this Motion.

DATED this 2nd day of September, 2020

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By */s/ Adam Garth*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On February 4, 2019, the Estate of Rebecca Powell and individual heirs (collectively "Plaintiffs") filed an untimely Complaint against CHH as well as other co-defendants (collectively "Defendants"), for alleged professional negligence/wrongful death arising out of the care and treatment Ms. Powell received at CHH.[1] Plaintiffs contend that Defendants breached standard of care by purportedly failing to recognize and consider drug-induced respiratory distress, allowing the administration of Ativan, and failing to otherwise treat or monitor Ms. Powell.[2] Plaintiffs allege that these deviations caused her death on May 11, 2017 and that they personally observed the alleged negligence.[3] Plaintiffs do not allege any negligent care, treatment, actions or inactions by Defendants after Ms. Powell's death on May 11, 2017. Consequently, under the facts pled, the statute of limitations began to run on May 11, 2017. Although the statute of limitations began to run on May 11, 2017 and expired on May 11, 2018, Plaintiffs failed to file their Complaint until February 4, 2019, more than one year and eight months after the statute of limitations expired. Since Plaintiffs failed to file their Complaint within NRS 41A.097(2)'s one-year statute of limitations, CHH's motion for summary judgment should be granted in its entirety and the Complaint dismissed.

II. STATEMENT OF UNDISPUTED FACTS

A. Procedural History

1. Plaintiffs commenced this action on February 4, 2019 by the filing of the Complaint.[4]

2. Co-defendants filed a Motion to Dismiss Plaintiffs' Complaint on June 12, 2019, seeking dismissal on multiple grounds including the untimely filing of the Complaint and expiration

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[1] *See* Complaint annexed hereto as Exhibit "A"

[2] Exhibit "A", ¶ 28

[3] Exhibit "A" ¶ 29; Exhibit "A", ¶¶ 41-56 (asserting shock as a result of the observance or contemporaneous witnessing of the alleged negligence)

[4] Exhibit "A"

(footnote continued)

of the statute of limitations.[5]

3. Defendant Shah, MD joined Defendants' Concio's and Juliano MDs' Motion to Dismiss on June 13, 2019.[6]

4. In lieu of an answer, CHH filed a motion to dismiss the Complaint on June 19, 2019, alleging that the statute of limitations elapsed long before Plaintiffs' Complaint was filed.[7]

5. CHH joined Defendants Concio and Juliano's Motion to Dismiss on June 26, 2019.[8]

6. Plaintiffs' opposed Concio and Juliano's Motion to Dismiss on August 13, 2019. [9]

7. Defendants filed their respective replies to Plaintiffs' opposition to the motion to dismiss.[10]

8. Defendant Universal Health Services Inc. filed its own motion to dismiss on September 23, 2019.[11]

9. On September 25, 2019, this Court denied Defendants' respective motions to dismiss,[12] but Universal Health Systems, Inc.'s motion was rendered moot by stipulation of the parties to dismiss the action as against that defendant only without prejudice.[13]

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[5] *See* Defendants Concio's and Juliano, MD's Motion to Dismiss Plaintiffs' Complaint annexed hereto as Exhibit "B"

[6] *See*, Defendant Shah MD's Joinder annexed hereto as Exhibit "C"

[7] *See* Defendant Centennial Hills Hospital's Motion to Dismiss Plaintiffs' Complaint annexed hereto as Exhibit "D"

[8] *See* CHH's Joinder to Concio's and Juliano's Motion to Dismiss annexed hereto as Exhibit "E"

[9] *See* Plaintiffs' Opposition to Concio and Juliano's Motion to Dismiss annexed hereto as Exhibit "F"

[10] *See* Concio and Juliano's Reply annexed hereto as Exhibit "G" and CHH's Reply annexed hereto as Exhibit "H"

[11] *See* Universal Health Services, Inc.'s Motion to Dismiss annexed hereto as Exhibit "I"

[12] *See* Minute Order dated September 25, 2019 annexed hereto as Exhibit "J"

[13] *See* Stipulation of Dismissal Without Prejudice annexed hereto as Exhibit "K"

(footnote continued)

10. On April 15, 2020, CHH filed its Answer to Plaintiffs' Complaint.[14]

B. Undisputed Facts Demonstrating Untimely Filing

11. Based upon the Complaint and the accompanying affidavit, Rebecca Powell overdosed on Benadryl, Cymbalta, and Ambien on May 3, 2017.[15]

12. Plaintiffs' further allege that EMS was called and came to Ms. Powell's aid, discovering her with labored breathing and vomit on her face.[16] Plaintiffs further allege that Ms. Powell was transported to CHH where she was admitted.[17]

13. Plaintiffs claim that one week into her admission, on May 10, 2017, Ms. Powell complained of shortness of breath, weakness, and a drowning feeling, and Defendant Vishal Shah, MD, ordered Ativan to be administered via IV push.[18]

14. Plaintiffs assert that on May 11, 2017, Defendant Conrado Concio, MD, ordered two doses of Ativan via IV push.[19]

15. To assess her complaints, Plaintiffs alleged that a chest CT was ordered, but the providers were unable to obtain the chest CT due to Ms. Powell's anxiety, and she was returned to her room.[20]

16. Plaintiffs further alleged that Ms. Powell was placed in a room with a camera monitor.[21]

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[14] *See* CHH's Answer annexed hereto as Exhibit "L"

[15] Exhibit "A", ¶ 18

[16] Exhibit "A", ¶ 18

[17] Exhibit "A", ¶ 18

[18] Exhibit "A", ¶ 21

[19] Exhibit "A", ¶ 22

[20] Exhibit "A", ¶ 22; see also Exhibit A (Affidavit of Dr. Sami Hashim, M.D.) to the Complaint (Exhibit "A" hereto) at p. 3

[21] Exhibit "A", ¶ 22

(footnote continued)

17. Plaintiffs' expert stated in his affidavit used to support the Complaint that pursuant to the doctor's orders, a dose of Ativan was administered at 03:27.[22]

18. Thereafter, Ms. Powell allegedly suffered acute respiratory failure, which resulted in her death on May 11, 2017, according to Plaintiffs.[23]

19. Plaintiffs alleged that they personally observed the alleged negligence, Ms. Powell's rapid deterioration, and the results of the alleged negligence.[24]

20. On May 25, 2017, MRO, a medical records retrieval service responsible for supplying medical records to those requesting same on behalf of CHH, received a request for medical records from Taryn Creecy, one of the plaintiffs in this matter, along with a copy of a court order requiring that Centennial Hills Hospital provide a complete copy of Rebecca Powell's medical chart.[25] Exhibit "A" to Ms. Arroyo's declaration shows this request and court order.

21. On June 2, 2017, the request for the medical records for Mrs. Powell was processed by MRO personnel.[26]

22. On June 5, 2017, MRO determined that the records for Mrs. Powell were requested by Taryn Creecy, her daughter, that the records were requested to be sent to a post office box, and verified the court order for same.[27]

23. On June 7, 2017, MRO invoiced Ms. Creecy which included all fees associated with the provision of 1165 pages of Mrs. Powell's medical records from CHH. The 1165 pages invoiced

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[22] Exhibit A (Affidavit of Dr. Sami Hashim, M.D.) to the Complaint (Exhibit "A" hereto) at p. 3

[23] Exhibit "A", ¶ 22

[24] Exhibit "A", ¶¶ 44-45, 52-53

[25] *See* Declaration of Gina Arroyo and associated exhibits annexed thereto which are collectively annexed hereto as Exhibit "M", specifically ¶ 6

[26] Exhibit "M", ¶ 7

[27] Exhibit "M", ¶ 8 as well as Exhibit "A" thereto

(footnote continued)

represented the entirety of medical records for Mrs. Powell with no exclusions.[28] [29]

24. On June 12, 2017, MRO received payment for the 1165 pages of records and the next day, June 13, 2017, MRO sent out the complete 1165 pages to Ms. Creecy to the address provided on the request.[30]

25. MRO received the package back from the United States Postal Service due to undeliverability to the addressee on June 23, 2017.[31]

26. MRO contacted Ms. Creecy on June 28, 2017 regarding the returned records, and she advised MRO that the post office box to which she requested the records be sent was in the name of her father, Brian Powell, and that the Post Office likely returned them since she was an unknown recipient at the post office box. She thereafter requested that MRO resend the records to him at that post office box address.[32]

27. On June 29, 2017, MRO re-sent the records addressed to Mr. Powell at the post office box previously provided, and MRO never received the records back thereafter.[33]

28. MRO provided copies of all medical records for Mrs. Powell as part of this medical records request, and no records for this patient were excluded from that packet.[34] [35]

29. CHH's custodian of records stated that she compared the 1165 pages of records suppled in June, 2017 to Ms. Creecy to CHH's electronic medical records system and she verified

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[28] Exhibit "M", ¶ 9 as well as Exhibit "B" thereto

[29] Declaration of Melanie Thompson, CHH's custodian of records, annexed hereto as Exhibit "N", ¶ 4

[30] Exhibit "M", ¶ 10 as well as Exhibit "C" thereto

[31] Exhibit "M", ¶ 11 as well as Exhibit "D" thereto

[32] Exhibit "M", ¶ 12

[33] Exhibit "M", ¶ 13

[34] Exhibit "M", ¶ 14

[35] Declaration of Melanie Thompson, CHH's custodian of records, annexed hereto as Exhibit "N", ¶ 4

(footnote continued)

that the totality of the medical records for Ms. Powell was provided to Ms. Creecy without excluding any records.[36]

30. On February 4, 2019, which was one year, eight months, and twenty-four days after Ms. Powell's death, Plaintiffs filed the subject Complaint seeking relief under the following causes of action: 1) negligence/medical malpractice; 2) wrongful death pursuant to NRS 41.085; 3) negligent infliction of emotional distress on behalf of Darci, Taryn, and Isaiah; and 4) negligent infliction of emotional distress on behalf of Lloyd Creecy.[37] Plaintiffs included the Affidavit of Sami Hashim, MD, which sets forth alleged breaches of the standard of care.[38]

31. NRS 41A.097 (2)(a) and (c) requires that an action based upon professional negligence of a provider of health be commenced the earlier of one year from discovery of the alleged negligence, but no more than three years after alleged negligence.

32. An action which is dismissed and not refiled within the time required by NRS 41A.097 (2)(a) and (c) is time barred as a matter of law.

33. Plaintiffs' claims sound in professional negligence, which subjects the claims to NRS 41A.097(2)'s one-year statute of limitations requirement.

34. Since Plaintiffs failed to file their Complaint within one-year after they discovered or through the use of reasonable diligence should have discovered the injury, Plaintiffs failed to timely file their Complaint, which necessitated the instant motion. See NRS 41A.097(2).

35. Moreover, Plaintiffs neither pled nor provided any explanation, valid or otherwise, to justify the late filing of their Complaint.

III. LEGAL ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories,

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[36] Declaration of Melanie Thompson, CHH's custodian of records, annexed hereto as Exhibit "N", ¶ 4

[37] Exhibit "A"

[38] Exhibit A to the Complaint (Exhibit "A" hereto)

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any disputed material fact and that the moving party is entitled to a judgment as a matter of law." N.R.C.P. 56(c). In other words, a motion for summary judgment shall be denied only when the evidence, taken together, shows a genuine issue as to any material fact. In the milestone case *Wood v. Safeway, Inc.*, 121 Nev. 724, 731 (2005), the Supreme Court of Nevada held that "[t]he substantive law controls which factual disputes are material" to preclude summary judgment, and that "[a] factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* Summary judgment is proper "where the record before the Court on the motion reveals the absence of any material facts and [where] the moving party is entitled to prevail as a matter of law." *Zoslaw v. MCA Distribution Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983); Fed. R. Civ. Proc. 56. "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties differing versions of the truth." *Sec. and Exch. Comm. v. Seaboard Corp.*, 677 F.2d 1289, 1293 (9th Cir. 1982).

When applying the above standard, the pleadings and other proof must be construed in a light most favorable to the nonmoving party. *Wood, supra* 121 Nev. at 732. However, the nonmoving parties in this case, Plaintiffs, "may not rest upon general allegations and conclusions," but shall "by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial." *Id.* at 731-32. The nonmoving party "bears the burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered in the moving party's favor." *Id.* at 732. "The nonmoving party 'is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture.'" Id. But, "the nonmoving party is entitled to have the evidence and all reasonable inferences accepted as true." *Lease Partners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 752 (1997).

The moving party has the burden of showing the absence of a genuine issue of material fact, and a court must view all facts and inferences in the light most favorable to the responding party. *See Adickes v. S.H. Dress & Co.*, 398 U.S. 144, 157 (1970). *See also Zoslaw*, 693 F.2d at 883; *Warren v. City of Carlsbad*, 58 F.3d 439 (9th Cir. 1995). Once this burden has been met, "[t]he

opposing party must then present specific facts demonstrating that there is a factual dispute about a material issue." *Zoslaw*, 693 F.2d at 883. The moving party is entitled to summary judgment if the non-moving party, who bears the burden of persuasion, fails to designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986) (internal quotation omitted).

As to when a court should grant summary judgment, the High Court has stated:

> [T]he motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.

Celotex, 477 U.S. at 323-324. "A [s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Id.* at 327.

B. Plaintiffs' Causes of Action Are Subject to NRS 41A's Requirements

NRS 41A.097 states in pertinent part:

> 2. Except as otherwise provided in subsection 3, an action for injury or death against a provider of health care may not be commenced more than 3 years after the date of injury or 1 year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first, for:
>
> (a) Injury to or the wrongful death of a person occurring on or after October 1, 2002, based upon alleged professional negligence of the provider of health care;
>
> * * *
>
> (c) Injury to or the wrongful death of a person occurring on or after October 1, 2002, from error or omission in practice by the provider of health care.

NRS 41A.017 defines a "'Provider of health care'" . . . [as] **a physician licensed pursuant to chapter 630 or 633 of NRS, physician assistant**, dentist, **licensed nurse**, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory director or technician, licensed dietitian or **a licensed hospital**, clinic, surgery center, **physicians' professional corporation or group practice**

that employs any such person and its employees." (Emphasis supplied). CHH, as a licensed hospital, its nurses, and the physicians Plaintiffs allege were the ostensible agents of CHH, CHH falls within the protections of NRS Chapter 41A, with the one year discovery rule applicable thereto.

To determine whether a plaintiff's claim sounds in "professional negligence," the Court should look to the gravamen of the claim to determine the character of the action, not the form of the pleadings. *See Szymborski v. Spring Mountain Treatment Ctr.*, 403 P.3d 1280, 1285 (Nev. 2017) ("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.") (quoting *Estate of French*, 333 S.W.3d at 557 (citing Black's Law Dictionary 770 (9th ed. 2009))); *see also Lewis v. Renown,* 432 P.3d 201 (Nev. 2018) (recognizing that the Court had to look to the gravamen of each claim rather than its form to determine whether the claim sounded in professional negligence); *Andrew v. Coster,* 408 P.3d 559 (Nev. 2017), cert. denied, 138 S. Ct. 2634, 201 L. Ed. 2d 1037 (2018); *see generally Egan v. Chambers*, 299 P.3d 364, 366 n. 2 (Nev.2013) (citing *State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 495 P.2d 359, 361 (1972)); *see also Brown v. Mt. Grant Gen. Hosp.*, No. 3:12-CV-00461-LRH, 2013 WL 4523488, at *8 (D. Nev. Aug. 26, 2013).

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." NRS 41A.015. A "provider of health care" includes, in pertinent part, a physician, a nurse, and a licensed hospital. *See* NRS 41A.017. Consequently, if a plaintiff's claim arises out of the alleged failure of a physician, nurse, and/or hospital to use reasonable care, skill, or knowledge, used by other similarly trained and experienced providers, in rendering services to the patient, the plaintiff's claim sounds in professional negligence.

Generally, "[a]llegations of breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for medical malpractice." *Szymborski.*, 403 P.3d at 1284 (citing *Papa v. Brunswick Gen. Hosp.*, 132 A.D.2d 601, 517 N.Y.S.2d 762, 763 (1987) ("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."); *Estate of French v. Stratford House*, 333 S.W.3d 546, 555 (Tenn. 2011) ("If the alleged breach of duty of care set forth in the complaint is one that was based upon medical art or science, training, or expertise, then it is a claim for medical malpractice.")); see also *Lewis v. Renown Reg'l Med. Ctr.*, 432 P.3d 201 (Nev. 2018) (holding that Plaintiffs' elder abuse claim under NRS 41.1495 sounded in professional negligence where it involved alleged failures to check on the patient while under monitoring). For example, in *Lewis v. Renown*, the Nevada Supreme Court recognized that a claim for elder abuse arising out of alleged failure to properly check or monitor a patient or otherwise provide adequate care sounded in professional negligence. *See generally Lewis v. Renown* , 432 P.3d 201 (Nev. 2018). Since the gravamen of Plaintiff's claim was professional negligence, the Court affirmed the District Court's dismissal of the elder abuse claim on statute of limitations grounds. *Id.* In reaching this holding, the Court reasoned as follows:

> In *Szymborski* we considered the distinction between claims for medical negligence and claims for ordinary negligence against a healthcare provider in the context of the discharge and delivery by taxi of a disturbed patient to his estranged father's house, without notice or warning. *Id.* at 1283-1284. In contrast to allegations of a healthcare provider's negligent performance of nonmedical services, "[a]llegations of [a] breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for [professional negligence]." *Id.* at 1284. The gravamen of Lewis' claim for abuse and neglect is that Renown failed to adequately care for Sheila by failing to monitor her. Put differently, Renown breached its duty to provide care to Sheila by failing to check on her every hour per the monitoring order in place. We are not convinced by Lewis' arguments that a healthcare provider's failure to provide care to a patient presents a claim distinct from a healthcare provider's administration of substandard care; both claims amount to a claim for professional negligence where it involves a "breach of duty involving medical judgment, diagnosis, or treatment." *Id.* Lewis' allegations that Renown failed to check on Sheila while she was under a monitoring order necessarily involve a claim for a breach of duty in the administration of medical treatment or judgment. Thus, we affirm the district court's dismissal of Lewis' claims against Renown because his claim for abuse and neglect sounds in professional negligence and is time barred pursuant to NRS 41A.097(2).

Id. (emphasis added).

Similarly, in this case, Plaintiffs' claims for negligence/medical malpractice pursuant to

NRS 41A, wrongful death pursuant to NRS 41.05, and negligent infliction of emotional distress, all sound in professional negligence. Plaintiffs' first cause of action for negligence/medical malpractice is explicitly one for professional negligence subject to NRS 41A's requirements and is based upon the report from Sami Hashim, MD.[39] Plaintiffs' second cause of action is based upon the same alleged failures to provide medical services below the applicable standard of care and the same affidavit from Dr. Hashim.[40]. Plaintiffs' third and fourth causes of action for negligent infliction of emotional distress are also based upon the same alleged deviations in the standard of care and the same affidavit as the professional negligence claim.[41] As a result, it is clear Plaintiffs' claims sound in professional negligence or that the gravamen of their claims is professional negligence. Consequently, Plaintiffs' claims are necessarily subject to NRS 41A.097(2)'s statute of limitations.

C. CHH's Motion for Summary Judgment Should Be Granted Since Plaintiffs' Complaint Was Filed After the One-Year Statute of Limitations Expired

As expressed in *Massey v. Litton*, 99 Nev. 723, 669 P.2d 248 (1983), the one year discovery period within which a plaintiff has to commence an action commences when the plaintiff ". . . knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action." *Id.* at 728, 669 P.2d at 252; *See, also Eamon v. Martin,* 2016 Nev. App. Unpub. LEXIS 137 at 3-4 (Nev. App. Mar. 4, 2016).

"This does not mean that the accrual period begins when the plaintiff discovers the precise facts pertaining to his legal theory, but only to the general belief that someone's negligence may have caused the injury." (citing *Massey,* 99 Nev. at 728, 669 P.2d at 252). Thus, the plaintiff "discovers" the injury when 'he had facts before him that would have led an ordinarily prudent person to investigate further into whether [the] injury may have been caused by someone's negligence.'" *Eamon* at 4 (quoting *Winn v. Sunrise Hosp. & Med. Ctr.,* 128 Nev 246, 252, 277 P.3d

[39] Exhibit "A" hereto, ¶¶ 26-33 and Dr. Hashim's Aff. annexed thereto as Exhibit A

[40] Exhibit "A" hereto, ¶¶ 34-40

[41] Exhibit "A", ¶¶ 41-48; 49-56

458, 462). "The plaintiff need not be aware of the precise causes of action he or she may ultimately pursue. *Winn*, 128 Nev. at 252-53, 277 P.3d at 462. Rather, the statute begins to run once the plaintiff knows or should have known facts giving rise to a 'general belief that someone's negligence may have caused his or her injury.' *Id.*" *Golden v. Forage,* 2017 Nev. App. Unpub. LEXIS 745 at 3 (Nev. App. October 13, 2017).

The date on which the one-year statute of limitation begins to run may be decided as a matter of law where uncontroverted facts establish the accrual date. *See Golden, supra.* at *2 (Nev. App. Oct. 13, 2017) ("The date on which the one-year statute of limitation began to run is ordinarily a question of fact for the jury, and may be decided as a matter of law only where the uncontroverted facts establish the accrual date.") (citing *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 251, 277 P.3d 458, 462 (2012) (recognizing that the district court may determine the accrual date as a matter of law where the accrual date is properly demonstrated)); *see also Dignity Health v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark, No. 66084*, 2014 WL 4804275, at *2 (Nev. Sept. 24, 2014).

If the Court finds that the plaintiff failed to commence an action against a provider of health care before the expiration of the statute of limitations under NRS 41A.097, the Court may properly dismiss the Complaint pursuant to NRCP 12(b)(5). *See, e.g., Egan v. Adashek,* 2015 Nev. App. Unpub. LEXIS 634, at *2 (Nev. App. Dec. 16, 2015) (affirming district court's dismissal of action under NRCP 12(b)(5) where the plaintiff failed to file within the statute of limitations set forth in NRS 41A.087); *Rodrigues v. Washinsky*, 127 Nev. 1171, 373 P.3d 956 (2011) (affirming district court's decision granting motion to dismiss the plaintiffs' claims for failure to comply with NRS 41A.097); *Domnitz v. Reese*, 126 Nev. 706, 367 P.3d 764 (2010) (affirming district court's decision dismissing plaintiff's claim after finding that plaintiff had been placed on inquiry notice prior to one year before his complaint was filed and that the statute of limitations had expired pursuant to NRS 41A.97(2)).

While this is a motion for summary judgment (unlike a motion to dismiss when the averments in the Complaint need to be taken as true), the standard is more favorable to the moving party since once a prima facie case that no genuine issue of material fact exist, the non-moving party

is obligated to come forth with sufficient **and** admissible evidence demonstrating the presence of a material issue of fact. CHH has more than presented their prima facie case, and Plaintiffs will find it impossible to demonstrate with any credibility or admissible evidence sufficient to overcome the burden now shifted to them for their failure to timely file their Complaint.

In this case, NRS 41A.097(2)'s one-year statute of limitations began to run on the date of Ms. Powell's death (May 11, 2017). Per the Complaint, the individually named Plaintiffs, including Darci Creecy, Taryn Creecy, Isaiah Creecy, and Lloyd Creecy, contemporaneously observed the alleged negligence and Ms. Powell's rapid deterioration leading up to her death on May 11, 2017.[42]

In fact, such contemporary observance of the alleged negligence is an element of Plaintiffs' claims for negligent infliction of emotional distress.[43] In order to establish negligent infliction of emotional distress under Nevada law, a plaintiff must generally show that he or she was a bystander, who is closely related to the victim of an accident, be located near the scene of such accident and suffer "shock" that caused emotional distress resulting from the "observance or contemporaneous sensory of the accident." *State v. Eaton*, 101 Nev. 705, 714, 710 P.2d 1370, 1376 (1985) (allowing recovery for negligent infliction of emotional distress to witness of car accident in which the plaintiff's baby daughter was killed); *see also Grotts v. Zahner*, 989 P.2d 912, 920 (Nev. 1999). "[R]ecovery may not be had under this cause of action, for the 'grief that may follow from the [injury] of the related accident victim.'" *Eaton*, at 714, 710 P.2d at 1376. In fact, in cases where emotional distress damages are not secondary to physical injuries, "proof of 'serious emotional distress' causing physical injury or illness must be presented." *Olivero v. Lowe*, 116 Nev. 395, 399-405 (Nev. 2000).

Since Plaintiffs allege that they contemporaneously observed the alleged negligence and deterioration of Ms. Powell leading up to her death, the Plaintiffs knew, or should have known, of

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[42] *See* Exhibit "A" hereto at ¶ 20 (died on May 11, 2017); *see also* Exhibit "A" hereto at ¶¶ 45-46 and 52-53 (allegedly contemporaneously observing Ms. Powell rapidly deteriorate and die).

[43] An earlier filed Motion for Summary Judgment on the issue of negligent infliction of emotional distress has not yet decided as of the filing of this Motion.

(footnote continued)

facts that would put a reasonably person on inquiry notice by May 11, 2017. Plaintiffs were aware of facts that would lead an ordinarily prudent person to investigate the matter further at that time. In fact, the evidence submitted herewith demonstrates that Taryn Creecy, one of the plaintiffs herein, specifically requested copies of Ms. Powell's complete medical records from CHH on May 25, 2017, a mere two weeks after Ms. Powell's death.[44] Ms. Creecy even went to the trouble of going to Probate Court to obtain a court order directing the production of Ms. Powell's records from CHH, and actually obtained that very order.[45] It is abundantly clear that Plaintiffs sought and obtained all of Ms. Powell's medical records as late as June, 2017. The declarations of both Gina Arroyo and Melanie Thompson[46] conclusively establish that Plaintiffs received a complete copy of Ms. Powell's medical records from CHH in June, 2017 and Plaintiffs sought them in May, 2017.

Under Nevada law, Plaintiffs did not have to know precise facts or legal theories for their claims; rather, they only needed to be placed on inquiry notice. Here, under the facts alleged in the Complaint and based upon the conclusive and incontrovertible evidence annexed hereto, Plaintiffs were placed on inquiry notice because they were aware of facts that would lead an ordinarily prudent person to investigate the matter further. Not only were they placed on inquiry notice, but they actually pursued the medical records upon which the Complaint is based. They sought and obtained all they needed to investigate the claims immediately after Ms. Powell's death, but they failed to timely file their lawsuit.

Furthermore, Dr. Hashim, Plaintiffs' expert, was able to provide a medical affidavit to support Plaintiffs' Complaint in January, 2019, based upon the complete medical record they requested a mere two weeks after Ms. Powell's death, and which they obtained from CHH in June, 2017. There is nothing more than the CHH medical records which were necessary either to frame a complaint, or to have had Plaintiffs be placed upon inquiry notice of alleged professional

[44] *See* Declaration of Gina Arroyo and associated exhibits annexed thereto which are collectively annexed hereto as Exhibit "M"

[45] Exhibit A to Exhibit "M" hereto.

[46] Exhibits "M" and "N" respectively hereto

negligence (which itself is completely denied by CHH). The fault lies not with anyone other than either Plaintiffs or their counsel for their failure to file their Complaint by May 11, 2018.

Given this, the one-year statute of limitations under NRS 41A.097(2) began to run on May 11, 2017. Thus, Plaintiffs were required to file their Complaint by May 11, 2018. Plaintiffs obtained their expert affidavit on January 23, 2019, and failed to file their Complaint until February 4, 2019. Since Plaintiffs failed to file their Complaint within the one-year statute of limitations provided by NRS 41A.097(2), Plaintiffs' Complaint was untimely. Therefore, the CHH's instant motion should be granted as there are no genuine issues of fact as to (1) the lateness of the filing, (2) no evidence (nor can there be) to excuse such a late filing, and (3) nothing in Plaintiffs' Complaint affirmatively pleading and justification for the late filing.

IV. CONCLUSION

CHH introduced incontrovertible evidence that Plaintiffs' Complaint was untimely filed. The fact that the action itself accrued more than one year after Plaintiffs' discovery of the injury which placed them on reasonable notice of their causes of action, Plaintiffs are time barred and CHH's motion for summary judgment should be granted in its entirety and the complaint against CHH be dismissed with prejudice.

DATED this 2nd day of September, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Adam Garth*

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 2020, a true and correct copy of **VALLEY HEALTH SYSTEM, LLC AND UNIVERSAL HEALTH SERVICES, INC.'S MOTION FOR SUMMARY JUDGMENT BASED UPON THE EXPIRATION OF THE STATUTE OF LIMITATIONS** 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.

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DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF REBECCAL POWELL, through Brian Powell as Special Administrator; DARCI CREECY, individually; TARYN CREECY, individually; ISAIAH KHOSROF, individually; LLOYD CREECY, individually; Plaintiffs, vs. VALLEY HEALTH SYSTEM, LLC (doing business as "Centennial Hills Hospital Medical Center"), a foreign limited liability company; UNIVERSAL HEALTH SERVICES, INC., a foreign corporation; DR. DIONICE S. JULIANO, M.D., an individual; DR. CONRADO C.D. CONCIO, M.D., an individual; DR. VISHAL S. SHAH, M.D., an individual; DOES 1-10; ROES A-Z; Defendants.	CASE NO. A-19-788787-C DEPT. NO. XXX (30) **PLAINTIFFS' OPPOSITION TO VALLEY HEALTH SYSTEM, LLC'S MOTION FOR SUMMARY JUDGMENT SEEKING DISMISSAL ON STATUTE OF LIMITATIONS GROUNDS**

Pursuant to Nevada Rule of Civil Procedure 56 and Eighth Judicial District Court Rule 2.20, Plaintiffs hereby respond to Defendants Valley Health Systems, LLC ("VHS") and

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Universal Health Services, Inc.'s ("UHS")[1] motion styled "*Valley Health System, LLC And Universal Health System Services, Inc.'s Motion For Summary Judgment Based Upon The Expiration Of The Statute Of Limitations.*"[2] The motion currently pending before the Court, filed on September 2, 2020, is simply a rehash of a prior motion filed by VHS on June 19, 2019 – the only distinction being that the current motion is styled a motion for summary judgment whereas the prior motion was labelled a motion to dismiss. Simply slapping a new label on an old motion does not improve the merits of the same arguments previously considered and rejected by the Court. Instead, the only thing VHS accomplishes by filing an old motion with a new label is to require undersigned counsel to divert attention from prosecuting the merits of this case and once again respond to an issue that has already been decided by this Court. In the process, VHS wastes this Court's precious time by requiring it to revisit a decided issue.

For the reasons set forth in the memorandum of points and authorities below, the Court should deny VHS's motion for summary judgment for the same reasons it previously rejected the motion to dismiss that was presented by VHS arguing a statute of limitations defense. In support this opposition, Plaintiffs rely upon all papers on file in this case, but especially

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[1] Counsel for VHS and UHS are apparently unacquainted with the procedural history in this case. UHS was dismissed, without prejudice, on December 5, 2019. To the extent UHS is requesting to become a Defendant again by joining in the motion filed by VHS, Plaintiff do not oppose that request.

[2] Referred to herein for ease of reference as "VHS MSJ."

Plaintiffs' filing of August 13, 2019 (fully incorporated by reference herein), and the Appendix attached hereto (which includes the Declaration of Paul S. Padda, Esq.).

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

This is a wrongful death case in which it is alleged that Rebecca Powell died while in the care of Centennial Hills Hospital on account of negligence by the hospital and its medical personnel. Ms. Powell was the mother of three children – Isaiah, Taryn and Darci. *See* App. 2, 19.[3] Ms. Powell died on May 11, 2017. App. 3. According to the State of Nevada Certificate of Death (issued on June 28, 2017), Ms. Powell's cause of death was listed as a "suicide." Id.

According to Rebecca Powell's former husband, Brian Powell, he could not visit with Rebecca while she was in the hospital because he was "turned away by the nurses." App. 85. However, he has stated under oath that, following Rebecca's death on May 11, 2017, "I did meet with Taryn, Isaiah and one of Rebecca's friends to speak with the doctor and risk manager after Rebecca's death, but they didn't provide any information." App. 86, 88. Following notification by the State of Nevada on June 28, 2017 that his former wife's death was a "suicide," Brian Powell filed a complaint with the State of Nevada Department of Health and Human Services ("HHS") seeking further answers.

[3] "App. ___." refers to the referenced page(s) of the Appendix attached and filed herewith.

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By letter dated February 5, 2018, HHS notified Mr. Powell that it conducted an "investigation" of Centennial Hills Hospital and found that the facility had "violation(s) with rules and/or regulations." App. 4. HHS's report, dated February 5, 2018 and presumably mailed to Mr. Powell that same day, noted a number of deficiencies in the medical care provided to Rebecca Powell including, among other things, that Rebecca was exhibiting symptoms that should have triggered a higher level of care. App. 16 ("the physician should have been notified, the RRT activated and the level of care upgraded").

Within one year of the HHS investigative report dated February 5, 2018, Rebecca Powell's family filed a Complaint in this Court on February 4, 2019 alleging wrongful death. App. 4, 17. The HHS investigative report stands in stark contrast to the death certificate suggesting Ms. Powell died of a suicide. *See* App. 3, 4-16. In support of the Complaint, Plaintiffs attached a medical affidavit from Dr. Sami Hashim, M.D. opining that in his opinion Ms. Powell was the victim of a "wrongful death" on account of several failures and breaches by the Defendants. App. 44. Dr. Hashim's affidavit references both the Certificate of Death and the HHS Report of Investigation. App. 39-45.

On September 2, 2020 Defendant VHS filed a motion for summary judgment alleging this lawsuit should be dismissed on the grounds that the Complaint was not filed within the appropriate statute of limitations period. In support of its argument, VHS relies primarily upon the allegations in the Complaint, the medical affidavit that was prepared by Dr. Sami Hashim, M.D. at the time the Complaint was filed on February 4, 2019 and the declaration of Gina Arroyo (attached to VHS MSJ as Exhibit M). Ms. Arroyo, an employee of a medical records

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retrieval company, claims she was notified by Taryn Creecy that records Ms. Creecy had allegedly requested were never received. Mr. Arroyo further testifies that "[o]n June 29, 2017, we re-sent the records addressed to Mr. Powell at the post office box previously provided and we did not receive the records back thereafter." VHS MSJ, Exhibit M, ¶ 13.

II.

ARGUMENTS

A. THE STANDARD OF REVIEW APPLICABLE TO THIS CASE COUNSELS THAT WHETHER PLAINTIFFS TIMELY FILED THEIR COMPLAINT IS A QUESTION OF FACT

In Massey v. Linton, 99 Nev. 723 (1983), the Nevada Supreme Court held that a Plaintiff "discovers" his injury "when he knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on *inquiry notice* of his cause of action." "While difficult to define in concrete terms, a person is put on "inquiry notice" when he or she should have known of facts that 'would lead an ordinary prudent person to investigate the matter further." Winn v. Sunrise Hospital and Medical Center, 128 Nev. 246, 252 (2012) (*quoting* Black's Law Dictionary 1165 (9th ed. 2009). The Nevada Supreme Court has held that the accrual date for NRS 41A.097's one-year discovery period ordinarily presents a question of fact to be decided by the jury. *See* Winn, 128 Nev. at 258. "Only when the evidence irrefutably demonstrates that a plaintiff was put on inquiry notice of a cause of action should the district court determine this discovery date as a matter of law." Id.

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B. THE COURT SHOULD REJECT VHS'S MOTION FOR SUMMARY JUDGMENT (AND AWARD PLAINTIFFS REASONABLE FEES AND COSTS) BECAUSE IT SIMPLY SEEKS TO RELITIGATE AN ISSUE ALREADY DECIDED BY THE COURT AND THEREFORE VIOLATES THIS COURT'S RULE 2.24

On September 25, 2019, the Court denied Defendants' motion to dismiss on statute of limitations grounds. App. 77. Defendant VHS acknowledges this fact in its motion for summary judgment. *See* VHS MSJ, p. 4. Yet, notwithstanding this admission, VHS continues to purse the same arguments that were previously considered and denied by the Court.

Under this Court's Eighth Judicial District Court Rule ("EDCR") 2.24(a) "[n]o motions 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."[4] This rule exists for a reason: namely so parties are not required to waste time, money and limited resources litigating issues that have already been decided. The point of seeking leave first is so the Court and non-moving party understand what issues the moving party seeks to litigate and whether it has any new evidence to offer. Otherwise, allowing parties to re-label previously denied motions would result in an inequitable waste of a non-moving parties time and resources. That is exactly what has occurred here.

During that past several days, undersigned counsel on behalf of Plaintiffs has responded to over 200 written discovery requests propounded by Defendants. During this same period, undersigned counsel has been required to yet again respond to legal issues previously decided

[4] Emphasis supplied.

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by this Court. The record in this case clearly demonstrates that VHS has violated this Court's EDCR 2.24 insofar as leave was never provided by the Court for the filing of a motion for summary judgment that embraces the same issues previously decided. Simply slapping the label of "summary judgment" on a previously denied motion to dismiss is a flagrant abuse of the process and violates the spirit and purpose of EDCR 2.24.

Undersigned counsel for Plaintiffs has been required to expend unnecessary time and resources on responding to a motion that is even weaker (given the facts presented herein) than was its predecessor motion to dismiss which presented the same arguments. The Court should affirm the principles of EDCR 2.24 and award Plaintiffs their reasonable attorney fees and costs.

C. THE OBVIOUS INCONSISTENCY BETWEEN THE DEATH CERTIFICATE AND THE HHS REPORT OF INVESTIGATION CREATE GENUINE ISSUES OF MATERIAL FACT AS TO WHEN PLAINTIFFS HAD INQUIRY NOTICE WHICH ONLY A JURY CAN DECIDE

Following Rebecca Powell's death on May 11, 2017, the family received no concrete facts or answers from Centennial Hills Hospital or its medical personnel. *See* App. 86. Approximately six weeks later, the family was notified by the State of Nevada that Rebecca died of "suicide" and noted that alleged fact in block "28a" of the Certificate of Death. App. 3. At that point, no reasonable person would be on "inquiry notice" that their loved one died from medical malpractice when the State of Nevada was characterizing the death in an official document as a "suicide." Obviously, a suicide is a willful act in which a person takes their own life.

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Seeking more answers, Brian Powell filed a complaint with Nevada HHS. App. 5. The agency conducted an "investigation" and rendered findings directly in contradiction to the prior finding of suicide. By letter dated February 5, 2018, which was apparently mailed to Brian Powell's United States Postal Service "PO Box,"[5] and did not reach him until several days later, the State of Nevada notified him of several concerning issues relating to the medical care rendered to Rebecca Powell. The investigation found, among other things, that Rebecca's "[c]linical record lacked documented evidence the patient's vital signs were monitored on 5/11/2017 from 4:47 AM through 6:10 AM, when the patient was found unresponsive." App. 12. Given that the Certificate of Death alleges Rebecca died from "Complications of Duloxetine (Cymbalta) Intoxication," which it characterized as a suicide, this would suggest she overdosed while in the hospital. How is that possible? Of course, that suggestion would be inconsistent with the Nevada HHS finding that Rebecca was "in respiratory distress was unattended and was not upgraded to a higher level of care." App. 5. Nevada HHS notified Brian Powell by letter dated February 5, 2018 that "[b]ased on the completed investigation, it was concluded that the facility or agency [Centennial Hills Hospital] had violation(s) with rules and/or regulations." App. 4.

Rebecca Powell's family filed the instant action within one year of the date of the Nevada HHS letter – on February 4, 2019.[6] The letter notified them, for the first time, that what

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[5] *See* App. 4.

[6] The letter was actually received later than February 5, 2018.

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was listed on the Certificate of Death was inaccurate. In the face of the foregoing, all of which Defendant VHS has been aware of since the initiation of this lawsuit since the Nevada HHS investigative report and Certificate of Death are referenced throughout the medical affidavit[7] filed with the Complaint, Defendant VHS continues to argue, frivolously, that this lawsuit is untimely.

Based upon the documents provided in the Appendix filed with this Opposition, Plaintiffs have clearly shown there are genuine issues of material fact regarding when they received inquiry notice. Confronting a similar set of facts in the Winn case, the Nevada Supreme Court reversed the trial court's grant of summary judgment by concluding that whether a father discovered facts placing him on inquiry notice of potential claims for malpractice when he was informed that patient had suffered extensive brain injury during heart surgery was a question of fact, for limitations purposes.

Although Defendant VHS relies upon the declaration of Gina Arroyo, who testifies records were mailed to Taryn Creecy but cannot confirm they were actually received by her, the declaration is of no merit on the issue before the Court. Even assuming Taryn Creecy received the medical documents, which Ms. Arroyo alleges were mailed on June 29, 2017,[8] the State of Nevada issued a Certificate of Death one day earlier, on June 28, 2017, ruling Rebecca Powell's death a suicide. Thus, under the standard articulated in Winn, "no ordinary prudent person"

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[7] *See* App. 39-45.

[8] VHS MSJ, Exhibit M.

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would investigate further in the face of an official record finding their loved one committed suicide. Yet, Brian Powell did pursue the matter further by asking the Nevada HHS to investigate her care which it did and concluded there were violations. At this point, the family had inquiry notice for the first time.

While VHS can argue the facts and disagree with Nevada HHS's findings, including the import of those findings, what is beyond dispute is that there are genuine issues of material fact as to when the family had inquiry notice of potential medical malpractice and those are questions only a jury can decide.

D. THE FACT THAT THE CHILDREN AND FATHER OF REBECCA POWELL ARE SUING UNDER A THEORY OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS DOES NOT MEAN THEY WERE ON INQUIRY NOTICE WHEN THEY SUFFERED SENSORY SHOCK

In what can only charitably be called the most frivolous argument advanced in the motion for summary judgment, Defendant VHS argues that if Lloyd, Taryn, Darci and Isaiah Creecy are each suing under a negligent infliction of emotional distress ("NIED") theory, then they were on "notice" of Defendants alleged negligence at the time they experienced sensory shock. This argument is patently absurd. Whether a breach of the duty of care occurred would often not be discovered until much later irrespective of whatever sensory shock a person observed at the time. A plaintiff obviously knows what he or she feels and experiences in the moment, not necessarily what legal theory applies to their situation. Under VHS's tortured logic, the fact that Plaintiffs are now suing for negligent infliction of emotional distress means, from VHS's perspective, that they knew when they experienced sensory shock and

contemporaneous observance of Rebecca's condition that someone was negligent. This is both conclusory and illogical. Negligence is only a theory that applies to a set of "facts." That facts exist which may give rise to a cause of action does not mean the plaintiff is aware of the legal theory or has notice that someone may be responsible for their shock and condition of their loved one.

In this case, Plaintiffs had no access nor were they provided with any information (App. 86) at the time Rebecca was in the hospital that suggested she was the victim of medical negligence. VHS argues out of both sides of its figurative "mouth" by arguing on the one hand that the NIED claims are evidence of "notice" but then admitting in Gina Arroyo's declaration that medical records were not mailed or otherwise provided to Taryn Creecy until June 29, 2017. The medical records themselves establish nothing since the State of Nevada ruled Rebecca's death a suicide one day earlier; a conclusion later contradicted by Nevada HHS's investigative findings issued on February 5, 2018.

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III.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court deny Defendants' motion for summary judgment for the same reasons it previously denied the motion to dismiss asserting the same arguments. Simply put, Plaintiffs' Complaint initiating this lawsuit was timely filed. And if it was not, as previously noted by the Nevada Supreme Court in a case with similar facts, that's a question for the jury to decide.

Respectfully submitted,

/s/ Paul S. Padda

Paul S. Padda, Esq.
James P. Kelly, Esq.
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Las Vegas, Nevada 89103
Attorneys for Plaintiffs

Dated: September 16, 2020

CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure 5, the undersigned hereby certifies that on this day, September 16, 2020, I filed and served a true and correct copy of the above document entitled **PLAINTIFFS' OPPOSITON TO VALLEY HEALTH SYSTEM, LLC'S MOTION FOR SUMMARY JUDGMENT SEEKING DISMISSAL ON STATUTE OF LIMITATIONS GROUNDS** on all parties/counsel of record in the above entitled matter through the Court's electronic filing system.

/s/ Jennifer Greening

Jennifer Greening, Paralegal
PAUL PADDA LAW, PLLC

DECLARATION OF PAUL S. PADDA, ESQ.

I, Paul S. Padda, do hereby declare the following:

1. I am providing this declaration based upon my personal knowledge. I am above the age of 18 and not a party to the litigation referenced in the proceeding paragraph. I am competent to testify to the matters set forth herein.

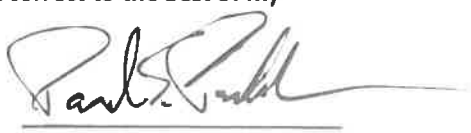
2. I am counsel of record for Plaintiffs in the case pending before this Court styled Estate of Rebecca Powell, *et. al.* vs. Valley Health System, LLC, *et. al.*, Clark County District Court, Case No. A-19-788787-C.

3. In conjunction with and in support of Plaintiffs' Opposition to Defendant Valley Health System, LLC's Motion for Summary Judgment I have attached an Appendix with various documents. Included among those documents is a State of Nevada Certificate of Death (redacted in part). Also included is a State of Nevada Department of Health and Human Services Report issued to Brian Powell on February 5, 2018. The Report details numerous deficiencies on the part of Valley Health System, LLC (doing business as Centennial Hills Hospital). Both the death certificate and the Report are self-authenticating documents pursuant to Nevada Revised Statute 52.125.

4. Also included is a color photograph of Rebecca Powell with her children Isaiah, Darci and Taryn Creecy. This photograph was provided to my office by Ms. Powell's father Lloyd Creecy and has been provided to Defendants as part of Plaintiffs' First Supplemental Disclosures, PLTF #141.

5. Finally, included among the court filed documents printed from the Court's electronic docketing system is also a copy of the Estate of Rebecca Powell's response to Interrogatory number 10 to Defendants' Requests for Interrogatories. As counsel of record for Plaintiff, I assisted in the drafting of this response and having it served upon counsel for Defendants.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.



Paul S. Padda, Esq.

Dated: September 16, 2020

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DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF REBECCA POWELL, through BRIAN POWELL, as Special Administrator; DARCI CREECY, individually and as Heir; TARYN CREECY, individually and as an Heir; ISAIAH KHOSROF, individually and as an Heir; LLOYD CREECY, individually;,

Plaintiffs,

vs.

VALLEY HEALTH SYSTEM, LLC (doing business as "Centennial Hills Hospital Medical Center"), a foreign limited liability company; UNIVERSAL HEALTH SERVICES, INC., a foreign corporation; DR. DIONICE S. JULIANO, M.D., an individual; DR. CONRADO C.D. CONCIO, M.D., an individual; DR. VISHAL S. SHAH, M.D., an individual; DOES 1-10; and ROES A-Z;,

Defendants.

Case No. A-19-788787-C

Dept. No.: 30

DEFENDANTS VALLEY HEALTH SYSTEM, LLC AND UNIVERSAL HEALTH SERVICES, INC.'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED UPON THE EXPIRATION OF THE STATUTE OF LIMITATIONS

Hearing Date: October 28, 2020
Hearing Time: 9:00 a.m.

COMES NOW, Defendants VALLEY HEALTH SYSTEM, LLC (doing business as "Centennial Hills Hospital Medical Center"), a foreign limited liability company; UNIVERSAL HEALTH SERVICES, INC., a foreign corporation (collectively "CHH") by and through their

counsel of record S. Brent Vogel, Esq., and Adam Garth, Esq., of the Law Firm LEWIS BRISBOIS BISGAARD & SMITH, LLP, hereby submit their reply to Plaintiffs' opposition to CHH's motion for an order granting summary judgment due to the expiration of the statute of limitations as contained in NRS 41A.097, necessitating dismissal of the instant case.

CHH makes and bases this motion upon the papers and pleadings on file in this case, the Memorandum of Points and Authorities submitted herewith, and any arguments adducted at the hearing of this Motion.

DATED this 21st day of October, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Adam Garth*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs **fail to cite one legal authority or contradict** any authority CHH advances to dispute CHH's basis for its Motion. Plaintiffs' lead argument in opposition is predicated on both a false assumption and claim that the instant motion is a rehearing of CHH's prior motion to dismiss in violation of EDCR 2.24. Plaintiffs' counsel also uses his lead opposition argument to complain about having to respond to legitimate written discovery propounded upon the respective Plaintiffs. **Plaintiffs' counsel misrepresents facts and purposefully excludes material evidence that Plaintiffs' themselves just recently disclosed which categorically refute Plaintiffs' assertions they make in opposition to the instant motion.** This lack of candor by Plaintiffs' counsel is disturbing to say the least, and the evidence, which will be discussed herein below, demonstrates that Plaintiffs were actually on inquiry notice as early as the date of Ms. Powell's death on May 11, 2017, and as late as June 11, 2017, when Special Administrator and Ms. Powell's ex-husband, Brian Powell, filed a complaint with the Nevada Nursing Board wherein he specifically requested an investigation of Ms. Powell's death. His complaint to the Nursing Board asserted that there was "a lack of sufficient care from those assigned to her ensure her well being [at CHH] . . . Now I ask that you advocate for her, investigate and ensure this doesn't happen again."[1] This acknowledgement by the lead plaintiff in this case could not be more clear that Plaintiffs not only suspected potential malpractice, but affirmatively accused CHH of same and requested intervention by a State agency.[2] There could be no clearer evidence of inquiry notice.

[1] See, Excerpts from Plaintiffs' First Supplement to Initial Designation of Experts and Pre-Trial List of Witnesses and Documents Pursuant to NRCP 16.1(A)(3), annexed hereto as **Exhibit "O"**, specifically Special Administrator Brian Powell's Complaint against CHH Nurse Michael Pawlak dated June 11, 2017 designated as PLTF 48-49.

[2] All other Plaintiffs in the instant case are charged with the same inquiry notice since they all have an identity of interest. *See, Costello v Casler*, 127 Nev. 436, 441-442, 254 P.3d 631, 634-635 (2011); *Murphy v. City of Portland*, 2007 U.S. Dist. LEXIS 105222 at 8-10 (DC Oregon, May 2, 2007).

(footnote continued)

Furthermore, Plaintiffs' counsel failed to acknowledge the completely different standards, evidentiary requirements, and court responsibilities on a motion for summary judgment versus the limitations posed by motions to dismiss.

Finally, Plaintiffs' reference to the negligent infliction of emotional distress (NIED) claim has little if anything to do with the instant motion before the Court. CHH referred only the NIED claim to demonstrate that it stems from the malpractice claims and is subject to the same statute of limitations as the professional negligence claims.[3] Co-defendants separately moved for summary judgment on the limited issue of the NIED claim to which CHH joined.

II. LEGAL ARGUMENT

A. Motion to Dismiss Standard vs. Summary Judgment Standard

For dismissal under NRCP 12(b)(5), the court is to construe the pleading liberally and draw every fair inference in favor of the non-moving party. *Vacation Village v. Hitachi America*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). In a motion to dismiss, all factual allegations in the complaint must be regarded as true and all inferences must be drawn in favor of the non-moving party. *Buzz Stew, LLC v. City of North Law Vegas*, 181 P.3d 670, 672 (Nev 2008). A complaint should only be dismissed if it appears beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle him to relief. *Id.* "When the defense of statute of limitations appears from the complaint itself, a motion to dismiss is proper." *Kellar v. Snowden*, 87 Nev. 488, 489 P.2d 90 (1971). NRS 41A.097 (2)(a) and (c) requires that an action based upon professional negligence of a provider of health be commenced the earlier of one year from discovery of the alleged negligence, but no more than three years after alleged negligence. On motions to dismiss, a court is limited to evaluating the four corners of the complaint itself, without regard to any extraneous evidence.

Summary judgment, on the other hand, is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

[3] See, *Mendoza v. Johnson*, 2016 Nev. Dist. LEXIS 3521, Case No. A-14-708740-C (March, 2016) in which the District Court acknowledged that NIED claims tied to medical malpractice lawsuits are subject to the medical malpractice statute of limitations.

genuine issue as to any disputed material fact and that the moving party is entitled to a judgment as a matter of law." N.R.C.P. 56(c). In other words, a motion for summary judgment shall be denied only when the evidence, taken together, shows a genuine issue as to any material fact. In the milestone case *Wood v. Safeway, Inc.*, 121 Nev. 724, 731 (2005), the Supreme Court of Nevada held that "[t]he substantive law controls which factual disputes are material" to preclude summary judgment, and that "[a] factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* Summary judgment is proper "where the record before the Court on the motion reveals the absence of any material facts and [where] the moving party is entitled to prevail as a matter of law." *Zoslaw v. MCA Distribution Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983); Fed. R. Civ. Proc. 56. "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties differing versions of the truth." *Sec. and Exch. Comm. v. Seaboard Corp.*, 677 F.2d 1289, 1293 (9th Cir. 1982).

When applying the above standard, the pleadings and other proof must be construed in a light most favorable to the nonmoving party. *Wood, supra* 121 Nev. at 732. However, the nonmoving parties in this case, Plaintiffs, "may not rest upon general allegations and conclusions," but shall "by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial." *Id.* at 731-32. The nonmoving party "bears the burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered in the moving party's favor." *Id.* at 732. "The nonmoving party 'is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture.'" Id. But, "the nonmoving party is entitled to have the evidence and all reasonable inferences accepted as true." *Lease Partners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 752 (1997).

The moving party has the burden of showing the absence of a genuine issue of material fact, and a court must view all facts and inferences in the light most favorable to the responding party. *See Adickes v. S.H. Dress & Co.*, 398 U.S. 144, 157 (1970). *See also Zoslaw*, 693 F.2d at 883; *Warren v. City of Carlsbad*, 58 F.3d 439 (9th Cir. 1995). Once this burden has been met, "[t]he opposing party must then present specific facts demonstrating that there is a factual dispute about a

material issue." *Zoslaw*, 693 F.2d at 883. The moving party is entitled to summary judgment if the non-moving party, who bears the burden of persuasion, fails to designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986) (internal quotation omitted).

As to when a court should grant summary judgment, the High Court has stated:

> [T]he motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.

Celotex, 477 U.S. at 323-324. "A [s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Id.* at 327.

In other words, when CHH made its motion to dismiss, the Court was obligated to take the allegations made on the face of the Complaint as true. CHH's prior motion to dismiss was limited solely to the Complaint. On the instant motion, Plaintiffs do not receive that preference, and the Court is now obligated to review admissible evidence. CHH came forth with evidence in the first instance to demonstrate that Plaintiffs' received all materials necessary to investigate and suspect alleged malpractice merely a couple of weeks after Ms. Powell's death in May, 2017 and that the case was filed more than one year from the discovery date. The burden then shifted to Plaintiffs to demonstrate otherwise. This they failed to do.

B. Fraudulent Concealment Must Be Pled With Particularity

In opposition to the instant Motion, Plaintiffs effectively claim that they were misled as to Ms. Powell's cause of death and lacked sufficient information to suspect alleged malpractice. Plaintiffs state that they were misled by Ms. Powell's death certificate's cause of death, and only after receiving the HHS Report dated February 5, 2018 were they made aware of alleged specific deviations from the standard of care. Plaintiffs are, in essence, making a claim of fraudulent concealment. As the evidence submitted herewith and on the motion in chief, Plaintiffs assertions are entirely false.

In the first instance, a claim for fraudulent concealment needs to be alleged with particularity, demonstrating " . . . the means by which the previously unknown information was acquired within the statutory period which led to the discovery of the concealment and underlying breach of fiduciary duty." *Golden Nugget v. Ham*, 98 Nev. 311, 314-315 (1982). A review of the face of Plaintiffs Complaint[4] demonstrates that there is no allegation of fraudulent concealment with particularity. Plaintiff's failure to so allege with particularity necessitates the granting of summary judgment.

C. Fraudulent Concealment Requires Proof of Fraudulent Means to Conceal Plaintiff's Cause of Action as Well as Plaintiff's Actual Lack of Awareness Thereof Caused by the Concealment

In *Garcia v. Eighth Judicial Dist. Court of Nev.*, 2011 Nev. Unpub. LEXIS 1288, 2011 WL 5903792, subsequently published without opinion at 127 Nev. 1136 (November 22, 2011), the Supreme Court held that fraudulent concealment in a medical malpractice context requires a showing by Plaintiff that the doctor (1) used fraudulent means to keep the plaintiff unaware of her cause of action, and (2) Plaintiff was actually ignorant of her cause of action. *See, Id.* 2011 Nev. Unpub. LEXIS at 5. In this case, Plaintiffs failed to demonstrate either prong of this test. There is a complete absence of any evidence in support of Plaintiffs' Complaint or in opposition to the instant motion demonstrating either that there was fraud involved or that Plaintiffs were unaware of their cause of action against CHH resulting therefrom. Plaintiffs failed to plead fraudulent concealment with specificity, as they were required to do, rendering Plaintiffs' Complaint facially and fatally deficient. Second, Plaintiffs failed to interpose any evidence of what materials they allegedly sought from CHH prior to instituting their original Complaint which they now claim they were missing in determining the potential for a medical malpractice lawsuit. In fact, the affidavit of Plaintiffs' expert, Dr. Sami Hashim, states in clear terms the following:

> **Based upon the medical records**, the patient did not and with high probability could not have died from the cause of death stated in the Death Certificate. The patient died as a direct consequence of respiratory failure directly **due to below standard of care violations as indicated by her medical records and reinforced** by the

[4] **Exhibit "A"** to CHH's Motion in chief.

(footnote continued)

> Department of Heath and Human Services – Division of Health Quality and Compliance Investigative Report.[5]

(Emphasis supplied).

Dr. Hashim noted that he primarily relied upon the very medical records which Plaintiffs obtained in May/June, 2017. The report of the Department of Health and Human Services is referred to by Dr. Hashim as only a "reinforcement" of what was contained in the medical records. Plaintiffs attempt to paint the picture that they lacked sufficient information to be on notice of potential malpractice, when their own expert indicated that the medical records themselves (which Plaintiffs long had in their possession) were sufficient from which to form a claim of malpractice.

"'[T]he party alleging fraud bears the burden of proving it with clear, precise, and unequivocal evidence.' (Internal quotation marks omitted.) [*Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 105,] 110, [912 A.2d 1019 (2007)]."

> "To establish that the defendants had fraudulently concealed the existence of their cause of action and so had tolled the statute of limitations, **the plaintiffs had the burden of proving** that the defendants were aware of the facts necessary to establish this cause of action . . . and that they had intentionally concealed those facts from the plaintiffs . . . The defendants' actions must have been directed to the very point of obtaining the delay [in filing the action] of which [they] afterward [seek] to take advantage by pleading the statute . . . **To meet this burden, it was not sufficient for the plaintiffs to prove merely that it was more likely than not that the defendants had concealed the cause of action. Instead, the plaintiffs had to prove fraudulent concealment by the more exacting standard of clear, precise, and unequivocal evidence . . .**" (Citations omitted; footnote omitted; internal quotation marks omitted.) *Bound Brook Associates v. Norwalk*, 198 Conn. 660, 665-66, 504 A.2d 1047 (1986).

Richardson v. Hierholzer, No. CV176072031S, 2018 Conn. Super. LEXIS 979, at *12-13 (Super. Ct. May 17, 2018) (emphasis supplied).

Furthermore, as the Nevada Court of Appeals held in *Callahan v. Johnson*, 2018 Nev. App. Unpub. LEXIS 950, 3-5

> Under Nevada law, the one-year statute of limitations begins to run

[5] See, Affidavit of Sami Hashim, M.D. attached as Exhibit A to Plaintiffs' Complaint, which itself is attached to Plaintiffs' Motion in chief as **Exhibit "A"**, para. 6(B).

> when the plaintiff "knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action." *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983). Our supreme court has clarified that the plaintiff need not know the "precise legal theories" underlying her claim, so long as the plaintiff has a "general belief that someone's negligence may have caused his or her injury." *Winn*, 128 Nev. at 252-53; 277 P.3d at 462. Thus, at its core the one-year statute of limitation requires the "plaintiff to be aware of the cause of his or her injury." *Libby*, 130 Nev. at 365, 325 P.3d at 1279 (addressing the rule from Massey and Winn). The district court may determine the accrual date as a matter of law if the evidence irrefutably demonstrates that date. *Winn*, 128 Nev. at 253, 277 P.3d at 463.
>
> We conclude the uncontroverted facts show that Callahan was on inquiry notice more than a year in advance of the date she filed her complaint. Critically, Callahan knew that her nerve had been cut during the February 10 surgery and that this injury caused her complained-of symptoms. Callahan testified that her symptoms began immediately following the February 10 surgery and that Dr. Johnson and Dr. Glyman both opined that her symptoms stemmed from nerve damage sustained during that surgery. On April 22, 2014, when Callahan first presented to Dr. Glyman, she listed "lingual nerve injury" as the reason for her visit. Moreover, Callahan testified that Dr. Glyman confirmed during the May 5 surgery that Callahan's nerve had been cut in half and that he told her of the injury no later than May 12. Dr. Johnson's medical records also show that Callahan called Dr. Johnson shortly after her May 5 surgery to tell him that the nerve had been cut, but repaired in surgery.
>
> Although Callahan may have misunderstood which nerve was actually injured and why, she was still aware of the cause of her injury— that her nerve had been cut in half during the February 10 surgery—by no later than May 12, 2014. *See Libby*, 130 Nev. at 365, 325 P.3d at 1279 (holding that the one-year statute of limitation requires the "plaintiff to be aware of the cause of his or her injury"). We conclude this knowledge "would put a reasonable person on inquiry notice" of her cause of action, and that the record therefore irrefutably demonstrates Callahan was on inquiry notice more than a year before she filed her complaint. *See Massey*, 99 Nev. at 728, 669 P.2d at 252.

This case is predicated on Plaintiffs' claim of improper patient monitoring. CHH's motion in chief clearly demonstrates Plaintiffs' received the complete copy of Ms. Powell's medical records in June, 2017.[6] They went to Probate Court to obtain a Court order to obtain them in May, 2017.[7]

[6] **Exhibits "M" and "N"** to CHH's motion in chief and the exhibits annexed thereto.

[7] Exhibit A to **Exhibit "M"** to CHH's motion in chief

(footnote continued)

Brian Powell specifically wrote a complaint to the Nevada Nursing Board accusing CHH personnel of malpractice and requesting an investigation on June11, 2017.[8] The Nevada Department of Health and Human Services specifically acknowledged Mr. Powell's separate complaint of patient neglect on May 23, 2017 with a promise to investigate same.[9] Plaintiffs failed to provide any evidence of the materials they claim to have missed to prevent them from determining they had a potential malpractice claim. In fact, all of the evidence (which Plaintiffs specifically want to hide from this Court), demonstrates that they indeed possessed everything they needed. Plaintiffs had more than inquiry notice of their potential claim - they just failed to timely file their case.

Plaintiffs' argument that they were somehow misled by the death certificate and the coroner's report is specious at best. Specifically, the coroner's report made a particular finding as to cause of death.[10] CHH had nothing to do with the preparation of the coroner's report, and cannot be held as having fraudulently concealed anything pertaining to Ms. Powell's death when CHH had no hand in the preparation thereof.

"Only when the evidence irrefutably demonstrates that a plaintiff was put on inquiry notice of a cause of action should the district court determine this discovery date as a matter of law." *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 258, 277 P.3d 458, 466 (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.' Black's Law Dictionary 1165 (9th ed. 2009). We reiterated in *Massey* that 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. 99 Nev. at 728, 669 P.2d at 252." *Winn, supra* at 252-53, 277 P.3d 458, 462 (2012). The evidence presented here in reply and in CHH's motion in chief irrefutably demonstrates that Plaintiffs' possessed inquiry notice as late as June 11, 2017, and as early as May, 2017. The one

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[8] **Exhibit "O"** hereto, specifically Special Administrator Brian Powell's Complaint against CHH Nurse Michael Pawlak dated June 11, 2017 designated as PLTF 48-49.

[9] **Exhibit "O"** hereto, PLTF 50

[10] **Exhibit "O"** hereto, PLTF 34-47

(footnote continued)

year statute of limitations began running from as late as June 11, 2017, and as early as Ms. Powell's date of death on May 11, 2017, making the instant Complaint untimely filed as a matter of law.

Here, Plaintiffs possessed the entirety of Ms. Powell's medical records just a few weeks after her death.[11] They initiated a complaint to the Nursing Board directly alleging issues with the care Ms. Powell received at CHH and requested an investigation of same as late as June, 2017.[12] Earlier than that, Plaintiffs initiated a complaint to the Nevada Department of Health and Human Services alleging patient neglect as it pertained to Ms. Powell, the acknowledgement of which HHS sent on May 23, 2017.[13] Plaintiffs did nothing until February 4, 2019 before filing their Complaint. Essentially, their position is that until the State rendered its findings on February 5, 2018, they had no knowledge of potential malpractice. Not only is that not the standard, Plaintiffs' position is untenable and their own evidence demonstrates a contrary position. Once inquiry notice was received, the clock started running. **Plaintiffs' own documents demonstrate they possessed that very notice as late as June 11, 2017, but other documents show they knew as early as either Mrs. Powell's date of death on May 11, 2017, or on May 23, 2017, when the state acknowledged their complaint of patient neglect.[14] At the latest, they had until June 11, 2018 to file their Complaint. However, it was not filed until almost eight months later.** Moreover,

> [w]e have previously determined that NRS 41A.097(3)'s tolling provision applies only when there has been an *intentional act* that objectively hindered a reasonably diligent plaintiff from timely filing suit. *Winn*, 128 Nev. at , 277 P.3d at 464.
>
> Ms. Hamilton does not point to any evidence that Dr. Libby concealed anything from her. She argues only that Dr. Libby "should have known" that he left the sutures in her knee, but does not allege that Dr. Libby performed any intentional act that hindered her from learning about the sutures. We therefore conclude that Ms. Hamilton has failed to satisfy *Winn's* requirement that a plaintiff must prove that there was an intentional act of concealment by the health care

[11] **Exhibits "M" and "N"** to CHH's motion in chief and the exhibits annexed thereto.

[12] **Exhibit "O"** hereto, PLTF 48-49.

[13] **Exhibit "O"** hereto, PLTF 50

[14] Interestingly, Plaintiffs' failed to disclose the date Mr. Powell filed his complaint with HHS alleging patient neglect and possible malpractice, but clearly it was sent earlier than HHS's May 23, 2017 acknowledgement letter.

> provider, and thus, has not shown that there are any genuine issues of material fact remaining as to whether NRS 41A.097(3)'s tolling provision applied to toll the statute of limitation for her claim.

Libby v. Eighth Judicial Dist. Court of the State, 130 Nev. Adv. Rep. 39, 325 P.3d 1276, 1281 (Nev. 2014) (emphasis in original). In this case, Plaintiffs failed to demonstrate any intentional act by the CHH to have objectively hindered Plaintiffs from timely filing suit against it. Their failure to demonstrate any intentional act by CHH, which they are obligated to do, necessitates the granting of the instant motion.

D. Plaintiff's Lack of Diligence Precludes Tolling of the Statute of Limitations

According to the Nevada Supreme Court:

> In addition to establishing that a defendant "concealed" information under [NRS 41A.097] subsection 3, a plaintiff seeking to toll [NRS 41A.097] subsection 2's one-year discovery period must also establish that he or she satisfied [NRS 41A.097] subsection 2's standard of "reasonable diligence." Thus, regardless of a plaintiff's subjective concern regarding the significance of withheld information, the plaintiff must show that this information would have objectively hindered a reasonably diligent plaintiff from timely filing suit. In other words, the plaintiff must show that the withheld information was "material." *Cf. Basic Inc. v. Levinson*, 485 U.S. 224, 240, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988) (equating "materiality" of undisclosed information with the significance that a "reasonable investor" would ascribe to the information); Restatement (Second) of Torts § 538(2)(a) (1977) (indicating that a matter is "material" if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action").

Winn, supra at 255, 277 P.3d 458, 464 (2012).

"[Plaintiff] Winn must satisfy a two-prong test: (1) that Sunrise [Defendant] intentionally withheld records after being presented with an unequivocal request for them, and (2) that this intentional withholding would have hindered a reasonably diligent plaintiff from procuring an expert affidavit." *Winn, supra.* 128 Nev. at 256-57, 277 P.3d 458, 465 (2012).

Here, Plaintiffs fail to demonstrate either prong of the test. In the first place, Plaintiffs failed to submit any evidence of specifically what was requested from CHH prior to initiating their lawsuit in February, 2019, which they failed to receive. Second, Plaintiffs failed to establish that any records were not supplied to them, nor that they were intentionally withheld. Third, Plaintiffs failed to establish that even if they were intentionally withheld (which they were not), that any additional

records hindered a reasonably diligent plaintiff from procuring an expert affidavit. Plaintiffs' own expert rendered his opinion, by his own admission, based upon the medical records from CHH, with the Health and Human Services Report as only additional supporting material. In other words, the medical records themselves were more than sufficient for him to render his opinion.

In order ". . . to avoid the bar of limitations by claiming fraudulent concealment, a plaintiff must show that he used due diligence to detect the fraud." *Brown v. Westinghouse Electric Corp.*, 803 S.W.2d 610, 615 (Court of Appeals, Missouri, Eastern District, 1990).

As the Court of Appeals held in *Eamon v. Martin*, 2016 Nev. App. Unpub. LEXIS 137, *8

> . . . [C]oncealment only tolls the statute of limitations where the information would have objectively hindered a reasonably diligent plaintiff from filing suit. In this case the allegedly concealed information was available to Eamon through other means before the deadline expired; had he been diligent and undergone further medical examination when his physicians recommended it rather than wait while the pain worsened, he could have discovered the alleged malpractice within the statutory period.

In this case, Plaintiffs requested and received all information from CHH in May/June, 2017.[15] They reported suspected patient neglect to the State (on a date earlier than May 23, 2017) and received acknowledgement of same on May 23, 2017.[16] They reported a CHH nurse for neglect to the Nursing Board on June 11, 2017, alleging a need for an investigation and claiming that it resulted from "a lack of sufficient care from those assigned to her ensure her well being."[17] Now, Plaintiffs have the audacity to feign ignorance until after their receipt of the HSS Report. Such an argument is untenable. From all of the cited case law, the Courts toll a statute of limitations in the case of fraudulent concealment so that the alleged concealer derives no benefit from the time of concealment. In this case, not only was there no concealment, Plaintiffs possessed the very inquiry notice that commences the running of the statute of limitations only as late as June 11, 2017. Despite Ms. Powell's death on May 11, 2017 (which should have started the clock running), giving the

[15] **Exhibits "M" & "N"** to CHH's motion in chief and exhibits annexed thereto.

[16] **Exhibit "O"** hereto, PLTF 50

[17] **Exhibit "O"** hereto, PLTF 48-49

Plaintiffs every benefit of the doubt, they admittedly had inquiry notice on June 11, 2017, tolling the limitations period only for one month (**the aforenoted evidence demonstrates they possessed inquiry notice on or before May 23, 2017 with acknowledgement of an investigation by HHS resulting from Mr. Powell's complaint of alleged patient neglect**). Plaintiffs do not get to claim a tolling of the statute of limitations for a period of 8 months beyond that when they admittedly had inquiry notice long before.

As expressed in *Massey v. Litton*, 99 Nev. 723, 669 P.2d 248 (1983), the one year discovery period within which a plaintiff has to commence an action commences when the plaintiff "... knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action." *Id.* at 728, 669 P.2d at 252; *See, also Eamon v. Martin,* 2016 Nev. App. Unpub. LEXIS 137 at 3-4 (Nev. App. Mar. 4, 2016).

"This does not mean that the accrual period begins when the plaintiff discovers the precise facts pertaining to his legal theory, **but only to the general belief that someone's negligence may have caused the injury**." (citing *Massey*, 99 Nev. at 728, 669 P.2d at 252) (emphasis supplied). Thus, the plaintiff "discovers" the injury when 'he had facts before him that would have led an ordinarily prudent person to investigate further into whether [the] injury may have been caused by someone's negligence.'" *Eamon* at 4 (quoting *Winn v. Sunrise Hosp. & Med. Ctr.,* 128 Nev 246, 252, 277 P.3d 458, 462). "The plaintiff need not be aware of the precise causes of action he or she may ultimately pursue. *Winn*, 128 Nev. at 252-53, 277 P.3d at 462. Rather, the statute begins to run once the plaintiff knows or should have known facts giving rise to a 'general belief that someone's negligence may have caused his or her injury:' *Id.*" *Golden v. Forage,* 2017 Nev. App. Unpub. LEXIS 745 at 3 (Nev. App. October 13, 2017).

In *Green v. Frey*, 2014 Nev. Dist. LEXIS 1401 at 3 (CV12-01530, Washoe County), the decedent's date of death was determined to be sufficient to place the plaintiff on inquiry notice. As applied to the facts of this case, the statute of limitations should have began to run from May 11, 2017, Ms. Powell's date of death. In *Barcelona v. Eighth Judicial Dist. Court*, 448 P.3d 544, the Supreme Court, in an unpublished decision, held that death following surgery would lead an ordinarily prudent person to investigate further into possible negligence, especially since their

Complaint included a medical affidavit demonstrating that the plaintiffs had sufficient information to make out a malpractice case.

In the instant case, Dr. Hashim's own affidavit stated that he possessed sufficient information from the CHH medical records themselves, which Plaintiffs had in their possession in May/June, 2017. The statute of limitations, therefore, should begin running from as late as when they received the CHH records in May/June, 2017. Moreover, Plaintiffs themselves initiated two state investigations concerning the care of Ms. Powell, and alleged in both requests that they suspected negligence. This definitively proves they possessed inquiry notice long before they claim in opposition to the instant motion.

The date on which the one-year statute of limitation begins to run may be decided as a matter of law where uncontroverted facts establish the accrual date. *See Golden, supra.* at *2 (Nev. App. Oct. 13, 2017) ("The date on which the one-year statute of limitation began to run is ordinarily a question of fact for the jury, and may be decided as a matter of law only where the uncontroverted facts establish the accrual date.") (citing *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 251, 277 P.3d 458, 462 (2012) (recognizing that the district court may determine the accrual date as a matter of law where the accrual date is properly demonstrated)); *see also Dignity Health v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark, No. 66084*, 2014 WL 4804275, at *2 (Nev. Sept. 24, 2014).

If the Court finds that the plaintiff failed to commence an action against a provider of health care before the expiration of the statute of limitations under NRS 41A.097, the Court may properly dismiss the Complaint pursuant to NRCP 12(b)(5). *See, e.g., Egan v. Adashek,* 2015 Nev. App. Unpub. LEXIS 634, at *2 (Nev. App. Dec. 16, 2015) (affirming district court's dismissal of action under NRCP 12(b)(5) where the plaintiff failed to file within the statute of limitations set forth in NRS 41A.087); *Rodrigues v. Washinsky*, 127 Nev. 1171, 373 P.3d 956 (2011) (affirming district court's decision granting motion to dismiss the plaintiffs' claims for failure to comply with NRS 41A.097); *Domnitz v. Reese*, 126 Nev. 706, 367 P.3d 764 (2010) (affirming district court's decision dismissing plaintiff's claim after finding that plaintiff had been placed on inquiry notice prior to one

year before his complaint was filed and that the statute of limitations had expired pursuant to NRS 41A.97(2)).

While this is a motion for summary judgment (unlike a motion to dismiss when the averments in the Complaint need to be taken as true), the standard is more favorable to the moving party since once a prima facie case that no genuine issue of material fact exists, the non-moving party is obligated to come forth with sufficient **and** admissible evidence demonstrating the presence of a material issue of fact. CHH has more than presented their prima facie case, and Plaintiffs opposition and further lack of candor with the Court (by failing to provide evidence they disclosed to the defendants), demonstrates an absence of any credibility on their part, and a lack of admissible evidence sufficient to overcome the burden now shifted to them for their failure to timely file their Complaint.

Under Nevada law, Plaintiffs did not have to know precise facts or legal theories for their claims; rather, they only needed to be placed on inquiry notice. Here, under the facts alleged in the Complaint and based upon the conclusive and incontrovertible evidence annexed hereto and CHH's motion in chief, Plaintiffs were placed on inquiry notice because they were aware of facts that would lead an ordinarily prudent person to investigate the matter further. Not only were they placed on inquiry notice, but they actually pursued the medical records upon which the Complaint is based and filed complaints with State agencies specifically alleging suspected malpractice. They sought and obtained all they needed to investigate the claims immediately after Ms. Powell's death and were in possession of all they needed and admittedly were on inquiry notice as late as June 11 2017. Plaintiffs did nothing for **20 months after being placed on inquiry notice**, and they failed to timely file their lawsuit.

Essentially, Plaintiffs argue that their time does not begin to run until someone or some entity tells them specifically either "I committed malpractice" or there is some deficiency which raises that issue. Plaintiffs had more than inquiry notice as late as June 11, 2017 but they failed to act. Now they want a pass on their lack of diligence. The law does not afford them that privilege.

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E. Plaintiffs' Negligent Infliction of Emotional Distress Claims Are Time Barred

1. Negligent Infliction of Emotional Distress Claims Require a Plaintiff's Contemporaneous Visualization of the Precipitating Event

Under Nevada law, "the negligent infliction of emotional distress can be an element of the damage sustained by the negligent acts committed directly against the victim-plaintiff." *Shoen v. Amerco,* Inc., 111 Nev. 735, 748, 896 P.2d 469, 477 (1995). Thus, a cause of action for negligent infliction of emotional distress ("NIED") has essentially the same elements as a cause of action for negligence: (1) duty owed by defendant to plaintiff, (2) breach of said duty by defendant, (3) said breach is the direct and proximate cause of plaintiff s emotional distress, and (4) damages (i.e., emotional distress). *See Id.* NIED is not a separate claim for relief but an element of a negligence claim in the victim-plaintiff context. *Id.* ("An examination of the case law indicates that Nevada has not expressly permitted damages to be recovered for the infliction of emotional distress in a negligence cause of action.").

Traditionally, claimants could not recover damages for emotional distress absent some physical touching or "impact" as a result of the defendant's negligent conduct. *State v. Eaton*, 101 Nev. 705, 711, 710 P.2d 1370, 1374-75 (1985). Over time, Nevada courts recognized a cause of action for negligent infliction of emotional distress **where a bystander** suffers serious emotional distress which results in physical symptoms caused by apprehending the death or serious injury of a loved one due to the negligence of the defendant applying the general rules of tort law:

1. **Proximate cause-** Plaintiff's burden of proving causation in fact should not be minimized. The emotional injury must be directly attributable to the emotional impact of the plaintiff's observation or contemporaneous sensory perception of the accident and immediate viewing of the accident victim." *State v. Eaton*, 101 Nev. 705, 714, 710 P.2d 1370, 1376 (1985).

2. **Primarily Liable** – The defendant must be primarily liable for the injury. *State v. Eaton*, 101 Nev. 705, 714-15, 710 P.2d 1370, 1377 (1985)

3. **Harm to Plaintiff Must have been Foreseeable** - A further limit on liability requires that the harm occasioned by the defendant's negligence must be foreseeable to be compensable. *Id.*

Here, it is undisputed that none of the Plaintiffs alleging a cause of action for NIED were

present for, or even witnessed Ms. Powell's death.[18] Thus, the bodily and emotional injuries for which Plaintiffs claim damages cannot be directly attributable to the emotional impact of their observation or contemporaneous sensory perception of Ms. Powell's death and immediate viewing of her at the time thereof, and Plaintiffs cannot successfully sustain an NIED claim against CHH or any other defendant.

Integral to this analysis is what has been deemed the "physical impact requirement." *See, e.g., Olivero v. Lowe*, 116 Nev. 395, 399, 995 P.2d 1023, 1026 (2000). Nevada Courts have explained "general physical or emotional discomfort are insufficient to satisfy the physical impact requirement." *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 483, 851 P.2d 459, 462 (1993). Plaintiffs in this case have submitted **no evidence whatsoever** regarding this issue, and such evidence would be in their exclusive possession and control. They failed to submit an affidavit, declaration or any other form of admissible evidence to prove their claim. Based upon the evidence CHH has submitted, Plaintiffs lack any cause of action for NIED as admitted by Plaintiffs in their failure to respond to co-defendants' requests for admission.[19]

2. NIED Claims Stemming From an Underlying Claim of Medical Malpractice Are Subject to the Same Statute of Limitations as the Medical Malpractice Claim Itself

Plaintiffs' NIED claims, even if viable (which they are demonstrably not), are subject to the same statute of limitations requirements as the underlying professional negligence claims from which they stem. See, *Mendoza v. Johnson*, 2016 Nev. Dist. LEXIS 3521, Case No. A-14-708740-C (March, 2016); see also *Szymborski v. Spring Mt. Treatment Ctr.*, 403 P.3d 1280 (Nev. 2017).[20]

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[18] **Exhibit "P"** hereto

[19] **Exhibit "P"** hereto

[20] To determine whether the medical affidavit requirements of NRS 41A.071, apply, the courts must look to whether Plaintiff's underlying claims involve medical diagnosis, judgment, or treatment or are based on performance of nonmedical services. See *Szymborski*; see also *Gold v. Greenwich Hosp. Assn*, 262 Conn. 248, 811 A.2d 1266, 1270 (Conn. 2002) (determining that the plaintiff's complaint was for medical malpractice because the "alleged negligence [was] substantially related to medical diagnosis and involved the exercise of medical judgment"); *Gunter v. Lab. Corp. of Am.*, 121 S.W.3d 636, 640 (Tenn. 2003) ("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 (footnote continued)

The key question is to determine the underlying basis of the lawsuit, i.e. the gravamen of a plaintiff's claims. If the claims stem directly from allegations of medical negligence, a plaintiff's remaining claims are subject to all of the requirements and limitations attributable to medical malpractice cases.

To make a determination of the applicability of the special rules for medical negligence cases, courts are to look at whether allegations of breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for medical malpractice. See *Papa v. Brunswick Gen. Hosp.*, 132 A.D.2d 601, 517 N.Y.S.2d 762, 763 (App. Div. 1987) ("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."); *Estate of French v. Stratford House*, 333 S.W.3d 546, 555 (Tenn. 2011) ("If the alleged breach of duty of care set forth in the complaint is one that was based upon medical art or science, training, or expertise, then it is a claim for medical malpractice."), superseded by statute Tenn. Code. Ann. 29-26-101 et seq. (2011), as recognized in *Ellithorpe v. Weismark*, 479 S.W.3d 818, 824-26 (Tenn. 2015). By extension, if the jury can only evaluate the plaintiff's claims after presentation of the standards of care by a medical expert, then it is a medical malpractice claim. See *Bryant*, 684 N.W.2d at 872; *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court*, 132 Nev., Adv. Op. 53, 376 P.3d 167, 172 (2016) (reasoning that a medical expert affidavit was required where the scope of a patient's informed consent was at issue, because medical expert testimony would be necessary to determine the reasonableness of the health care provider's actions). If, on the other hand, the reasonableness of the health care provider's actions can be evaluated by jurors on the basis of their common knowledge and experience, then the claim is likely based in ordinary negligence. See *Bryant*, 684 N.W.2d at 872. The *Szymborski* Court noted that "we must look to the gravamen or "substantial point or essence" of each claim rather than its form to see whether each individual claim is for medical malpractice or ordinary negligence." *Szymborski*, *supra* at 1285.

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resulting from negligent acts that did not affect the medical treatment of a patient, the claim sounds in ordinary negligence.") (Citation omitted)).

Like the statute of limitations requirement for medical malpractice cases, a medical affidavit is required for cases in which the gravamen of the claims assert a cause of action for medical malpractice. By deeming the primary thrust of a case as grounded in medical malpractice, all of the limitations and requirements attendant to such cases apply. In *Kinford v. Pincock*, 2019 Nev App. Unpub. LEXIS 318, 2019 WL 1388056, an unpublished opinion of the Nevada Court of Appeals, plaintiff sued for mental anguish from an alleged mishandled facial surgery. The Court held that plaintiff incorrectly asserted that his claim of mental anguish did not require a medical affidavit in support, since all of the alleged injuries stem from the purported mishandled surgery involving medical treatment and judgment. Thus, an expert medical affidavit to support the complaint was required. Its absence necessitated dismissal.

The Nevada Supreme Court in *Estate of Curtis v. South Las Vegas Med. Investor, LLC*, 2000 Nev. LEXIS 2103 held that in cases involving negligent hiring claims which are inextricably linked to claims of professional negligence, such claims fall within the vicarious liability ambit rather than an independent tort, and such claims cannot be used to circumvent the requirement of a Chapter 41A affidavit requirement. *See, Id.* at 7-8. In this case, Plaintiff alleges a negligent hiring, retention and supervision claim which stems directly from his allegation that Seven Hills prematurely discharged Mrs. Palmer. Plaintiff cannot seek to circumvent the affidavit requirement by alleging a separate cause of action which itself is wholly dependent upon a medical judgment determination,

In *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court of Nev.*, 132 Nev. 544, 376 P.3d 167 (2016), the Nevada Supreme Court held that when a question requires an expert opinion regarding the standard of care, such a complaint requires a medical affidavit falling within the ambit of Chapter 41A's requirements. *See, Id.* at 551, 376 P.3d at 172.

The Federal Courts in Nevada have also weighed in on when a medical affidavit is required. Most recently in *Stutts v. County of Lyon*, 2020 U.S. Dist. LEXIS 638394, the U.S.D.C for Nevada found that claims requiring expert testimony to determine the proper standard of care or which are substantially related to medical treatment require a Chapter 41A affidavit. *See, Id.* at 11. The Court determined that whether or not procedures are performed without a medical purpose involve issues of medical judgment, thus triggering the affidavit requirement. *See, Id.* at 12. Similarly, in *O'Neal*

v. Las Vegas Metro. Police Dep't, 2018 U.S. Dist. LEXIS 145237, 2018 WL 4088002 (2018), the U.S.D.C for Nevada found that defendant NaphCare's determination that the plaintiff's injuries required no further medical treatment or pain management required expert testimony to ascertain the reasonableness thereof on the issue of standard of care.

In *Szymborski*, the Nevada Supreme Court cited favorably to case law from other jurisdictions demonstrating scenarios involving medical decision making and treatment that should be considered professional negligence cases:

> [W]e must determine whether Szymborski's claims involve medical diagnosis, judgment, or treatment or are based on Spring Mountain's performance of nonmedical services. See *id.*; see also *Gold v. Greenwich Hosp. Assn*, 262 Conn. 248, 811 A.2d 1266, 1270 (Conn. 2002) (determining that **the plaintiff's complaint was for medical malpractice because the "alleged negligence [was] substantially related to medical diagnosis and involved the exercise of medical judgment"**); *Gunter v. Lab. Corp. of Am.*, 121 S.W.3d 636, 640 (Tenn. 2003) (**"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.") (Citation omitted).

Id. at 1284 (emphasis added).

While the issue of whether a medical affidavit is required is not at issue here, the rationale for determining the applicability of the statute of limitations for NIED claims stemming therefrom carries the same logical requirements. Any causes of action which are inextricably linked to allegations of medical negligence are subject to the same statute of limitations requirements and the underlying medical malpractice claims from which they stem. The evidence submitted on CHH's motion in chief and annexed hereto, coupled with the legal authority cited in this Motion, taken together, demonstrate in no uncertain terms that Plaintiffs filed their Complaint late. Summary judgment granted in CHH's favor is the proper remedy and must be granted.

III. CONCLUSION

CHH introduced incontrovertible evidence that Plaintiffs' Complaint was untimely filed. The fact that the action itself accrued more than one year after Plaintiffs' discovery of the injury which placed them on reasonable notice of their causes of action, Plaintiffs are time barred and CHH's motion for summary judgment should be granted in its entirety and the complaint against

CHH be dismissed with prejudice along with all causes of action stemming directly from the alleged malpractice.

DATED this 21st day of October, 2020

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By */s/ Adam Garth*

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2020, a true and correct copy of **DEFENDANTS VALLEY HEALTH SYSTEM, LLC AND UNIVERSAL HEALTH SERVICES, INC.'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED UPON THE EXPIRATION OF THE STATUTE OF LIMITATIONS** 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.

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DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF REBECCA POWELL, through BRIAN POWELL, as Special Administrator; DARCI CREECY, individually and as Heir; TARYN CREECY, individually and as an Heir; ISAIAH KHOSROF, individually and as an Heir; LLOYD CREECY, individually;,

Plaintiffs,

vs.

VALLEY HEALTH SYSTEM, LLC (doing business as "Centennial Hills Hospital Medical Center"), a foreign limited liability company; UNIVERSAL HEALTH SERVICES, INC., a foreign corporation; DR. DIONICE S. JULIANO, M.D., an individual; DR. CONRADO C.D. CONCIO, M.D., an individual; DR. VISHAL S. SHAH, M.D., an individual; DOES 1-10; and ROES A-Z;,

Defendants.

Case No. A-19-788787-C

Dept. No.: 30

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an ORDER was entered with the Court in the above-captioned matter on the 29th day of October 2020, a copy of which is attached hereto.

DATED this 2nd ay of November, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 2020, a true and correct copy of **NOTICE OF ENTRY OF ORDER** 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.

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By */s/ Roya Rokni*
An Employee of
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Electronically Filed
10/29/2020 8:13 AM
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

ESTATE OF REBECCA POWELL, through BRIAN POWELL, as Special Administrator; DARCI CREECY, individually and as an Heir; TARYN CREECY, individually and as an Heir; ISAIAH KHOSROF, individually and as an Heir; LLOYD CREECY, individually, Plaintiffs, vs. VALLEY HEALTH SYSTEM, LLC (doing Business as "Centennial Hills Hospital Medical Center"), a foreign limited liability Company; UNIVERSAL HEALTH SERVICES, INC., a foreign corporation; DR. DIONICE S. JULIANO, M.D., an individual; DR. CONRADO C.D. CONCIO, M.D., an individual; DR. VISHAL S. SHAH, M.D., an individual; DOES 1-10; and ROES A-Z, Defendants.	CASE NO.: A-19-788787-C DEPT. NO.: XXX ORDER

The above-referenced matter was scheduled for a hearing on November 4, 2020, with regard to Defendant Valley Health System LLC's (Valley's) and Universal Health Services, Inc.'s (Universal's) Motion for Summary Judgment Based upon the Expired Statute of Limitations. Defendants Dionice Juliano, M.D., Conrado Concio, M.D., and Vishal Shah, M.D. joined the Motion for Summary Judgment. Additionally, Defendant, Juliano's Motion for Summary Judgment and Defendants Concio and Shaw's Motion for Partial Summary Judgment on Emotional Distress Claims is on calendar. Finally, Plaintiff's Counter-Motion to Amend or Withdraw Plaintiffs' Responses to Defendants' Requests for Admissions is on calendar. Pursuant to A.O. 20-01 and subsequent administrative orders, these matters are deemed "non-essential," and may be decided after a hearing, decided on the papers, or continued. This Court has determined that it

Case Number: A-19-788787-C

would be appropriate to decide these matters on the papers, and consequently, this Order issues.

Defendants, Valley's and Universal's Motion for Summary Judgment Based upon the Expiration of the Statute of Limitations.

On May 3, 2017 Rebecca Powell ("Plaintiff") was taken to Centennial Hills Hospital, a hospital owned and operated by Valley Health System, LLC ("Defendant") by EMS services after she was discovered with labored breathing and vomit on her face. Plaintiff remained in Defendant's care for a week, and her condition improved. However, on May 10, 2017, Plaintiff complained of shortness of breath, weakness, and a drowning feeling. In response to these complaints, Defendant Doctor Vishal Shah ordered Ativan to be administered via IV push. Plaintiff's condition did not improve. Defendant, Doctor Conrado Concio twice more ordered Ativan to be administered via IV push, and Plaintiff was put in a room with a camera in order to better monitor her condition. At 3:27 AM on May 11, 2017, another dose of Ativan was ordered. Plaintiff then entered into acute respiratory failure, resulting in her death.

Plaintiff brought suit on February 4, 2019 alleging negligence/medical malpractice, wrongful death pursuant to NRS 41.085, and negligent infliction of emotional distress. Defendant previously filed a Motion to Dismiss these claims, which was denied on September 25, 2019. The current Motion for Summary Judgment was filed on September 2, 2020. Defendants Dionice Juliano, MD, Conrado Concio, MD, and Vishal Shah, MD joined in this Motion on September 3, 2020. Plaintiff filed their opposition September 16, 2020. Defendant filed its reply on October 21, 2020 and Defendants Dionice Juliano, MD, Conrado Concio, MD, and Vishal Shah, MD joined the reply on October 22, 2020.

Defendant claims that, pursuant to NRS 41A.097 Plaintiff's claims were brought after the statute of limitations had run. In pertinent part, NRS 41A.097 states in pertinent part: "an action for injury or death against a provider of health care may not be commenced more than 3 years after the date of injury or 1 year after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first." NRS 41A.097(2). There appears to be no dispute that the Complaint was filed within 3 years after the date of injury (or death). The issue is whether the Complaint was filed within 1 year after the Plaintiffs knew or should have

known of the injury. Defendants claim that they fall under the definition of a "provider of health care" under NRS 41A.017 and that all of Plaintiff's claims sound in professional negligence. Therefore, all the claims are subject to NRS 41A.097.

Defendant claims that Plaintiff was put on inquiry notice of the possible cause of action on or around the date of Plaintiff's death in May of 2017 and therefore the suit, brought on February 4, 2019, was brought after the statute of limitations had tolled. Defendant makes this claim based on several theories. Defendant claims that since Plaintiffs are suing for Negligent Infliction of Emotional Distress, and an element of that claim is contemporaneous observation, that Plaintiff was put on notice of the possible claim on the date of Ms. Powell's death. Alternatively, Defendant argues that since Plaintiff ordered and received Ms. Powell's medical records no later than June 2017, they were put on notice upon the reception of those records. Finally, Defendant argues that since Plaintiffs made two separate complaints alleging negligence, they were aware of the possible claim for negligence and thus on inquiry notice. (On May 23, 2017, Defendants provide an acknowledgement by the Nevada Department of Health and Human Services ("HHS") that they received Plaintiff Brian Powell's complaint made against Defendants. And on June 11, 2017, Plaintiff Brian Powell filed a complaint with the Nevada State Board of Nursing alleging negligence in that Decedent was not properly monitored.)

Plaintiff argues that the date of accrual for the statute of limitations is a question of fact for the jury and summary judgment is not appropriate at this stage where there are factual disputes. Plaintiffs claim they were not put on inquiry notice of Defendant's negligence until they received the February 5, 2018, HHS report and therefore the complaint, filed on February 4, 2019, was brought within the one-year statute of limitations. Plaintiff makes this claim based on several pieces of evidence. First, while the medical records were mailed to Plaintiffs on June 29, 2017, there is no evidence that shows the records were ever received. Additionally, on June 28, 2017, Plaintiffs were informed via the Certificate of Death, that Ms. Powell's death was determined to be a suicide. This prevented Plaintiff from ever considering negligence contributed to her death. Plaintiffs argue the first time they could have suspected negligence was when they received the report from HHS on February 5, 2018, that stated the facility

had committed violations with rules and/or regulations and deficiencies in the medical care provided to Decedent.

Plaintiff claims that Defendant's present Motion for Summary Judgment is just a regurgitation of Defendant's prior Motion to Dismiss on the same facts in violation of Eighth Judicial District Court Rule (EJDCR) 2.24(a). Plaintiff claims this Motion is a waste of time, money, and resources that rehashes the same arguments that the court had already decided, and the Motion should be denied pursuant to EJDCR 2.24(a).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any disputed material fact and that the moving party is entitled to a judgment as a matter of law. NRCP 56(c). The tolling date ordinarily presents a question of fact for the jury. *Winn v. Sunrise Hospital and Medical Center*, 128 Nev. 246, 252 (2012). "Only when the evidence irrefutably demonstrates that a plaintiff was put on inquiry notice of a cause of action should the district court determine this discovery date as a matter of law." *Id.* A plaintiff discovers an injury when "he knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action." *Massey v. Linton,* 99 Nev. 723 (1983). The time does not begin when the plaintiff discovers the precise facts pertaining to his legal theory but when there is a general belief that negligence may have caused the injury. *Id.* at 728.

There is a suggestion in the Defendants' Reply Brief that the Plaintiffs may have been arguing that any delay in filing the Complaint may have been due to a fraudulent concealment of the medical records, and that such a defense needs to be specifically pled. This Court has not interpreted the Plaintiff's position to be one that the records were "fraudulently concealed," only that there was no evidence that they had timely received them. This Court will not take a position on this issue at this time, as it is not necessary as part of the Court's analysis, and it does not change the opinion of the Court either way.

Although the Complaints filed by Brian Powell, suggest that Plaintiff may have at least been on inquiry notice in 2017, the fact that the family was notified shortly after the decedent's death that the cause of death was determined to be a "suicide," causes this Court some doubt or concern about what the family knew at that time period.

Since the family did not receive the report from the State Department of Health and Human Services, indicating that their previously determined cause of death was in error, it is possible that the Plaintiffs were not on inquiry notice until February 4, 2019. This Court is not to grant a Motion to Dismiss or a Motion for Summary Judgment on the issue of a violation of the Statute of Limitations, unless the facts and evidence irrefutably demonstrate that Plaintiff was put on inquiry notice more than one year prior to the filing of the complaint. This Court does not find that such evidence is irrefutable, and there remains a genuine issue of material fact as to when the Plaintiffs were actually put on inquiry notice. Such issue is an issue of fact, appropriate for determination by the trier of fact. Consequently, Summary Judgment would not be appropriate, and the Motion for Summary Judgment, and the Joinders thereto, must be denied.

Defendant, Juliano's Motion for Summary Judgment, and Defendant Concio and Shah's Motion for Partial Summary Judgment on Emotional Distress Claims:

On or about 05/03/17, 41-year-old Rebecca Powell was transported to Centennial Hospital. Rebecca ultimately died on 05/11/17. Plaintiffs allege that the death was due to inadequate and absent monitoring, a lack of diagnostic testing, and improper treatment. Furthermore, Plaintiffs allege that Rebecca Powell's negligent death caused them Negligent Infliction of Emotional Harm.

Defendant, Doctor Dionice Juliano, argues that based on the discovery which has taken place, the medical records, and specifically his own affidavit, there are no material facts suggesting he was responsible for the care and treatment of Rebecca Powell after May 9, 2017.[1] Further, Defendant argues that for a claim for Negligent Infliction of Emotional to survive, the plaintiff must be physically present for the act which is alleged to have inflicted that emotional distress.

Defendants further argue that Summary Judgment is warranted because the Plaintiff failed to timely respond to Requests for Admission, and consequently,

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[1] Dr. Dionice Juliano's Affidavit indicates that the patient was admitted on May 3, 2017, by the physician working the night shift. Dr. Juliano saw her for the first time on May 4, 2017, and was her attending physician, until he handed her off at the end of a "week-on, week-off" rotation on Monday, May 8, 2017. He had no responsibility for her after May 8, as he was off duty until Tuesday, May 16, 2017. The Plaintiffs' Complaint is critical of the acts or omissions which occurred on May 10 and 11, 2017.

pursuant to NRCP 36, they are deemed admitted. Defendants argue that Plaintiffs have no good cause for not responding.

Plaintiffs argue that Defendants prematurely filed their motions since there is over a year left to conduct discovery. Moreover, Plaintiffs argue that Defendants acted in bad faith during a global pandemic by sending the admission requests and by not working with Defendants' counsel to remind Plaintiffs' counsel of the missing admission requests. Moreover, since Defendants have not cited any prejudice arising from their mistake of submitting its admission requests late, this Court should deem Plaintiffs' responses timely or allow them to be amended or withdrawn. Plaintiffs ask this Court to deny the premature motions for Summary Judgment and allow for discovery to run its natural course.

Pursuant to NRCP 56, and the relevant case law, summary judgment is appropriate when the evidence establishes that there is no genuine issue of material fact remaining and the moving party is entitled to judgment as a matter of law. All inferences and evidence must be viewed in the light most favorable to the non-moving party. A genuine issue of material fact exists when a reasonable jury could return a verdict for the non-moving party. See NRCP 56, *Ron Cuzze v. University and Community College System*, 123 Nev. 598, 172 P.3d 131 (2008), and *Golden Nugget v. Ham*, 95 Nev. 45, 589 P.2d 173 (1979), *and Oehler v. Humana, Inc.*, 105 Nev. 348 (1987). While the pleadings are construed in the light most favorable to the non-moving party, however, that party is not entitled to build its case on "gossamer threads of whimsy, speculation, and conjecture." *Miller v. Jones*, 114 Nev. 1291 (1998).

With regard to the Requests for Admissions, NRCP 36(a)(3) provides that a matter is deemed admitted unless, within 30 days after being served, the party sends back a written answer objecting to the matters. Here, Plaintiff's counsel failed to respond to Defendants' counsel request for admissions during the allotted time. Defendants' counsel argues that Plaintiffs should not be able to withdraw or amend their responses because their attorney was personally served six different times and emailed twice as notice that they were served the admission requests. On the other hand, Plaintiffs' counsel argued that their late response was due to consequences from the unprecedented global pandemic that affected their employees and work. NRCP 36(b) allows the Court to permit the admission to be withdrawn or amended if it would

promote the presentation of the merits. Since Nevada courts, as a public policy, favor hearing cases on its merits, and because this Court finds that the global pandemic should count as "good cause," this Court will allow Plaintiffs' late responses to be recognized as timely responses. They were filed approximately 40 days late, but the Court finds that the delay was based on "good cause," and that they will be recognized as if they had been timely responses.

Under *State v. Eaton*, 101 Nev. 705, 710 P.2d 1370 (1985), to prevail in a claim for Negligent Infliction of Emotional Distress, the following elements are required: (1) the plaintiff was located near the scene; (2) the plaintiff was emotionally injured by the contemporaneous sensory observance of the accident; and (3) the plaintiff was closely related to the victim. The Plaintiffs argue that although there has been a historical precedent requiring the plaintiff to have been present at the time of the accident. This Court previously held in this case that the case of *Crippens v. Sav On Drug Stores*, 114 Nev., 760, 961 P.2d 761 (1998), precluded the Court from granting a Motion to Dismiss. Although the burden for a Motion for Summary Judgment is different, the Court is still bound by the Nevada Supreme Court's decision in *Crippins*, which indicated, "it is not the precise position of plaintiff or what the plaintiff saw that must be examined. The overall circumstances must be examined to determine whether the harm to the plaintiff was reasonably foreseeable. Foreseeability is the cornerstone of this court's test for negligent infliction of emotional distress." Id. The Court still believes that the "foreseeability" element is more important than the location of the Plaintiffs, pursuant to the Court's determination in Crippins, and such an analysis seems to be a factual determination for the trier of fact. Consequently, Summary Judgment on the basis of the Plaintiff's failure to be present and witness the death of the decedent, seems inappropriate.

With regard to the argument that Dr. Juliano did not participate in the care of the Plaintiff during the relevant time period, the Plaintiff's objection simply indicates that the motion is premature, but fails to set forth any facts or evidence to show that Dr. Juiliano was in fact present or involved in the care of the decedent during the relevant time period. The Court believes that this is what the Nevada Supreme Court was referring to when it said that a Plaintiff is not entitled to build its case on "gossamer threads of whimsy, speculation, and conjecture." *Miller v. Jones*, 114 Nev.

1291 (1998). As the Plaintiffs have been unable to establish or show any facts or evidence indicating that Dr. Juliano was present during the relevant time period, the Court believes that no genuine issues of material fact remain in that regard and Dr. Juliano is entitled to Summary Judgment. With regard to all other issues argued by the parties, the Court finds that genuine issues of material fact remain, and summary judgment would therefore not be appropriate.

Based upon the foregoing, and good cause appearing,

IT IS HEREBY ORDERED that Defendants Valley's and Universal's Motion for Summary Judgment Based upon the Expiration of the Statute of Limitations, and all Joinders thereto are hereby **DENIED**.

IT IS FURTHER ORDERED that Defendant Juliano's Motion for Summary Judgment is hereby **GRANTED**, and Dr. Juliano is hereby Dismissed from the Action, without prejudice.

IT IS FURTHER ORDERED that the Defendants, Concio and Shah's Motion for Partial Summary Judgment on the Negligent Infliction of Emotional Distress Claims is hereby **DENIED**. All joinders are likewise **DENIED.**

IT IS FURTHER ORDERED that because the Court has ruled on these Motions on the papers, the hearing scheduled for November 4, 2020, with regard to the foregoing issues is now moot, and will be taken off calendar.

Dated this 28th day of October, 2020.

Dated this 29th day of October, 2020

JERRY A. WIESE II
DISTRICT COURT JUDGE
EIGHTH JUDICIAL DISTRICT COURT
DEPARTMENT XXVI
Jerry A. Wiese
District Court Judge