

IN THE SUPREME COURT OF THE STATE OF NEVADA

ESTATE OF REBECCA POWELL,
THROUGH BRIAN POWELL, AS
SPECIAL ADMINISTRATOR; DARCI
CREECY, INDIVIDUALLY AND AS
HEIR; TARYN CREECY,
INDIVIDUALLY AND AS HEIR;
ISAIAH KHOSROF, INDIVIDUALLY
AND AS HEIR; AND LLOYD
CREECY, INDIVIDUALLY,

Appellants,

vs.

VALLEY HEALTH SYSTEM, LLC,
D/B/A CENTENNIAL HILLS
HOSPITAL MEDICAL CENTER, A
FOREIGN LIMITED LIABILITY
COMPANY,

Respondent.

Supreme Court No. 84861
District Court Case No. A-19-788787-C

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**RESPONDENT'S APPENDIX TO MOTION TO REQUIRE POSTING OF
OR INCREASING AMOUNT OF SUPERSEDEAS BOND BY
APPELLANTS VOLUME II**

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DATED this 10th day of March, 2023.

LEWIS BRISBOIS BISGAARD &
SMITH LLP

By /s/ Adam Garth

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System, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2023, a true and correct copy of **RESPONDENT'S APPENDIX TO MOTION TO REQUIRE POSTING OF OR INCREASING AMOUNT OF SUPERSEDEAS BOND BY APPELLANTS VOLUME II** 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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And Vishal S. Shah, M.D.*

By /s/ Heidi Brown

An Employee of
LEWIS BRISBOIS BISGAARD &
SMITH LLP

1 This is a civil action seeking monetary damages for the death of Rebecca Powell. In
2 support of this Complaint, Plaintiffs rely upon the Affidavit of Dr. Sami Hashim, M.D.
3 (incorporated by reference herein and attached to this Complaint as Exhibit A) and allege as
4 follows:

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6 I.

7 ARBITRATION EXEMPTION

8 1. Nevada Revised Statute ("N.R.S.") 38.250 requires that "[a]ll civil actions filed in
9 district court for damages, if the cause of action arises in the State of Nevada and the amount in
10 issue does not exceed \$50,000 per plaintiff, exclusive of attorney's fees, interest and court costs,
11 must be submitted to nonbinding arbitration . . ."

12
13 2. This case is automatically exempt from the arbitration program because "the
14 amount in issue" (i.e. damages) for Plaintiffs significantly exceeds \$50,000.00, and because it is
15 a medical malpractice matter.

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17 II.

18 JURISDICTION, VENUE AND LEGAL BASIS FOR THIS ACTION

19 3. This civil action is brought by Plaintiffs pursuant to the statutory and common law
20 of the State of Nevada. Venue is appropriate in this Court because all events giving rise to the
21 present cause of action occurred in Clark County, Nevada. The amount in controversy in this
22 case is well in excess of the statutorily required amount of \$15,000.00.

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III.

THE PARTIES

4. Plaintiff, "Estate of Rebecca Powell" administers the affairs of Rebecca Powell ("Rebecca") who died in Clark County, Nevada on May 11, 2017. At the time of her death, Rebecca, an adult female, was approximately 42-years old. Rebecca was born on May 30, 1975.

5. Plaintiff Brian Powell ("Brian") is an adult male and the ex-husband of Rebecca as well as the Special Administrator of Rebecca's Estate. At all time periods relevant to this lawsuit, Brian was a resident of Clark County, Nevada.

6. Plaintiff Darci Creecy ("Darci") is an adult female and the daughter of Rebecca. At all time periods relevant to this lawsuit, Darci was a resident of Ohio.

7. Plaintiff Taryn Creecy ("Taryn") is an adult female and the daughter of Rebecca. At all time periods relevant to this lawsuit, Taryn was a resident of Ohio.

8. Plaintiff Isaiah Khosrof ("Khosrof") is an adult male and the son of Rebecca. At all time periods relevant to this lawsuit, Khosrof was a resident of Massachusetts.

9. Plaintiff Lloyd Creecy ("Lloyd") is an adult male and the father of Rebecca. At all time periods relevant to this lawsuit, Lloyd was a resident of Ohio.

10. Defendant Valley Health System, LLC (doing business as "Centennial Hills Hospital Medical Center") ("VHS") is a for-profit healthcare company, upon information and belief, headquartered in Nevada, that operates approximately 6 hospitals in Nevada. Upon information and belief, VHS owns and operates "Centennial Hills Hospital Medical Center"

1 located in Las Vegas, Nevada. VHS is a Delaware limited liability company registered to transact
2 business in Nevada.

3 11. Defendant Universal Health Services, Inc. ("UHS") is, upon information and
4 belief, a for-profit healthcare company headquartered in King of Prussia, Pennsylvania. Upon
5 further information and belief, UHS, through subsidiarie(s)/intermediarie(s) owns and operates
6 "Centennial Hills Hospital Medical Center" located in Las Vegas, Nevada, through
7 ownership/control of Valley Health System, LLC. UHS is a foreign corporation registered in
8 Delaware.
9

10 12. Defendant Dr. Dionice S. Juliano, M.D. ("Dr. Juliano") is an adult male individual
11 that, upon information and belief, was a resident of Clark County, Nevada for all time periods
12 relevant to this lawsuit. Dr. Juliano is licensed to practice medicine in the State of Nevada.
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14 13. Defendant Dr. Conrado C.D. Concio, M.D. ("Dr. Concio") is an adult male
15 individual that, upon information and belief, was a resident of Clark County, Nevada for all time
16 periods relevant to this lawsuit. Dr. Concio is licensed to practice medicine in the State of Nevada.
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18 14. Defendant Dr. Vishal S. Shah, M.D. ("Dr. Shah") is an adult male individual that,
19 upon information and belief, was a resident of Clark County, Nevada for all time periods relevant
20 to this lawsuit. Dr. Shah is licensed to practice medicine in the State of Nevada.

21 15. Plaintiffs are informed and believe, and thereupon allege, that each of the
22 Defendants designated as Does 1 through 10, inclusive, are responsible in some manner for the
23 events and happenings herein referred to and negligently and/or intentionally caused injuries and
24 damages to Plaintiffs. Plaintiffs further allege that they cannot currently ascertain the identity of
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1 each of the Doe Defendants and Plaintiffs will therefore seek leave of Court to amend this
2 Complaint to insert the true names and capacities of Doe Defendants when they have been
3 ascertained, together with appropriate charging allegations and to join such Defendants in this
4 action.

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6 16. Plaintiffs are informed and believe, and thereupon allege, that each of the
7 Defendants designated as Roes A through Z, inclusive, is responsible in some manner for the
8 events and happenings herein referred to and negligently and/or intentionally caused injuries and
9 damages to Plaintiffs. Plaintiffs are further informed and believe that each of the Roes is either a
10 corporation, related subsidiary, parent entity, group, partnership, holding company, owner,
11 predecessor entity, successor entity, joint venture, related association, insurer or business entity,
12 the true names of which are currently unknown to Plaintiffs at this time. Additionally, Plaintiffs
13 allege that they cannot currently ascertain the identity of each of the Roe Defendants and Plaintiffs
14 will therefore seek leave of Court to amend this Complaint to insert the true names and capacities
15 of Roe Defendants when they have been ascertained, together with appropriate charging
16 allegations and to join such Defendants in this action.
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19 IV.

20 FACTUAL BACKGROUND

21 17. Centennial Hills Hospital Medical Center ("CHHMC") (operated by VHS and
22 UHS) advertises itself on its website as a hospital that offers various healthcare services, including
23 emergency care, heart care, stroke services, imaging services, gastroenterology and oncology,
24 among other things. UHS, the parent corporation of VHS, and through VHS, the owner and
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operator of CHHMC, in or around April 2018, was reported to have set aside approximately \$35 million for the potential settlement of alleged False Claims Act violations.

18. On May 3, 2017, Rebecca was found by emergency medical services (“EMS”) at home, unconscious with labored breathing, and with vomitus on her face. It was believed she had ingested an over-amount of Benadryl, Cymbalta and Ambien. *See Exhibit A*, (Affidavit of Dr. Sami Hashim, M.D. ¶ 6A). EMS intubated Rebecca and transported her to the Emergency Department (“ED”) of CHHMC. *Id.* At the ED, Rebecca was evaluated and diagnosed with: (a) Respiratory Failure and low blood pressure; (b) “Overdose on unknown amount of Benadryl, Cymbalta and ethyl alcohol”; (c) Sinus Tachycardia – no ectopy; and (d) Acidosis, among other things. *Id.*

19. Notwithstanding the Death Certificate stating that the only cause of death was “Complications of Cymbalta Intoxication,” Rebecca did not, and with high probability could not have died from this. *See Exhibit A*, (Affidavit of Dr. Sami Hashim, M.D. ¶ 6B). Instead, Rebecca 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 Department of Health and Human Services—Division of Health Quality and Compliance’s (“DHHS”) Investigative Report. *Id.* After being admitted to Centennial Hills Hospital on March 3, 2017, Rebecca’s health status steadily improved over the course of almost a week to a point where a pulmonologist consultation stated that Rebecca felt well and wanted to go home, while making no note to delay discharge. *Id.* Plaintiffs were also told by healthcare providers that Rebecca was doing much better and “would be discharged soon.” *Id.* Metabolically, Cymbalta has a half-shelf life of approximately

1 12-24 hours and up to 48 hours if an excessive amount is ingested. Rebecca's health status did
2 not deteriorate, and was in fact improving, until 150 hours plus had transpired. *Id.* Therefore, the
3 possibility that Rebecca died of Cymbalta intoxication or of complications arising therefrom, is
4 not realistic. *Id.* A bronchoscopy and bronchoalveolar lavage on May 4, 2017 excluded any
5 aspiration of vomitus, and toxicology reports did not find evidence of the ingestion of Ambien,
6 Benadryl or ethyl alcohol. *Id.*

8 20. By May 9, 2017, it was noted that Rebecca "had significantly improved and was
9 expected to be discharged." *Id.* However, Rebecca's health status began to deteriorate the next
10 day, on May 11, 2017. *See Exhibit A*, (Affidavit of Dr. Sami Hashim, M.D. ¶ 6C). The initial
11 changes were not critical, nor overly concerning. *Id.* However, Defendants' conduct in providing
12 healthcare services to Rebecca fell below the appropriate standard of care; this included
13 inadequate and absent monitoring, a lack of diagnostic testing and improper treatment, all of
14 which were directly related to Rebecca's acutely failing health status and ultimately her death
15 early in the morning of May 11, 2017. *Id.*

18 21. The day before, on May 10, 2017 in the wee hours of the morning, Rebecca started
19 coughing and complained of shortness of breath, weakness and a "drowning" feeling. *Id.* Pursuant
20 to this, the drug Ativan was ordered to be administered to Rebecca by Dr. Shah via IV push. *Id.*
21 Various tests including x-rays were administered, which showed possible infiltrates or edema. *Id.*

22 22. On May 11, 2017, Dr. Concio ordered two consecutive doses of the drug Ativan
23 to be administered to Rebecca via IV push. *See Exhibit A*, (Affidavit of Dr. Sami Hashim, M.D.
24 ¶ 6D). A CT Scan of Rebecca's chest was also ordered, but said scan was aborted due to
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1 Rebecca's shortness of breath and "anxiety." *Id.* At the very least, a portable x-ray should have
2 been ordered when the patient was returned to her room, but it was not. *Id.* Later, an RT-Tech
3 noted that Rebecca needed to be monitored by a "sitter" due to her attempting to remove her
4 oxygen mask. *Id.* However, no sitter was assigned, nor was Rebecca moved to another room with
5 adequate monitoring capabilities. *Id.* Indeed, the camera monitor of the room Rebecca was in
6 noted that the resolution of the camera/monitor did not allow him to see the patient enough to
7 discern when she attempted to remove the mask. *Id.* Rebecca was mis-diagnosed with 'anxiety
8 disorder' by an unqualified healthcare provider and there was no differential diagnosis presented
9 by any physician at any time on May 11, 2017 when the patient was suffering from respiratory
10 insufficiency. *Id.* Given that Rebecca had been receiving daily doses of Midazolam,
11 Acetylcysteine and at least four other drugs known to cause adverse respiratory side effects, and
12 that Rebecca went into Code Blue status within 90 minutes after Ativan dosing, it is highly
13 probable that the administration of back-to-back doses of Ativan via IV Push to her (while she
14 was already in respiratory distress), alongside the inadequate and absent monitoring, and other
15 act or omissions falling below standard of care, as notes by the DHHS Investigative Report, all
16 directly led to Rebecca's acute respiratory failure resulting in the final cardiorespiratory event
17 and her death. *Id.*

21 23. Dr. Juliano, Dr. Concio and Dr. Shah all breached their duty as professionals
22 providing medical services to Rebecca. *See Exhibit A*, (Affidavit of Dr. Sami Hashim, M.D. ¶
23 7). All three of them were aware of the patient's acutely declining health status and were
24 responsible (and should have) ordered alternative diagnostic imaging such as a portable x-ray to
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1 detect any significant pulmonary changes when an attempt to conduct a CT scan failed due to
2 “anxiety.” See **Exhibit A**, (Affidavit of Dr. Sami Hashim, M.D. ¶ 7A). In addition, based on
3 Rebecca’s stable condition until late May 10, 2017 and her acute decline in health status on May
4 11, 2017, these three physicians should have made a differential diagnosis that included the
5 possibility of side effect(s) and adverse reaction(s) from the numerous medications being
6 administered to Rebecca known to have side effects directly related to her symptoms manifesting
7 during the deterioration of her health status on May 10 and 11, 2017. *Id.* The nature of the sudden
8 onset of Rebecca’s symptoms should have triggered the three doctors to review drug side effects
9 and interactions as a likely cause of her symptoms and declining health status, but this possibility
10 was ignored by them. *Id.* All three physicians were aware of the decision to administer more
11 Ativan via IV-Push to Rebecca multiple times in rapid succession to treat the her symptom of
12 anxiety, and allowed this administration in dereliction of their responsibility to have been aware
13 that administering Ativan to a respiratory-compromised patient poses significant risks related to
14 serious pulmonary/respiratory function. *Id.* Indeed, the FDA provides warnings of such risks. *Id.*

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18 24. Had the three physicians reviewed Rebecca’s drug regimen, they would have
19 realized a large number of these drugs caused shortness of breath, associated anxiety, cough,
20 labored breathing, weakness and other related symptoms exhibited by Rebecca. *Id.* They would
21 have further recognized that Ativan is known to potentially cause and/or increase respiratory
22 depression and would not have administered it, especially not by IV-Push, which is fast-acting.

23 *Id.*

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25. In concert with, and in addition to the above-articulated failures, a DHHS report dated February 5, 2018 (received by Special Administrator Brian Powell on February 9, 2018) found a plethora of violations falling below the standard of care. *See Exhibit A*, (Affidavit of Dr. Sami Hashim, M.D. ¶ 8). Among other things, the report criticized the fact that no specific differential diagnosis was shown in the records related to Rebecca's complaints and abnormal findings between May 10 and 11, 2017. *Id.* It also notes that the records state numerous times that physician notification, elevation to a higher level of care and/or closer monitoring was required but did not occur. *Id.* For example, at one point in time the respiratory therapist concluded the physician should have been notified, the Rapid Response Team ("RRT") activated, and the level of care upgraded, but the physician was not notified, the RRT was not activated and the level of care was not elevated. *Id.* Further, Rebecca was never moved to a different room for closer monitoring as earlier advised. *Id.* Instead, for at least one hour while she was in severe respiratory distress, no RN or CNA checked on her, which was grossly inadequate. *Id.* Also falling far below the standard of care was the fact that Rebecca did not receive any cardiac monitoring until she entered Code Blue status. *Id.* Any patient in respiratory distress needing a re-breather mask and receiving the same medications as Rebecca, must be on telemetry to monitor cardiac status. *Id.* In Rebecca's case, this was critically important given the fact she had been administered multiple IV Push doses of Ativan, a drug known to depress the respiratory system. *Id.*

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V.

FIRST CAUSE OF ACTION

[On Behalf Of The Estate Of Rebecca Powell (Through Special Administrator Brian), Dacri, Taryn and Isaiah Against All Defendants]
Negligence / Medical Malpractice

26. Plaintiffs The Estate Of Rebecca Powell (through Special Administrator Brian), Dacri, Taryn, and Isaiah reallege and incorporate by reference the allegations set forth in paragraphs 1 through 25 above.

27. Under Nevada law, specifically the provisions of Nevada Revised Statute ("NRS") sections 41A, a plaintiff may recover for medical malpractice by showing the following: (i) defendant(s) (i.e. hospital, physician or employee of hospital) failed in rendering services to use reasonable care, skill or knowledge ordinarily used in similar circumstances; (ii) defendant's conduct was the actual and proximate cause of plaintiff's injuries; and (iii) plaintiff suffered damages. Under NRS 41A.071, a suit alleging medical malpractice requires an affidavit from a "medical expert."

28. In this case, Defendants (physicians, medical personnel and medical services corporations in the business of operating/providing services at Centennial Hills Hospital Medical Center) owed Rebecca a duty of care to provide her with medical services in a reasonable and safe manner. Defendants breached their duty of care towards Rebecca by providing her with medical services that fell below the acceptable standards of practice and care. *See Exhibit A* (attached in compliance with NRS 41A.071 and fully incorporated by reference herein). Specifically, Defendants acted below the standard of care when, among other things detailed in *Exhibit A*, they failed to recognize and consider the differential diagnosis of drug-induced

1 respiratory distress, inappropriately administering and/or allowing the administration of
2 additional Ativan via IV Push which further depressed Rebecca's respiration, contributing to her
3 death. This was compounded by numerous instances of failure to notify a physician, failure to
4 elevate to a higher level of care, failure to conduct necessary tests and failure to conduct closer
5 monitoring, all falling below the standard of care. Defendants also failed to recognize the fact that
6 Cymbalta could not be the cause of Rebecca's acute health deterioration due to its short half-shelf
7 life. Any other failures by Defendants to adhere to the standard of care while treating Rebecca
8 not described herein are realleged and incorporated by reference herein, as set forth in **Exhibit A**
9 and paragraphs 1 to 27 above.

11 29. Based upon the foregoing, it was entirely foreseeable that administering several
12 doses of Ativan via IV Push in quick succession to Rebecca, who was already experiencing
13 respiratory distress, and who was already on a cocktail of other drugs also known to have negative
14 respiratory effects, in conjunction with the various failures of care describes above and in **Exhibit**
15 **A**, could have caused (and in all probability did cause) severe respiratory symptoms, ultimately
16 putting Rebecca into Code Blue status and killing her. **Exhibit A**, ¶ 7 and 8. Thus, Defendants'
17 breach of their duty was both the actual and proximate cause of Rebecca's death.

20 30. Plaintiffs Dacri, Taryn and Isaiah, the heirs of Rebecca, as well as her Estate, have
21 suffered damages, including but not limited to significant pain and suffering, as a result of
22 Defendants' negligence in excess of \$15,000.00.

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1 31. As a result of Defendants' negligence, these Plaintiffs have been required to obtain
2 the services of an attorney to prosecute this action. These Plaintiffs are entitled to an award of
3 attorney's fees and costs of suit incurred herein.

4 32. That the conduct of Defendants rose to the level of oppression, fraud or malice,
5 express or implied. That Defendants consciously disregarded the welfare and safety of Rebecca
6 and these Plaintiffs in providing substandard care to Rebecca, leading to her death. Further,
7 Defendants committed fraud where notes and records by RN(s) and/or CNAs were contradicted
8 by a note indicating that Rebecca was not checked on for an hour on May 11, 2017 while she was
9 in critical condition. See Exhibit A, (Affidavit of Dr. Sami Hashim, M.D. ¶ 8). These Plaintiffs
10 further reallege and incorporate any further applicable acts or omissions of Defendants while
11 treating Rebecca not described herein, as set forth in Exhibit A and paragraphs 1 to 31 above.
12 That these Plaintiffs are entitled to punitive/exemplary damages due to said acts or omissions.
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14 33. The Estate of Rebecca Powell is also entitled to, and does hereby maintain this
15 action, pursuant to NRS 41.100 and seeks all damages permitted under that statute.
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18 VI.

19 **SECOND CAUSE OF ACTION**

20 ***[On Behalf Of The Estate Of Rebecca Powell (Through Special Administrator Brian), Darci,***
21 ***Taryn and Isaiah Against All Defendants)***
22 **Wrongful Death Pursuant To NRS 41.085**

23 34. These Plaintiffs reallege and incorporate by reference the allegations set forth in
24 paragraphs 1 through 33 above.

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1 35. Under NRS 41.085, the heirs and personal representative of a decedent's estate
2 may respectively maintain independent causes of action against another where that person/party
3 has caused the decedent's death by wrongful act or neglect.

4 36. In this case, Rebecca's Estate (through Brian its Special Administrator) and her
5 heirs (her children Dacri, Taryn, and Isaiah) may each seek appropriate damages permitted by
6 Nevada law (NRS 41.085) based upon the death of Rebecca. This includes, but is not limited to,
7 damages for grief, sorrow, loss of probable support, companionship, society, comfort and
8 consortium, medical/funeral expenses and damages for pain/suffering/emotional distress of
9 Rebecca. Additionally, these Plaintiffs may also seek any special damages permitted by law.

10 37. Defendants acted wrongfully and neglectfully when they breached their duty of
11 care towards Rebecca by providing her with medical service that fell below the acceptable
12 standards of practice and care. See **Exhibit A** (fully incorporated by reference herein).
13 Specifically, Defendants acted below the standard of care when, among other things detailed in
14 **Exhibit A**, they failed to recognize and consider the differential diagnosis of drug-induced
15 respiratory distress, inappropriately administering and/or allowing the administration of
16 additional Ativan via IV Push which further depressed Rebecca's respiration, contributing to her
17 death. This was compounded by numerous instances of failure to notify a physician, failure to
18 elevate to a higher level of care, failure to conduct necessary tests and failure to conduct closer
19 monitoring, all falling below the standard of care. Defendants also failed to recognize the fact that
20 Cymbalta could not be the cause of Rebecca's acute health deterioration due to its short half-shelf
21 life. Any other failures by Defendants to adhere to the standard of care while treating Rebecca
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1 not described herein are realleged and incorporated by reference herein, as set forth in **Exhibit A**
2 and paragraphs 1 to 36 above.

3 38. These **Plaintiffs**, the heirs of Rebecca, as well as her Estate, have suffered
4 respective damages as a result of Defendants' negligence in excess of \$15,000.00.

5 39. That the conduct of Defendants rose to the level of oppression, fraud or malice,
6 express or implied. That Defendants consciously disregarded the welfare and safety of Rebecca
7 and these Plaintiffs in providing substandard care to Rebecca, leading to her death. Further,
8 Defendants committed fraud where notes and records by RN(s) and/or CNAs were contradicted
9 by a note indicating that Rebecca was not checked on for an hour on May 11, 2017 while she was
10 in critical condition. See **Exhibit A**, (Affidavit of Dr. Sami Hashim, M.D. ¶ 8). These Plaintiffs
11 further reallege and incorporate any further applicable acts or omissions of Defendants while
12 treating Rebecca not described herein, as set forth in Exhibit A and paragraphs 1 to 38 above.
13 That these Plaintiffs are entitled to punitive/exemplary damages due to said acts or omissions.
14

15 40. As a result of Defendants' negligence, these Plaintiffs have been required to obtain
16 the services of an attorney to prosecute this action. These Plaintiffs are entitled to an award of
17 attorney's fees and costs of suit incurred herein.
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20 **VII.**

21 **THIRD CAUSE OF ACTION**

22 ***[On Behalf Of Darci, Taryn and Isaiah Against All Defendants]***
23 **Negligent Infliction Of Emotional Distress**

24 41. These Plaintiffs reallege and incorporate by reference the allegations set forth in
25 paragraphs 1 through 40 above.

1 42. A plaintiff may recover for negligent infliction of emotional distress (bystander
2 theory) under Nevada law by showing the following: (i) defendant negligently committed an
3 injury upon another; (ii) plaintiff is closely related to the victim of the accident; (iii) plaintiff was
4 located near the scene of the accident; and (iv) plaintiff suffered a shock resulting from the sensory
5 and contemporaneous observance of the accident.
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7 43. In this case, Defendants (physicians and medical services corporations operating
8 a for-profit hospital) owed Rebecca a duty of care to provide reasonable and safe services. They
9 breached this duty of care towards Rebecca by providing her with medical service that fell below
10 the acceptable standards of practice and care. See **Exhibit A** (fully incorporated by reference
11 herein). Specifically, Defendants acted below the standard of care when, among other things
12 detailed in **Exhibit A**, they failed to recognize and consider the differential diagnosis of drug-
13 induced respiratory distress, inappropriately administering and/or allowing the administration of
14 additional Ativan via IV Push which further depressed Rebecca's respiration, contributing to her
15 death. This was compounded by numerous instances of failure to notify a physician, failure to
16 elevate to a higher level of care, failure to conduct necessary tests and failure to conduct closer
17 monitoring, all falling below the standard of care. Defendants also failed to recognize the fact that
18 Cymbalta could not be the cause of Rebecca's acute health deterioration due to its short half-shelf
19 life. Any other failures by Defendants to adhere to the standard of care while treating Rebecca
20 not described herein are realleged and incorporated by reference herein, as set forth in **Exhibit A**
21 and paragraphs 1 to 42 above.
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1 44. As a direct and proximate result of the negligence of Defendants, these Plaintiffs
2 suffered shock and serious emotional distress when they observed the condition of their mother
3 Rebecca precipitously deteriorate (ultimately leading to her rapid death) at CHHMC on May 10
4 and 11 of 2017.

5 45. These Plaintiffs contemporaneously observed the direct and proximate results of
6 Defendants' negligence when their mother Rebecca, who previously appeared to be recovering,
7 rapidly deteriorated before their eyes and died. These Plaintiffs suffered a shock and serious
8 emotional distress from sensory, contemporaneous observance of this tragic and unfortunate
9 event, all directly and proximately caused by Defendants' negligence. That said, this severe
10 emotional distress had an adverse impact on their physical health and well-being.

11 46. These Plaintiffs, and each of them, have suffered damages as a result of
12 Defendants' actions in excess of \$15,000.00.

13 47. That the conduct of Defendants rose to the level of oppression, fraud or malice,
14 express or implied. That Defendants consciously disregarded the welfare and safety of Rebecca
15 and these Plaintiffs in providing substandard care to Rebecca, leading to her death. Further,
16 Defendants committed fraud where notes and records by RN(s) and/or CNAs were contradicted
17 by a note indicating that Rebecca was not checked on for an hour on May 11, 2017 while she was
18 in critical condition. *See Exhibit A*, (Affidavit of Dr. Sami Hashim, M.D. ¶ 8). These Plaintiffs
19 further reallege and incorporate any further applicable acts or omissions of Defendants while
20 treating Rebecca not described herein, as set forth in Exhibit A and paragraphs 1 to 46 above.
21 That these Plaintiffs are entitled to punitive/exemplary damages due to said acts or omissions.
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1 death. This was compounded by numerous instances of failure to notify a physician, failure to
2 elevate to a higher level of care, failure to conduct necessary tests and failure to conduct closer
3 monitoring, all falling below the standard of care. Defendants also failed to recognize the fact that
4 Cymbalta could not be the cause of Rebecca's acute health deterioration due to its short half-shelf
5 life. Any other failures by Defendants to adhere to the standard of care while treating Rebecca
6 not described herein are realleged and incorporated by reference herein, as set forth in Exhibit A
7 and paragraphs 1 to 50 above.

9 52. As a direct and proximate result of the negligence of Defendants, this Plaintiff
10 suffered shock and serious emotional distress when he observed the condition of his daughter
11 Rebecca precipitously deteriorate (ultimately leading to her rapid death) at CHHMC on May 10
12 and 11 of 2017.

14 53. This Plaintiff contemporaneously observed the direct and proximate results of
15 Defendants' negligence when his daughter Rebecca, who previously appeared to be recovering,
16 rapidly deteriorated before his eyes and died. This Plaintiff suffered a shock and serious
17 emotional distress from sensory, contemporaneous observance of this tragic and unfortunate
18 event, all directly and proximately caused by Defendants' negligence. That said, this severe
19 emotional distress had an adverse impact on his physical health and well-being.

21 54. This Plaintiff has suffered damages as a result of Defendants' actions in excess of
22 \$15,000.00.

24 55. That the conduct of Defendants rose to the level of oppression, fraud or malice,
25 express or implied. That Defendants consciously disregarded the welfare and safety of Rebecca

1 and these Plaintiffs in providing substandard care to Rebecca, leading to her death. Further,
2 Defendants committed fraud where notes and records by RN(s) and/or CNAs were contradicted
3 by a note indicating that Rebecca was not checked on for an hour on May 11, 2017 while she was
4 in critical condition. See Exhibit A, (Affidavit of Dr. Sami Hashim, M.D. ¶ 8). These Plaintiffs
5 further reallege and incorporate any further applicable acts or omissions of Defendants while
6 treating Rebecca not described herein, as set forth in Exhibit A and paragraphs 1 to 54 above.
7 That these Plaintiffs are entitled to punitive/exemplary damages due to said acts or omissions.
8

9 56. As a result of Defendants' actions, this Plaintiff has been required to obtain the
10 services of an attorney to prosecute this action. This Plaintiff is entitled to an award of attorney's
11 fees and costs of suit incurred herein.
12

13 IX.

14 RELIEF REQUESTED

15 57. Wherefore, in light of the foregoing, Plaintiffs request that the Court enter the
16 following relief in this matter:
17

- 18 a. Set this matter for trial by jury on a date certain;
- 19 b. Award Plaintiffs compensatory and special damages in amounts exceeding
20 \$15,000.00 for each cause of action set forth herein;
- 21 c. Award Plaintiffs interest (pre-judgment and post-judgment) on all sums
22 permitted by law;
- 23 d. Award Plaintiff reasonable attorney's fees and costs for having to
24 prosecute this matter;
- 25 ...

- 1 e. Punitive/Exemplary Damages for each cause of action; and
2
3 f. Award all other just and proper relief.

4 DATED this 4th day of February 2019.

5 Respectfully submitted by:

6 PAUL PADDA LAW, PLLC

7
8 By: 

9 PAUL S. PADDA, ESQ.
10 JOSHUA Y. ANG, ESQ.
11 4560 South Decatur Blvd., Suite 300
12 Las Vegas, Nevada 89103

13 Attorneys for Plaintiffs
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EXHIBIT A

EXHIBIT A

AFFIDAVIT OF DR. SAMI HASHIM, M.D.

STATE OF NEW YORK }
COUNTY OF WESTCHESTER }

The undersigned affiant, Dr. Sami Hashim, M.D., being first duly sworn, hereby deposes and says:

1. I have reviewed the medical records pertaining to Rebecca Powell (Date of Birth: May 30, 1975 / Date of Death: May 11, 2017).
2. This affidavit is offered based upon my personal and professional knowledge. I am over the age of eighteen and competent to testify to the matters set forth herein if called upon to do so.
3. I am a medical doctor and senior attending physician in the Division of Endocrinology and Metabolism at St. Luke's Hospital/Medical Center at Mount Sinai in New York, New York. I have been a Professor of Endocrinology, Internal Medicine, Metabolism & Nutritional Medicine at Columbia University College of Physicians & Surgeons since the early 1970's and was Chief of Metabolic Research from 1971 to 1997. I have published over 200 papers in peer-reviewed journals and am a recognized expert in the fields of internal medicine (including general medicine, which includes cardiology, neurology, pulmonology and other specialties), endocrinology, metabolism and nutrition. I have served on research review committees of the National Institute of Health. I earned my MD degree from the State University of New York, with post graduate training at Harvard University.
4. I have worked as a senior attending physician and professor at St. Luke's Hospital and Medical Center, a Mount Sinai Medical Center affiliate hospital (previously affiliated with Columbia University) for over 20 years. As a professor, I teach medical students, interns, residents all aspects of internal and general medicine, in-patient and out-patient medical care. I complete medical rounds each day seeing patients with and without medical students, interns, residents and I train Fellows in many different specialties including Emergency Medicine, Cardiology, and Pulmonary Medicine. I also attend to private patients at St. Luke's.
5. As a senior attending physician and Professor with decades of teaching and training medical students, Interns, Residents and Fellows as well as attending to my own private patients, I can attest that following Standard of Care ("SOC") protocols is crucial and essential for proper diagnosis, treatment and care management. Obviously, there are numerous SOC protocols, which begin from the time the patient is first seen and examined at a hospital/medical center, post-admission, at time of discharge and following discharge. Many of the protocols are basic, yet of critical importance to the patient's overall health welfare and ultimate recovery during the recuperation period following discharge. That is why all hospitals/medical centers respect and adhere to strict guidelines and protocols described & defined by each healthcare facility and even by federal law(s). Certainly, real-time information stated

and revealed in a patient's medical records such as all chart notes, must be carefully evaluated and considered as primary SOC as part of patient care management. Disregard of even basic protocols can lead to catastrophic events and outcomes.

6. I have reviewed the available medical records, summary reports and the HHS-Investigative Report pertaining to Rebecca Powell. Evaluation of her medical records and reconstruction of an accurate timeline was available in part (all records were requested, not all records were provided by Centennial Hills Hospital & Medical Center). In my opinion, stated to a reasonable degree of medical probability, the conduct of *Centennial Hills Hospital & Medical Center* (including its hospitalists/nurses and other healthcare providers including *Dr. Julianio Dionice, M.D., Dr. C. Concio, M.D., Dr. Vishal Shah* - presumed employees)—fell below the appropriate standards of care that were owed to Rebecca Powell. The medical records and additional medical related information I have reviewed reveal the following:

- A. On May 3, 2017 at 3:27PDT, Rebecca Powell, a 41-year old adult female, was found by EMS at home, unconscious with labored breathing and vomitus on her face. It was believed she ingested an over-amount of Benadryl, Cymbalta and Ambien. EMS intubated Ms. Powell and transported her to Centennial Hills Hospital—Emergency Department (ED). At ED, patient was evaluated and diagnosed with:
- Respiratory Failure and low BP
 - “Overdose on unknown amount of Benadryl, Cymbalta and ETOH”
 - Review of Systems: “Within Normal Limits” (WNL)
 - Sinus Tachycardia – no ectopy
 - Lab results consistent with respiratory failure and over-dosage of suspected medications
 - Acidosis
- B. Notwithstanding clear evidence of intentional over-dosing of the substances mentioned, the Death Certificate noted the *only* cause of death was due to: “Complications of Cymbalta Intoxication.” Based on 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 Department of Health and Human Services—Division of Health Quality and Compliance Investigative Report. Furthermore:
- After being admitted to Centennial Hills Hospital on 05/03/17, the patient's health status steadily improved over the course of almost a week.
 - Patient was extubated in the ICU and moved to a medical floor.
 - Patient's lab results improved daily.
 - Pulmonologist consultation stated that the patient felt well enough and wanted to go home. The specialist made no note to delay discharge.
 - Healthcare providers told family members from out-of-town that the patient was doing much better and “would be discharged soon.” Family returned to their homes out-of-state based on the information they received.

- Metabolically, Cymbalta has a half-shelf life of approximately 12-24 hours, up to 48 hours if an over-amount is ingested. The patient didn't have a downward health status until 150 hours+ had transpired. *Therefore, the possibility that she died from Cymbalta intoxication or complication of, is not realistic.*
 - There was no medical evidence of the patient ingesting Ambien, Benadryl or ETOH, nor did toxicology reports reveal any of those substances.
 - On 05/04/17, the patient underwent a bronchoscopy and bronchoalveolar lavage. The report stated, *"There was no foreign material or deciduous matter evidenced."* Had the patient aspirated vomitus, there would have been some endotracheal or bronchial evidence of foreign or deciduous matter.
 - From 05/07/17 – 05/11/17 – Over a period of nearly five days, medical records state the patient steadily improved.
 - 05/07/17– PROGRESS NOTES state *"Patient alert and stable"* and *"Can upgrade diet to GI soft."*
 - 05/08/17 – *"Patient vitals remain stable"* and *"No significant event during shifts."*
 - 05/09/17 – PROGRESS NOTES (stating the patient had significantly improved and was expected to be discharged)
 - *"Patient eager to go home. Denies any shortness of breath. No cough, shortness of breath or sputum production."*
 - Review of Systems – Normal
 - Vitals – Normal
- C. Late on 05/10/17 and early hours of 05/11/17, the patient's health status changed. Initially, the changes were not even approaching critical by any stretch of consideration or concern. However, the *below standard of care related to inadequate and absent monitoring, lack of diagnostic testing and improper treatment were directly related to the patient's acutely failing health status and ultimately her pronounced death at 6:57 AM on 05/11/17.*
- On 05/10/17 at 2AM, patient started coughing and complained of SOB. Patient was receiving O2-2L/NC
 - At 10:51AM – Patient's SO2 dropped to 92%
 - At 3:11PM – *Patient complained of continued SOB and weakness*
 - At 4:11PM – Patient complaining of increased labor for breathing, states she feels like she's *"drowning"*
 - Order for breathing treatment and *Ativan IV Push* ordered by *Dr. Shah* & administered for anxiety with no improvement.
 - Dr. Shah contacted who ordered STAT ABG and 2 view x-ray – Results showed possible infiltrates or edema.
- D. On 05/11/17, the patient's health status markedly declined.
- At 2AM – A STAT CT scan of chest was ordered.
 - At 2:20AM – *Ativan IV Push* (.5mg) was ordered by *Dr. Concio* & administered.
 - At 2:40AM – *CT Lab called to state patient was being returned to her room (701) and CT could not be completed due to patient's complaint of SOB and anxiety.*
 - (Note: At the very least, a portable x-ray should have been ordered when the patient was returned to her room. It wasn't.)
 - At 3:27AM – *Ativan IV Push* was again ordered by *Dr. Concio* & administered.

- At 3:45AM – RT-Tech (Venessa) was called to assess the patient. Indicated that the patient was not cooperative and kept removing the O2 mask. Also stated the patient needed to be monitored with a “sitter.” Karen contacted House Supervisor David to explain that a sitter was needed. He suggested placing the patient in wrist restraints. When asked to closely monitor the patient, the camera monitor (John) noted that the resolution of the camera/monitor did not allow him to see the patient enough to discern when she attempted to remove the mask. He advised moving the patient to a room with better video capability. The patient did not receive a “sitter” nor was she moved to another room with adequate monitoring capability.
- The patient was mis-diagnosed with ‘anxiety disorder’ by an unqualified healthcare provider and there was no differential diagnosis presented by any physician at any time on 05/11/17 when the patient was suffering from respiratory insufficiency.
- Based on the administration of multiple doses of Ativan IV Push, the fact that the patient had been receiving daily doses of Midazolam (another Benzodiazepine causing respiratory depression), Acetylcysteine (can also cause respiratory symptoms), (at least four other drugs with side effects of SOB, labored breathing and cough) and the period of time from Ativan dosing to Code Blue was within less than 90 minutes. Given the medication regimen the patient was on, it’s highly probable that administering the back to back doses of Ativan IV Push to this patient (already in respiratory distress), the inadequate and absent monitoring of the patient and other below standards of care as verified in the Investigative Report, were all directly related to the patient’s acute respiratory failure leading to the final cardiorespiratory event and death.

7. Dr. Dionice, Dr. Concio and Dr. Shah, in my expert opinion, each one breached their duty.

A. Based on radiological reports as late as 05/10/17, stating there were no significant changes from 05/08/17, noting “possible infiltrates or edema.” This is extremely relevant in diagnosing and treating the patient’s sudden respiratory change in health status late 05/10/17 and 05/11/17.

- Since the patient was unable to undergo a CT scan due to “anxiety”, at the very least a portable x-ray should have been ordered to determine if and what significant pulmonary changes were present based on the presence of acute signs & symptoms. Each of the three physicians aforementioned were aware of the patient’s acutely declining health status and were responsible for not only ordering an alternative diagnostic imaging such as a portable x-ray, but also obtaining & reporting the results to determine pulmonary involvement based on her symptoms. Medical records do not reveal a portable x-ray ordered when the CT scan was unable to be completed, nor any results of any x-ray ordered after the attempted CT scan when the patient was returned to her room.
- Based on the patient’s stable condition until late 05/10/17 and her acute decline in health status on 05/11/17, an immediate differential diagnosis should have been made, which absolutely should have included the possibility of side effect(s) and adverse reaction(s) from medications being administered. Given the nature of the sudden onset of the patient’s symptoms, drug side effects and interactions should have been reviewed by each of the three physicians aforementioned. The patient had been receiving six drugs, including Ativan administered on 05/09/17 and 05/10/17, all having side effects directly

related to the symptoms and findings displayed by the patient at the time her health acutely worsened on 05/10/17 & 05/11/17.

- Without consideration of the probable drug side effects, adverse reactions and interactions, which were most probably directly related to the patient's acute symptoms, *the three physicians aforementioned ignored even the possibility that her medications might be the cause of her symptoms & declining health status. Consequently, not one of the three physicians aforementioned even placed drug's side effects/adverse reactions on any differential diagnosis.*
- *Instead of performing their professional duty related to prescribed and administered medications, all three of the physicians aforementioned were aware of the decision to administer even more Ativan IV-Push, multiple times in a short period of time to treat the patient's symptom of anxiety. It was the responsibility of each of the three physicians to have been aware and knowledgeable that administering Ativan to a respiratory compromised patient has significant risks related to serious pulmonary/respiratory function.* The FDA provides warnings with the use of benzodiazepines of such risk. Interactions with other drugs (not only when used concomitantly with opiates) can compound the seriousness of the risk(s).
- *Had any of the three physicians aforementioned, reviewed the patient's drug regimen, they would have realized that several of the drugs caused, shortness of breath (SOB) and associated anxiety, cough, labored breathing, weakness and other related symptoms exhibited by the patient. Had any of the three aforementioned physicians, reviewed the side effects, Ativan (known to potentially cause and/or increase respiratory depression) would not have been administered, especially not by IV-Push (the effects are much faster and more dramatically pronounced).*

8. Department of Health and Human Services—NV Bureau of Health Quality and Compliance Investigative Report, not only reinforced my findings, but revealed many other below standard of care violations, all related directly to the wrongful death of the patient. The information below, provides examples of other below standard of care violations found in the medical records and as part of the HHS—NV Bureau's Investigation:

- There was no specific differential diagnosis shown in the records related to her complaints and abnormal findings between 05/10/17 to 05/11/17.
- The records stated numerous times that the patient needed to be elevated to a higher level of care and required close monitoring. *Neither were provided.*
- **Respiratory Therapist** – (“...the RT concluded the physician should have been notified, the RRT activated and the level of care upgraded.”) *The physician was not notified, the RRT was not activated and the level of care was not elevated.*
- **Registered Nurse** – (“...RN explained normal vital signs were: B/P: 100/60, HR: no more than 100 bpm, RR: 16-20 br/m and SPO2 no less than 92%. If a patient with a HR of 130 bpm and RR of 30 br/m, the physician must be notified immediately and the RRT activated.”) *The patient had a HR of 130, SPO2 below 92% while receiving 3+ liters of oxygen and a respiratory rate of 30 bpm..”) The physician was not notified.*
- **The Legal 2000 Patient Frequency Observation Record** – (“...they could not see the incident on monitor and again advised to change the patient to room 832 (with working camera). The record revealed at 6:10 AM, Code Blue was announced. The record indicated the patient “last appeared to be sitting in close to upright position with fingers

possible in mouth for approximately one hour.") **IMPORTANT NOTE** – The patient was not changed to a different room as earlier advised. Hence, she was not being adequately monitored, which was of critical importance. *The last sentence in this record reveals that for at least one hour the patient was in severe respiratory distress and during that hour, no RN or CNA checked on the patient. This contradicts other records and statements made by the RN and the CNA.*

- **Chief of Nursing Operations** – (“...the Chief of Nursing Operations (CNO) indicated that the patient should have been monitored closely based on the vital signs and condition. The CNO acknowledged the Rapid Response Team (RRT) should have been activated and the patient upgraded to a higher level of care.”) **The RRT was not activated nor was the patient elevated to a higher level of care.**
- **Process Improvement Manager** – (“...the facility Process Improvement Manager indicated the patient was not monitored by telemetry and the cardiac monitoring documentation available for 05/11/17 was the EKG performed during the Code Blue.”) **The patient was already known to be in respiratory distress before she coded. According to this record-note, the patient was not receiving any cardiac monitoring and was only monitored during the code. (This is a shameful and gross example of below standard of care. Any patient in respiratory distress needing a re-breather mask and receiving the same medications for the present acute health status, must be on telemetry to monitor cardiac status. In this patient’s case, it was critically important given the fact she had been administered multiple IV PUSH doses of ATIVAN, a drug known to depress the respiratory system.**
- **Respiratory Therapy Supervisor** – (“...RT Supervisor confirmed according to the vital signs documented in the record on 05/11/17 at 4:08 AM and 4:47 AM, the patient was in respiratory distress and required an upgrade of the level of care.”) **On more than one occasion during the same hour, the patient required being upgraded to a higher level of care, but wasn’t upgraded. This note also indicates that during that hour between 4:00 AM – 5 AM, no RN or CNA checked on the patient. This contradicts other records and statements made by the RN and the CNA.**

9. In my expert opinion, stated to a reasonable degree of medical probability, the failure to properly diagnose the patient before she became acutely critical on 05/11/17, the failure of the healthcare provider staff to adequately monitor the patient (also stated in the HHS-Investigative Report), the failure to properly diagnose the patient, the failure to provide proper treatment (***lacking review of the patient’s medications***) and administering the drug (*Ativan*) several times IV-Push in a respiratory compromised patient, inclusively & directly led to the patient’s wrongful death. Additionally, there were many other below Standard of Care violations as revealed and reported by the Department of Health and Human Services. Nevada—Bureau of Health Care Quality and Compliance – Investigation Report (Complaint Number - NV00049271) also related directly to Rebecca’s Powell’s wrongful death.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief. I reserve the right to change my opinions pending production and review of additional medical records.

Sami Hashim
Dr. Sami Hashim, M.D.

Dated: 1/23/2019

Sworn to me before this 23rd day

of January, 2019.

Bonnie Leung
Notary Public



[Signature]
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

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

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

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

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

25 Defendant claims that, pursuant to NRS 41A.097 Plaintiff's claims were brought
26 after the statute of limitations had run. In pertinent part, NRS 41A.097 states in
27 pertinent part: "an action for injury or death against a provider of health care may not
28 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

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

4 Defendant claims that Plaintiff was put on inquiry notice of the possible cause of
5 action on or around the date of Plaintiff’s death in May of 2017 and therefore the suit,
6 brought on February 4, 2019, was brought after the statute of limitations had tolled.
7 Defendant makes this claim based on several theories. Defendant claims that since
8 Plaintiffs are suing for Negligent Infliction of Emotional Distress, and an element of
9 that claim is contemporaneous observation, that Plaintiff was put on notice of the
10 possible claim on the date of Ms. Powell’s death. Alternatively, Defendant argues that
11 since Plaintiff ordered and received Ms. Powell’s medical records no later than June
12 2017, they were put on notice upon the reception of those records. Finally, Defendant
13 argues that since Plaintiffs made two separate complaints alleging negligence, they
14 were aware of the possible claim for negligence and thus on inquiry notice. (On May 23,
15 2017, Defendants provide an acknowledgement by the Nevada Department of Health
16 and Human Services (“HHS”) that they received Plaintiff Brian Powell’s complaint
17 made against Defendants. And on June 11, 2017, Plaintiff Brian Powell filed a
18 complaint with the Nevada State Board of Nursing alleging negligence in that Decedent
19 was not properly monitored.)

20 Plaintiff argues that the date of accrual for the statute of limitations is a question
21 of fact for the jury and summary judgment is not appropriate at this stage where there
22 are factual disputes. Plaintiffs claim they were not put on inquiry notice of Defendant’s
23 negligence until they received the February 5, 2018, HHS report and therefore the
24 complaint, filed on February 4, 2019, was brought within the one-year statute of
25 limitations. Plaintiff makes this claim based on several pieces of evidence. First, while
26 the medical records were mailed to Plaintiffs on June 29, 2017, there is no evidence
27 that shows the records were ever received. Additionally, on June 28, 2017, Plaintiffs
28 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

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

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

8 Summary judgment is appropriate if the pleadings, depositions, answers to
9 interrogatories, and admissions on file, together with the affidavits, if any, show that
10 there is no genuine issue as to any disputed material fact and that the moving party is
11 entitled to a judgment as a matter of law. NRCP 56(c). The tolling date ordinarily
12 presents a question of fact for the jury. *Winn v. Sunrise Hospital and Medical Center*,
13 128 Nev. 246, 252 (2012). "Only when the evidence irrefutably demonstrates that a
14 plaintiff was put on inquiry notice of a cause of action should the district court
15 determine this discovery date as a matter of law." *Id.* A plaintiff discovers an injury
16 when "he knows or, through the use of reasonable diligence, should have known of facts
17 that would put a reasonable person on inquiry notice of his cause of action." *Massey v.*
18 *Linton*, 99 Nev. 723 (1983). The time does not begin when the plaintiff discovers the
19 precise facts pertaining to his legal theory but when there is a general belief that
20 negligence may have caused the injury. *Id.* at 728.

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

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

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

13 **Defendant, Juliano's Motion for Summary Judgment, and Defendant**
14 **Concio and Shah's Motion for Partial Summary Judgment on Emotional**
15 **Distress Claims.**

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

21 Defendant, Doctor Dionice Juliano, argues that based on the discovery which
22 has taken place, the medical records, and specifically his own affidavit, there are no
23 material facts suggesting he was responsible for the care and treatment of Rebecca
24 Powell after May 9, 2017.¹ Further, Defendant argues that for a claim for Negligent
25 Infliction of Emotional to survive, the plaintiff must be physically present for the act
26 which is alleged to have inflicted that emotional distress.

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

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.

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

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

12 Pursuant to NRCP 56, and the relevant case law, summary judgment is
13 appropriate when the evidence establishes that there is no genuine issue of material
14 fact remaining and the moving party is entitled to judgment as a matter of law. All
15 inferences and evidence must be viewed in the light most favorable to the non-moving
16 party. A genuine issue of material fact exists when a reasonable jury could return a
17 verdict for the non-moving party. See NRCP 56, *Ron Cuzze v. University and*
18 *Community College System*, 123 Nev. 598, 172 P.3d 131 (2008), and *Golden Nugget v.*
19 *Ham*, 95 Nev. 45, 589 P.2d 173 (1979), and *Oehler v. Humana, Inc.*, 105 Nev. 348
20 (1987). While the pleadings are construed in the light most favorable to the non-
21 moving party, however, that party is not entitled to build its case on "gossamer threads
22 of whimsy, speculation, and conjecture." *Miller v. Jones*, 114 Nev. 1291 (1998).

23 With regard to the Requests for Admissions, NRCP 36(a)(3) provides that a
24 matter is deemed admitted unless, within 30 days after being served, the party sends
25 back a written answer objecting to the matters. Here, Plaintiff's counsel failed to
26 respond to Defendants' counsel request for admissions during the allotted time.
27 Defendants' counsel argues that Plaintiffs should not be able to withdraw or amend
28 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

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

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

26 With regard to the argument that Dr. Juliano did not participate in the care of
27 the Plaintiff during the relevant time period, the Plaintiff’s objection simply indicates
28 that the motion is premature, but fails to set forth any facts or evidence to show that
Dr. Juliano 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.

1 1291 (1998). As the Plaintiffs have been unable to establish or show any facts or
2 evidence indicating that Dr. Juliano was present during the relevant time period, the
3 Court believes that no genuine issues of material fact remain in that regard and Dr.
4 Juliano is entitled to Summary Judgment. With regard to all other issues argued by the
5 parties, the Court finds that genuine issues of material fact remain, and summary
6 judgment would therefore not be appropriate.

7 Based upon the foregoing, and good cause appearing,

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

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

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

15 **IT IS FURTHER ORDERED** that because the Court has ruled on these
16 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.

17 Dated this 28th day of October, 2020.

Dated this 29th day of October, 2020

18
19
20 

21 JERRY A. WIESE II
22 DISTRICT COURT JUDGE
23 EIGHTH JUDICIAL DISTRICT COURT
24 DENVER, COLORADO 80202
25 Jerry A. Wiese
26 District Court Judge
27
28

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5
6 Estate of Rebecca Powell,
Plaintiff(s)

CASE NO: A-19-788787-C

7 vs.

DEPT. NO. Department 30

8
9 Valley Health System, LLC,
Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 10/29/2020

16 Paul Padda	psp@paulpaddalaw.com
17 S. Vogel	brent.vogel@lewisbrisbois.com
18 Jody Foote	jfoote@jhcottonlaw.com
19 Jessica Pincombe	jpinnacle@jhcottonlaw.com
20 John Cotton	jhcotton@jhcottonlaw.com
21 Johana Whitbeck	johana.whitbeck@lewisbrisbois.com
22 Brad Shipley	bshipley@jhcottonlaw.com
23 Tony Abbatangelo	Tony@thevegaslawyers.com
24 Adam Garth	Adam.Garth@lewisbrisbois.com
25 Royak Rokni	roya.rokni@lewisbrisbois.com

1 James Kelly jpk@paulpaddalaw.com
2 Arielle Atkinson arielle.atkinson@lewisbrisbois.com
3 Paul Padda civil@paulpaddalaw.com
4 Marlenne Casillas marlennec@paulpaddalaw.com
5 Jennifer Greening jennifer@paulpaddalaw.com
6

7
8 If indicated below, a copy of the above mentioned filings were also served by mail
9 via United States Postal Service, postage prepaid, to the parties listed below at their last
known addresses on 11/2/2020

10 John Cotton John H. Cotton & Associates, LTD.
11 Attn: John H. Cotton
12 7900 W. Sahara Ave. - Suite 200
Las Vegas, NV, 89117

13 Paul Padda Paul Padda Law, PLLC
14 c/o: Paul Padda
15 4560 S. Decature Blvd, Suite 300
16 Las Vegas, NV, 89103
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1 **ORDR**
2 **S. BRENT VOGEL**
3 Nevada Bar No. 6858
4 Brent.Vogel@lewisbrisbois.com
5 **ADAM GARTH**
6 Nevada Bar No. 15045
7 Adam.Garth@lewisbrisbois.com
8 **LEWIS BRISBOIS BISGAARD & SMITH LLP**
9 6385 S. Rainbow Boulevard, Suite 600
10 Las Vegas, Nevada 89118
11 Telephone: 702.893.3383
12 Facsimile: 702.893.3789
13 *Attorneys for Defendant Valley Health System,*
14 *LLC dba Centennial Hills Hospital Medical*
15 *Center*

DISTRICT COURT
CLARK COUNTY, NEVADA

16 ESTATE OF REBECCA POWELL, through
17 BRIAN POWELL, as Special Administrator;
18 DARCI CREECY, individually and as Heir;
19 TARYN CREECY, individually and as an
20 Heir; ISAIAH KHOSROF, individually and as
21 an Heir; LLOYD CREECY, individually,;

22 Plaintiffs,

23 vs.

24 VALLEY HEALTH SYSTEM, LLC (doing
25 business as "Centennial Hills Hospital Medical
26 Center"), a foreign limited liability company;
27 UNIVERSAL HEALTH SERVICES, INC., a
28 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

**ORDER VACATING PRIOR ORDER
DENYING DEFENDANT VALLEY
HEALTH SYSTEM, LLC DBA
CENTENNIAL HILLS HOSPITAL
MEDICAL CENTER'S MOTION FOR
SUMMARY JUDGMENT AND
GRANTING SAID DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
PER MANDAMUS OF NEVADA
SUPREME COURT**

25 This matter, coming before this Honorable Court on November 18, 2021 at 10:30 a.m. in
26 accordance with the order granting the petition for a writ of mandamus issued by the Nevada
27 Supreme Court dated October 18, 2021, directing that this Court vacate its order of October 29,
28 2020, which previously denied Defendant VALLEY HEALTH SYSTEM, LLC's motion for

1 summary judgment and co-defendants Concio and Shah's joinder thereto (collectively
2 "Defendants"), and ordering this Court to issue an order entering summary judgment in favor of
3 said Defendants due to the expiration of the statute of limitations, with Paul S. Padda, Esq. and
4 Srilata Shah, Esq. of PAUL PADDA LAW, PLLC, appearing on behalf of Plaintiffs, Adam Garth,
5 Esq., S. Brent Vogel, Esq. and Shady Sirsy, Esq., of the Law Offices of LEWIS BRISBOIS
6 BISGAARD & SMITH LLP, appearing on behalf of the Defendant VALLEY HEALTH SYSTEM,
7 LLC and John H. Cotton, Esq. and Brad Shipley, Esq. of JOHN H. COTTON AND ASSOCIATES,
8 appearing on behalf of DR. CONRADO C.D. CONCIO, M.D. and DR. VISHAL S. SHAH, M.D,
9 with the Honorable Court having reviewed the order of the Nevada Supreme Court, finds and orders
10 as follows:

11 THE COURT FINDS that Defendants argued that undisputed evidence demonstrated
12 Plaintiffs were on inquiry notice of their alleged professional negligence, wrongful death, and
13 negligent infliction of emotional distress claims by June 11, 2017, at the latest, and

14 THE COURT FURTHER FINDS that Defendants contended that Plaintiffs' February 4,
15 2019 complaint was time-barred under NRS 41A.097(2) (providing that plaintiffs must bring an
16 action for injury or death based on the negligence of a health care provider within three years of the
17 date of injury and within one year of discovering the injury, whichever occurs first), and

18 THE COURT FURTHER FINDS that the term injury in NRS 41A.097 means "legal injury."
19 *Massey v. Litton*, 99 Nev. 723, 726, 669 P.2d 248, 251 (1983). A plaintiff "discovers his legal injury
20 when he knows or, through the use of reasonable diligence, should have known of facts that would
21 put a reasonable person on inquiry notice of his cause of action." *Id.* at 728, 669 P.2d at 252. A
22 plaintiff "is put on 'inquiry notice' when he or she should have known of facts that 'would lead an
23 ordinarily prudent person to investigate the matter further.'" *Winn v. Sunrise Hosp. & Med. Ctr.*,
24 128 Nev. 246, 252, 277 P.3d 458, 462 (2012) (quoting *Inquiry Notice*, *Black's Law Dictionary* (9th
25 ed. 2009)), and

26 THE COURT FURTHER FINDS that while the accrual date for NRS 41A.097(2)'s one-
27 year period is generally a question for the trier of fact, this Court may decide the accrual date as a
28 matter of law when the evidence is irrefutable. *Winn*, 128 Nev. at 251, 277 P.3d at 462, and

1 THIS COURT FURTHER FINDS that here, irrefutable evidence demonstrated that
2 Plaintiffs were on inquiry notice by June 11, 2017, at the latest, when Plaintiff Brian Powell, special
3 administrator for the estate, filed a complaint with the State Board of Nursing. There, Brian alleged
4 that the decedent, Rebecca Powell, “went into respiratory distress” and her health care providers did
5 not appropriately monitor her, abandoning her care and causing her death, and

6 THIS COURT FURTHER FINDS that Brian Powell’s own allegations in the aforesaid
7 Board complaint demonstrate that he had enough information to allege a prima facie claim for
8 professional negligence—that in treating Rebecca Powell, her health care providers failed “to use the
9 reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained
10 and experienced providers of health care.” NRS 41A.015 (defining professional negligence); *Winn*,
11 128 Nev. at 252-53; 277 P.3d at 462 (explaining that a “plaintiffs general belief that someone’s
12 negligence may have caused his or her injury” triggers inquiry notice), and

13 THIS COURT FURTHER FINDS that the evidence shows that Plaintiff Brian Powell was
14 likely on inquiry notice even earlier than the aforesaid Board complaint, wherein Plaintiffs alleged
15 they had observed in real time, following a short period of recovery, the rapid deterioration of
16 Rebecca Powell’s health while in Defendants’ care, and

17 THIS COURT FURTHER FINDS that Plaintiff Brian Powell filed a complaint with the
18 Nevada Department of Health and Human Services (NDHHS) on or before May 23, 2017. Similar
19 to the Nursing Board complaint, this complaint alleged facts, such as the Defendants’ failure to
20 upgrade care, sterilize sutures properly, and monitor Rebecca Powell, all of which suggest he already
21 believed, and knew of facts to support his belief, that negligent treatment caused Rebecca Powell’s
22 death by the time he made these complaints to NDHHS and the Nursing Board, and

23 THIS COURT FURTHER FINDS that even though Plaintiffs received Rebecca Powell’s
24 death certificate 17 days later, erroneously listing her cause of death as suicide, that fact did not
25 change the conclusion that Plaintiffs received inquiry notice prior to that date, and

26 THE COURT FURTHER FINDS that Plaintiffs did not adequately address why tolling
27 should apply under NRS 41A.097(3) (providing that the limitation period for a professional
28 negligence claim “is tolled for any period during which the provider of health care has concealed

1 any act, error or omission upon which the action is based”), and

2 THIS COURT FURTHER FINDS that even if Plaintiffs did adequately address the tolling
3 issue, such an argument would be unavailing, as the medical records provided were sufficient for
4 their expert witness to conclude that petitioners were negligent in Rebecca Powell’s care. *See Wirm*,
5 128 Nev. at 255, 277 P.3d at 464 (holding that tolling under NRS 41A.097(3) is only appropriate
6 where the intentionally concealed medical records were “material” to the professional negligence
7 claims), and

8 THE COURT FURTHER FINDS that the doctrine of equitable tolling has not been extended
9 to NRS 41A.097(2), and

10 THIS COURT FURTHER FINDS that Plaintiffs did not adequately address whether such
11 an application of equitable tolling is appropriate under these facts. *See Edwards v. Emperor's*
12 *Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (refusing to consider
13 arguments that a party did not cogently argue or support with relevant authority), and

14 THE COURT FURTHER FINDS that Plaintiffs had until June 11, 2018, at the latest, to file
15 their professional negligence claim, making Plaintiffs’ February 4, 2019 complaint untimely, and

16 THE COURT FURTHER FINDS that given the uncontroverted evidence demonstrating that
17 Defendants were entitled to judgment as a matter of law because the complaint was time-barred
18 under NRS 41A.097(2), *see* NRCP 56(a); *Wood*, 121 Nev. at 729, 121 P.3d at 1029 (recognizing
19 that courts must grant summary judgment when the pleadings and all other evidence on file, viewed
20 in a light most favorable to the nonmoving party, “demonstrate that no genuine issue as to any
21 material fact [remains] and that the moving party is entitled to a judgment as a matter of law”
22 (internal quotations omitted));

23 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that this Court’s prior order
24 of October 29, 2020 denying VALLEY HEALTH SYSTEM, LLC’s motion for summary judgment
25 and co-defendants’ joinder thereto is vacated in its entirety, and

26 ///

27 ///

28 ///

1 IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant
2 VALLEY HEALTH SYSTEM, LLC's motion for summary judgment and co-defendants' joinders
3 thereto are granted in their entirety due to the untimely filing of this action by Plaintiffs.

4
5 Dated: _____

Dated this 19th day of November, 2021



DISTRICT COURT JUDGE

6
7
8 DATED this ____ day of November, 2021.

DATED this 18th day of November, 2021

Jerry A. Wiese
District Court Judge

9
10 *UNSIGNED*

/s/ Adam Garth

11 Paul S. Padda, Esq.
12 Srilata Shah, Esq.,
13 PAUL PADDALAW, PLLC
14 4560 S. Decatur Blvd., Suite 300
15 Las Vegas, NV 89103
16 Tel: 702.366.1888
17 Fax: 702.366.1940
18 psp@paulpaddalaw.com
19 *Attorneys for Plaintiffs*

S. BRENT VOGEL, ESQ.
Nevada Bar No. 6858
ADAM GARTH, ESQ.
Nevada Bar No. 15045
SHADY SIRSY, ESQ.
Nevada Bar No. 15818
LEWIS BRISBOIS BISGAARD & SMITH
LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
*Attorneys for Defendant Valley Health
System, LLC dba Centennial Hills Hospital
Medical Center*

DATED this 18th day of November, 2021

/s/ Brad Shipley

19 John H. Cotton, Esq.
20 Brad Shipley, Esq.
21 JOHN H. COTTON & ASSOCIATES
22 7900 W. Sahara Ave., Suite 200
23 Las Vegas, NV 89117
24 Tel: 702.832.5909
25 Fax: 702.832.5910
26 jhcotton@jhcottonlaw.com
27 bshipley@jhcottonlaw.com
28 *Attorneys for Defendants Dionice S. Juliano,
M.D., Conrado Concio, M.D And Vishal S.
Shah, M.D.*

From: Brad Shipley
To: Garth, Adam; Srilata Shah; Paul Padda
Cc: Vogel, Brent; Rokni, Roya; Sirsy, Shady; San Juan, Maria
Subject: [EXT] RE: Adam Garth sent you "Powell v Valley - Proposed Order Vacating Prior MSJ and Ordering SJ on SOL"
Date: Friday, November 12, 2021 10:00:14 AM
Attachments: image001.png

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Adam,

I believe the bracketed word [proposed] in the title caption should be removed before submission to the court, but please use my e-signature with or without making that change. Thank you for taking the time to draft the order.

Brad Shipley, Esq.
John H. Cotton & Associates, Ltd.
7900 W. Sahara ave. #200
Las Vegas, NV 89117
bshipley@jhcottonlaw.com
702 832 5909

From: Garth, Adam <Adam.Garth@lewisbrisbois.com>
Sent: Friday, November 12, 2021 8:50 AM
To: Srilata Shah <sri@paulpaddalaw.com>; Paul Padda <psp@paulpaddalaw.com>; Brad Shipley <bshipley@jhcottonlaw.com>
Cc: Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Rokni, Roya <Roya.Rokni@lewisbrisbois.com>; Sirsy, Shady <Shady.Sirsy@lewisbrisbois.com>; San Juan, Maria <Maria.SanJuan@lewisbrisbois.com>; John Cotton <jhcotton@jhcottonlaw.com>
Subject: FW: Adam Garth sent you "Powell v Valley - Proposed Order Vacating Prior MSJ and Ordering SJ on SOL"
Importance: High

Counsel,

As a reminder, we have not heard from any party with respect to an agreement on submitting the proposed order to the Court. Given that the hearing is scheduled for 11/18, we previously indicated that if we did not hear from all parties by 12:00 noon today, we would proceed to submit this order to the court indicating no agreement between the parties. Please advise your position on this proposed order. Many thanks.

Adam Garth

 **LEWIS
BRISBOIS**
Adam Garth
Partner
Adam.Garth@lewisbrisbois.com
T: 702.693.4335 F: 702.366.9563

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POWELL APP. 045

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From: Garth, Adam <Adam.Garth@lewisbrisbois.com>

Sent: Tuesday, November 9, 2021 10:33 AM

To: Sriyata Shah <sri@paulpaddalaw.com>; Paul Padda <psp@paulpaddalaw.com>; Brad Shipley <bshipley@ihcottonlaw.com>

Cc: Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Rokni, Roya <Roya.Rokni@lewisbrisbois.com>; San Juan, Maria <Maria.Santuan@lewisbrisbois.com>; Sirsy, Shady <Shady.Sirsy@lewisbrisbois.com>; ihcotton@ihcottonlaw.com

Subject: Adam Garth sent you "Powell v Valley - Proposed Order Vacating Prior MSJ and Ordering SJ on SOL"

Importance: High

Counsel:

Attached is a proposed order reflecting the Supreme Court's ruling on the writ petition for Judge Wiese's consideration and signature. In accordance with the Supreme Court's order, Judge Wiese was directed to vacate his order denying the respective summary judgment motions and issuing a new order granting said motions. This proposed order does exactly that and reflects the rationale utilized by the Supreme Court in its decision. It is our intention to submit this proposed order to Judge Wiese in advance of the hearing he scheduled for November 18, 2021. Please respond whether we have your consent to use your e-signature on the proposed order prior to submission. If you have proposed changes, please advise accordingly and we can see whether they can be incorporated. We would like to submit the order on or before Friday, November 12, 2021, so please indicate your agreement to the order or if you have an objection. If we do not hear from you by before 11/12 by 12:00 noon, we will submit the order with a letter of explanation as to those parties unwilling to sign and they will have an opportunity to submit any competing order to the Court. Many thanks for your attention to this matter

Adam Garth

Adam Garth
Partner
Las Vegas Rainbow
702.693.4335 or x7024335

From: Garth, Adam
To: ~~Paul Padda~~; Srilata Shah; Brad Shipley
Cc: Vogel, Brent; Rokni, Roya; Sirsy, Shady; San Juan, Maria; jhcotton@jhcottonlaw.com
Subject: RE: Adam Garth sent you "Powell v Valley - Proposed Order Vacating Prior MSJ and Ordering SJ on SOL"
Date: Friday, November 12, 2021 9:59:40 AM
Attachments: image001.png
image002.png

We are not willing to do that. As you were unwilling to stay anything at our request, we will return the courtesy.

From: Paul Padda <psp@paulpaddalaw.com>
Sent: Friday, November 12, 2021 9:56 AM
To: Garth, Adam <Adam.Garth@lewisbrisbois.com>; Srilata Shah <sri@paulpaddalaw.com>; Brad Shipley <bshipley@jhcottonlaw.com>
Cc: Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Rokni, Roya <Roya.Rokni@lewisbrisbois.com>; Sirsy, Shady <Shady.Sirsy@lewisbrisbois.com>; San Juan, Maria <Maria.SanJuan@lewisbrisbois.com>; jhcotton@jhcottonlaw.com
Subject: [EXT] RE: Adam Garth sent you "Powell v Valley - Proposed Order Vacating Prior MSJ and Ordering SJ on SOL"

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As you know, there is a motion for rehearing pending in the Supreme Court. Given that fact, and the lack of prejudice to Defendants, please advise if Defendants are willing to stay enforcement of the Supreme Court's decision which is the subject of a motion for rehearing? Thanks.

Paul S. Padda, Esq.
PAUL PADDA LAW, PLLC
Websites: paulpaddalaw.com

Nevada Office:
4560 South Decatur Blvd., Suite 300
Las Vegas, Nevada 89103
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From: Garth, Adam <Adam.Garth@lewisbrisbois.com>

POWELL APP. 047

Sent: Friday, November 12, 2021 8:50 AM

To: Srilata Shah <sri@paulpaddalaw.com>; Paul Padda <psp@paulpaddalaw.com>; Brad Shipley <bshipley@ihcottonlaw.com>

Cc: Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Rokni, Roya <Roya.Rokni@lewisbrisbois.com>; Sirsy, Shady <Shady.Sirsy@lewisbrisbois.com>; San Juan, Maria <Maria.SanJuan@lewisbrisbois.com>; ihcotton@ihcottonlaw.com

Subject: FW: Adam Garth sent you "Powell v Valley - Proposed Order Vacating Prior MSJ and Ordering SJ on SOL"

Importance: High

Counsel,

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Adam Garth

 **LEWIS
BRISBOIS**
Adam Garth
Partner
Adam.Garth@lewisbrisbois.com
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From: Garth, Adam <Adam.Garth@lewisbrisbois.com>

Sent: Tuesday, November 9, 2021 10:33 AM

To: Srilata Shah <sri@paulpaddalaw.com>; Paul Padda <psp@paulpaddalaw.com>; Brad Shipley <bshipley@ihcottonlaw.com>

Cc: Vogel, Brent <Brent.Vogel@lewisbrisbois.com>; Rokni, Roya <Roya.Rokni@lewisbrisbois.com>; San Juan, Maria <Maria.SanJuan@lewisbrisbois.com>; Sirsy, Shady <Shady.Sirsy@lewisbrisbois.com>; ihcotton@ihcottonlaw.com

Subject: Adam Garth sent you "Powell v Valley - Proposed Order Vacating Prior MSJ and Ordering SJ on SOL"

Importance: High

Counsel:

Attached is a proposed order reflecting the Supreme Court's ruling on the writ petition for Judge Wiese's consideration and signature. In accordance with the Supreme Court's order, Judge Wiese was directed to vacate his order denying the respective summary judgment motions and issuing a new order granting said motions. This proposed order does exactly that and reflects the rationale utilized by the Supreme Court in its decision. It is our intention to submit this proposed order to Judge Wiese in advance of the hearing he scheduled for November 18, 2021. Please respond whether we have your consent to use your e-signature on the proposed order prior to submission. If you have proposed changes, please advise accordingly and we can see whether they can be incorporated. We would like to submit the order on or before Friday, November 12, 2021, so please indicate your agreement to the order or if you have an objection. If we do not hear from you by before 11/12 by 12:00 noon, we will submit the order with a letter of explanation as to those parties unwilling to sign and they will have an opportunity to submit any competing order to the Court. Many thanks for your attention to this matter.

Adam Garth

Adam Garth

POWELL APP. 048

Partner
Las Vegas Rainbow
702.693.4335 or x7024335

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5
6 Estate of Rebecca Powell,
Plaintiff(s)

CASE NO: A-19-788787-C

7 vs.

DEPT. NO. Department 30

8
9 Valley Health System, LLC,
Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

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11 Attorneys for Plaintiffs

12 DISTRICT COURT

13 CLARK COUNTY, NEVADA

14 ESTATE OF REBECCA POWELL, through
15 BRIAN POWELL, as Special Administrator;
16 DARCI CREECY, individually and as an Heir;
17 TARYN CREECY, individually and as an
18 Heir; ISAIAH KHOSROF, individually and as
19 an Heir; LLOYD CREECY, individually;

20 Plaintiffs,

21 vs.

22 VALLEY HEALTH SYSTEM, LLC (doing
23 business as "Centennial Hills Hospital Medical
24 Center"), a foreign limited liability company;
25 UNIVERSAL HEALTH SERVICES, INC., a
26 foreign corporation; DR. DIONICE S.
27 JULIANO, M.D., an individual; DR.
28 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 (30)

NOTICE OF ENTRY OF ORDER AND
DECISION REGARDING VALLEY
HEALTH SYSTEM'S MOTION FOR
FEES AND COUNTERMOTION FOR
FEES AND COSTS

1

Estate of Rebecca Powell v. Valley Health System, LLC, et. al..
Eighth Judicial District Court, Case No. A-19-788787-C (Dept. 30)
Notice Of Entry Of Order And Decision Regarding Valley Health System's Motion For Fees
PPL #201297-15-06

Case Number: A-19-788787-C

POWELL APP. 052

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1 Notice is hereby provided that the Court filed an Order and Decision pertaining to
2 Valley Health System's Motion for Fees and the Countermotion for Fees and Costs. A copy of
3 that Order and Decision is attached hereto as Exhibit A.
4

5 Respectfully submitted,

6 /s/ Paul S. Padda
7

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15 Counsel for Plaintiffs

16 Dated: February 16, 2022
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1 **CERTIFICATE OF SERVICE**

2
3 Pursuant to the Nevada Rules of Civil Procedure, the undersigned hereby certifies that
4 on this day, February 16, 2022, a copy of the foregoing **NOTICE OF ENTRY OF ORDER**
5 **AND DECISION REGARDING VALLEY HEALTH SYSTEM'S MOTION FOR FEES**
6 **AND COUNTERMOTION FOR FEES AND COSTS** was filed and served through the
7 Court's electronic filing system upon all parties and counsel identified on the Court's master e-
8 service list.

9 */s/ Shelbi Schram*

10 Shelbi Schram, Litigation Assistant
11 PAUL PADDA LAW

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EXHIBIT A

EXHIBIT A


 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 RE: VALLEY
 HEALTH SYSTEM'S
 MOTION FOR FEES
 AND COUNTERMOTION
 FOR FEES AND COSTS**

INTRODUCTION

The above-referenced matter is scheduled for a hearing on 2/18/22, with regard to Defendant, Valley Health System (Centennial Hospital's) Motion for Attorneys' Fees and Countermotion for Fees and Costs. Pursuant to the Administrative Orders of the Court, as well as EDCR 2.23, these matters may be decided with or without oral argument. This Court has determined that it would be appropriate to decide these matters on the pleadings, and consequently, this Order issues.

FACTUAL AND PROCEDURAL HISTORY

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.

1 However, on May 10, 2017, her condition began to deteriorate and on May 11, 2017, she
2 suffered an acute respiratory failure, resulting in her death.

3 Plaintiffs brought suit on February 4, 2019 alleging negligence/medical
4 malpractice, wrongful death pursuant to NRS 41.085, and negligent infliction of
5 emotional distress. Defendants filed Motions to Dismiss and for Summary Judgment,
6 which this Court denied. After a recent remand from the Nevada Supreme Court, on
7 11/19/21, the Court entered an Order Vacating Prior Order Denying Defendant Valley
8 Health System, LLC DBA Centennial Hills Hospital Medical Center's Motion for
9 Summary Judgment and Granting Said Defendant's Motion for Summary Judgment
10 Per Mandamus of Nevada Supreme Court. A Notice of Entry of Order was entered that
11 same day. On 11/22/21, Defendant Valley Health Systems filed a Motion for Attorneys
12 Fee and Verified Memorandum of Costs. On 12/3/21, Plaintiffs filed a Motion to
13 Extend Time to Respond to Defendants' Valley Health Systems', Dr. Dionice S. Juliano,
14 Dr. Conrado Concio, and Dr. Vishal Shah's Memorandums of Costs. Plaintiffs received
15 an Order Shortening Time on 12/10/21. Following briefing, the Court entered an Order
16 denying Plaintiffs' Motion to Extend Time to Respond, because of a lack of diligence on
17 part of the Plaintiffs. On 12/20/21, Valley filed an Opposition to Plaintiff's Motion to
18 Extend Time to Retax Costs, and Countermotion for Fees and Costs.

19 **SUMMARY OF LEGAL AND FACTUAL ARGUMENTS**

20 Defendant Valley Health System, LLC d/b/a Centennial Hills Hospital Medical
21 Center (CHH) seeks attorneys' fees pursuant to NRCP 68(f) and NRS 17.117(10). CHH
22 argues that it is entitled to an award of attorneys' fees because Plaintiffs rejected CHH's
23 Offer of Judgment and then failed to obtain a more favorable judgment. See *Albias v.*
Horizon Cmty., Inc., 122 Nev. 409, 417, 132 P.3d 1022 (2006); *Logan v. Abe*, 131 Nev.
24 260, 268, 350 P.3d 1139 (2015).

25 CHH states that it served an Offer of Judgment on Plaintiffs for a waiver of any
26 presently or potentially recoverable costs, in full and final settlement of the Plaintiff's
27 claims. Plaintiffs rejected this Offer of Judgment by failing to accept it within 14 days.
28 N.R.C.P. 68(e) and N.R.S. 17.117(6). As this Court was directed by the Supreme Court to
vacate its order denying summary judgment to CHH and instead issue an order
granting CHH's summary judgment motion, Plaintiffs failed to obtain more a favorable
judgment than the one offered to them in CHH's Offer of Judgment. Thus, pursuant to

1 N.R.C.P. 68 and N.R.S. 17.117, this Court has discretion to award CHH its attorneys'
2 fees.

3 CHH cites to *Schouweiler v. Yancey Co.*, for the proposition that a Court must
4 consider the following factors in exercising its discretion to award fees: (1) whether
5 the offeree brought his claims in good faith; (2) whether the offeror's offer of judgment
6 was also brought in good faith in both timing and amount; (3) whether the offeree's
7 decision to reject the offer of judgment was in bad faith or grossly unreasonable; and
8 (4) whether the amount of offeror's requested fees is reasonable and justified.
9 *Schouweiler*, 101 Nev. 827, 833, 917 P.2d 786 (1985). CHH argues that all of the
10 Schouweiler factors weigh in favor of CHH.

11 As to the first factor, CHH notes that the Supreme Court determined Plaintiffs
12 were on notice of any alleged malpractice in this case, in possession of records long
13 before the statute of limitations expired, and knowingly initiated complaints to State
14 agencies manifesting definitive knowledge and belief of malpractice. Nevertheless,
15 CHH argues, Plaintiffs chose to initiate a lawsuit "which was dead on arrival,
16 continued to maintain it even after irrefutable evidence demonstrated its untenability,
17 and then used every opportunity to prevent the expenditure of additional resources in
18 order to prove the impropriety of the lawsuit." Accordingly, Plaintiffs' claims were not
19 brought in good faith.

20 With regard to the second factor, CHH argues that its Offer of Judgment was
21 brought in good faith in both timing and amount. At the time of the Offer, CHH had
22 incurred over \$58,000.00 in costs defending Plaintiffs' claims. The Offer was served
23 several days prior to CHH's Motion for Summary Judgment and about one and a half
24 years after the lawsuit's commencement. Before the Motion for Summary Judgment
25 was filed, Plaintiffs were in possession of documents that demonstrated irrefutable
26 evidence of inquiry notice. Plaintiffs were on notice of the statute of limitations issues
27 as early as July 2019 when CHH's prior counsel filed a Motion to Dismiss. Therefore,
28 given Plaintiffs' likelihood of losing on merits, the offered waiver of the right to seek
reimbursement of costs was reasonable in both timing and amount.

For similar reasons, CHH argues that Plaintiffs' decision to reject the offer of
judgment was in bad faith and grossly unreasonable. Instead of abandoning their

1 untimely filed action, Plaintiffs' decision to pursue an untenable case caused CHH to
2 incur substantial legal costs and expenses to seek dismissal.

3 CHH argues that the fourth factor regarding the reasonableness of CHH's
4 requested attorneys' fees also weighs in favor of CHH. Pursuant to NRCP 68, CHH may
5 recover their attorneys' fees from the date of service of the Offer of Judgment to the end
6 of the matter. In this case, CHH served an Offer of Judgment on 8/28/20 that expired
7 on 9/11/20. CHH states it incurred a total of \$110,930.85 in attorneys' fees alone (not
8 inclusive of expenses) from 8/28/20 to the present billing cycle (which does not
9 include all fees incurred in October 2021). Additionally, CHH incurred \$31,401.10 in
disbursements including expert fees and other expenses since 8/28/20.

10 CHH argues that the amount of its bills is reasonable, given the amount of time
11 and energy needed to defend this case, engage in extensive written discovery, extensive
12 motions and appeals practice, and, expert time and expenses, due to Plaintiffs' refusal
13 to stipulate to stay the litigation while the summary judgment issue made its way
14 through the court system. Additionally, medical malpractice cases are complex, involve
15 substantial amounts of expert testimony, and require a great deal of preparation. CHH
16 states that documents are available for in camera review by this Court, but were not
17 attached to the Motion in order to preserve attorney-client privilege and protect
information contained within the descriptions of the attorney billing.

18 With regard to the *Brunzell vs. Golden Gate* analysis, CHH indicates that
19 attorneys Mr. Garth and Mr. Vogel are experienced litigators that focus exclusively on
20 medical malpractice. Both have practiced many years and are partners at Lewis
21 Brisbois. They both billed \$225/hour on this matter. Where appropriate, work was also
22 assigned to associate attorneys (\$193.50/hour) and paralegals (\$90/hour).

23 CHH notes that medical malpractice cases are complex and require an in-depth
24 understanding of both unique legal issues as well as the medical care and course that is
25 at issue. Plaintiffs claimed that they were entitled to \$105,000,000.00 in damages
26 including \$172,728.04 billed by CHH as a recoverable expense, plus a loss of earning
capacity of \$1,348,596.

27 There were multiple highly skilled expert witnesses presented by both parties.
28 Further, nearly 14 months have passed since CHH's Offer of Judgment expired,
including the participation in motion practice regarding a motion for summary

1 judgment, two motions to stay proceedings (one in this Court and one in Supreme
2 Court), a writ petition to the Nevada Supreme Court, as well as extensive written
3 discovery. CHH argues that its requested attorneys' fees are well below the amounts
4 Nevada courts have found reasonable. Defendants are only requesting attorneys' fees at
5 a rate of \$225 and \$193.50 per hour, and a paralegal rate of \$90 per hour. CHH argues
6 that a consideration of the *Brunzell* factors shows that the recovery of the entire billed
7 amount of fees from August 28, 2020 to present is entirely appropriate. *Brunzell*, 85
8 Nev. 345, 455 P.2d 31 (1969).

9 In addition to all NRCP Rule 68 post offer fees and costs, CHH requests that
10 sanctions be imposed against Plaintiffs' counsel for all pre-NRCP Rule 68 costs and fees
11 totaling \$58,514.36 in accordance with NRS 7.085. CHH cites to EDCR 7.60, which
12 provides a further avenue of deterrence to attorneys, like Plaintiffs' counsel who engage
13 in these unnecessary and flagrantly frivolous lawsuits, which are dead before they are
14 even filed. Accordingly, CHH argues that an award of \$110,930.85 in attorneys' fees per
15 N.R.C.P. 68 and N.R.S. §§ 17.117, plus \$58,514.36 in pre-NRCP 68 offer fees and
16 expenses pursuant to N.R.S. §§ 7.085, 18.010(2) and EDCR 7.60, is justified. CHH
17 argues that it is entitled to an award of his attorney's fees and costs under NRS
18 §18.010(2)(b), as Plaintiffs maintained the lawsuit without reasonable grounds or to
19 harass the Defendants.

20 CHH's separately filed a Verified Memorandum of Costs indicates that it seeks
21 costs, pursuant to NRS 18.005 and 18.020, as well as NRCP 68 and NRS 17.117, in the
22 amount of \$42,492.03. A majority of the costs requested (\$41,724.10) are for expert
23 fees. CHH argues that the experts all meet the factors set forth in *Frazier v. Drake*.

24 In Opposition, Plaintiffs argue that the medical malpractice, wrongful death, and
25 negligent infliction of emotional distress claims on behalf of the estate and surviving
26 children of Rebecca Powell were not frivolous, and the claims for wrongful
27 death/medical malpractice and negligent infliction of emotional distress were brought
28 in good faith. Because this Court denied several dispositive motions before the Nevada
Supreme Court ultimately directed this Court to vacate its Order denying CHH's
Motion for Summary Judgment and enter judgment in favor of all the Defendants,
CHH did not "win" this matter on the merits.

1 Plaintiffs argue that the dismissal of the case on an incorrect interpretation of
2 the facts and application of inquiry notice to all the named Plaintiffs by the Supreme
3 Court does not make the claims of Plaintiffs any less meritorious. Further, pursuant to
4 NRCP 68, and NRS 17.117(10), a party is not entitled to attorney's fees simply because it
5 served an offer of judgment on the opposing party and that party failed to achieve a
6 more favorable verdict. The purpose of NRCP 68 is to encourage settlement; it is not to
7 force Plaintiffs' unfairly to forego legitimate claims. See *Beattie v. Thomas*, 99 Nev.
8 579, 668 P.2d 268 (1983).

9 Plaintiffs argue that their claims were brought in good faith, as HHS determined
10 that there were deficiencies in Ms. Powell's care and the death certificate was
11 inaccurate. Additionally, this Court repeatedly found merit in Plaintiffs' Complaint and
12 their causes of action for wrongful death, medical malpractice, and negligent infliction
13 of emotional harm.

14 Plaintiffs argue that Defendant's Offer of Judgment, to waive costs and fees, of
15 \$58,514.36 was not reasonable and nor was it in good faith considering Plaintiffs'
16 causes of action for medical malpractice, wrongful death, and negligent infliction of
17 emotional harm. Plaintiffs lost their mother, who was only 41 years old at the time of
18 her death. It was reasonable for Plaintiffs to reject Defendant's Offer of Judgment, as
19 the terms of the Offer of Judgment did not provide for any monetary recovery to
20 Plaintiffs to compensate them for the loss of their mother. CHH indicated at the time it
21 had incurred \$53,389.90 in fees and \$5,124.46 in costs, but no supporting documents
22 were provided. Moreover, this Court denied the Motion for Summary Judgment.
23 Therefore, CHH incorrectly states that given the likelihood of losing on this issue, the
24 offered waiver of right to seek reimbursement of costs was reasonable in both timing
25 and amount. Further, Plaintiffs contend that their decision to reject the Offer of
26 Judgment was not grossly unreasonable nor in bad faith because no amount was being
27 offered in damages to the Plaintiffs.

28 With regard to the fees sought, Plaintiffs argue that CHH won on a technicality
at the Supreme Court, and not on the merits or by way of a jury verdict in favor of
Defendants. Plaintiffs argue that CHH incurred so much in fees because it continued
filing motions based on the same statute of limitations theory. Thus, CHH's fees are
unreasonable and unjustified. Plaintiffs also claim they are unable to properly evaluate

1 the reasonableness of CHH's attorney's fees because Defendant only presented a
2 summary of the fees that were incurred.

3 Plaintiffs argue that it is absurd for CHH to suggest that the provisions of NRS
4 7.085 even apply to the facts of this case, and that Plaintiffs' attorneys violated NRS
5 18.010(2), NRCP 11 or EDCR 7.60. Plaintiffs further argue that CHH has not provided
6 factual support to support the request for pre-NRCP 68 costs and fees pursuant to NRS
7 7.085. Plaintiffs ask that this Court deny the application for fees and costs as the
8 Plaintiffs did not submit frivolous or vexatious claims and did not over burden the
9 limited judicial resources nor did it hinder the timely resolution of meritorious claims.
10 Similarly, Plaintiffs contend that CHH has not provided any factual support for its
11 request for attorneys' fees pursuant to EDCR 7.60 or 18.010(2).

12 In Reply, CHH argues that Plaintiffs' entire opposition is predicated on the false
13 assertion that they possessed a viable case in the first instance. CHH argues that,
14 "Plaintiffs' entire argument is that because this Court repeatedly denied dismissal
15 attempts by the respective defendants despite clear, convincing, and irrefutable
16 evidence of inquiry notice which each and every plaintiff possessed, they are somehow
17 absolved from either their malpractice or unethical practice of pursuing a case which
18 was dead on arrival when filed."

19 CHH argues that the Nevada Supreme Court held that the "district court
20 manifestly abused its discretion when it denied summary judgment." CHH argues that
21 this matter should have been dismissed a year ago at the latest.

22 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

23 With regard to the requested costs, in *Frazier v. Drake*, 131 Nev. 632, 357 P.3d
24 365 (NV.Ct.of App., 2015), the Court noted that NRS 18.005(5) provides for the
25 recovery of "reasonable fees of not more than five expert witnesses in an amount of not
26 more than \$1,500 for each witness unless the court allows a larger fee after
27 determining that the circumstances surrounding the expert's testimony were of such
28 necessity as to require the larger fee." *Id.*, at 644. The Court went on to state the
following:

... we conclude that any award of expert witness fees in excess of \$1,500
per expert under NRS 18.005(5) must be supported by an express,
careful, and preferably written explanation of the court's analysis of
factors pertinent to determining the reasonableness of the requested fees
and whether "the circumstances surrounding the expert's testimony were

1 of such necessity as to require the larger fee." See NRS 18.005(5); cf.
2 *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780
3 (1990) (requiring an "express, careful and preferably written explanation"
4 of the district court's analysis of factors pertinent to determining whether
5 a dismissal with prejudice is an appropriate discovery sanction). *In*
6 *evaluating requests for such awards, district courts should*
7 *consider the importance of the expert's testimony to the*
8 *party's case; the degree to which the expert's opinion aided*
9 *the trier of fact in deciding the case; whether the expert's*
10 *reports or testimony were repetitive of other expert witnesses;*
11 *the extent and nature of the work performed by the expert;*
12 *whether the expert had to conduct independent investigations*
13 *or testing; the amount of time the expert spent in court,*
14 *preparing a report, and preparing for trial; the expert's area*
15 *of expertise; the expert's education and training; the fee*
16 *actually charged to the party who retained the expert; the fees*
17 *traditionally charged by the expert on related matters;*
18 *comparable experts' fees charged in similar cases; and, if an*
19 *expert is retained from outside the area where the trial is held,*
20 *the fees and costs that would have been incurred to hire a*
21 *comparable expert where the trial was held.*

22 *Id.*, at 650-651.

23 The Defendant, CHH, argues the importance of the testimony of each of the
24 witnesses, and how their respective opinions were necessary for the Defendant's case.
25 CHH argues that the medical experts expended "many hours," and "prepared two
26 written reports." There was no discussion in the briefing about repetitiveness, whether
27 they had to conduct independent investigations or testing, the amount of time spent in
28 court, preparing reports, or preparing for trial, the fees charged to the Defendant, and
the fees traditionally charged, and what they charge compared to other experts, etc.
Consequently, the Court could allow the expert fee of \$1,500.00, for up to 5 expert
witnesses, if the Court were able to find that the experts were relevant and the fees
incurred, but the Court cannot allow expert fees in excess of \$1,500.00 without a
Frazier analysis.

Additionally, the Court notes that any costs awarded need to be itemized and
documented. The Nevada Supreme Court has stated that without "itemization or
justifying documentation," the Court is "unable to ascertain whether such costs were
accurately assessed." *Bobby Berosini, Ltd. V. People for the Ethical Treatment of*
Animals, 114 Nev. 1348, 1353, 971 P.2d 383 (1998). Further, when the "memorandum

1 of costs is completely void of any specific itemization,” and a “lack of supporting
2 documentation,” it is an abuse of discretion on the part of the Court if it awards the
3 requested costs. *Id.* The Supreme Court has further indicated that “‘justifying
4 documentation’ must mean something more than a memorandum of costs.” *Cadle Co.*
5 *v. Woods & Erickson, LLP*, 131 Nev. 114, 121, 345 P.3d 1049 (2015). The Court has
6 further indicated that “Without evidence to determine whether a cost was reasonable
7 and necessary, a district court may not award costs.” *Id.*, citing *Peta*, 114 Nev. at 1353,
8 971 P.2d at 386. In this case, Defendant produced a “Disbursement Diary,” but based
9 on the above-referenced cases, this is insufficient to support the requested costs. There
10 is insufficient evidence submitted for the Court to determine whether the requested
11 costs were reasonable and necessary, there was no specific itemization, other than the
12 Disbursement Diary, and there were no supporting documents.

13 Based upon the foregoing, the Court cannot award costs.

14 NRCP 68 provides in pertinent part as follows:

15 **Rule 68. Offers of Judgment**

16 (a) The Offer. At any time more than 21 days before trial, any party
17 may serve an offer in writing to allow judgment to be taken in accordance
18 with its terms and conditions. Unless otherwise specified, an offer made
19 under this rule is an offer to resolve all claims in the action between the
20 parties to the date of the offer, including costs, expenses, interest, and if
21 attorney fees are permitted by law or contract, attorney fees.

22 **....**
(d) Acceptance of the Offer and Dismissal or Entry of Judgment.

23 (1) Within 14 days after service of the offer, the offeree may accept
24 the offer by serving written notice that the offer is accepted.

25 (2) Within 21 days after service of written notice that the offer is
26 accepted, the obligated party may pay the amount of the offer and obtain
27 dismissal of the claims, rather than entry of a judgment.

28 (3) If the claims are not dismissed, at any time after 21 days after
service of written notice that the offer is accepted, either party may file
the offer and notice of acceptance together with proof of service. The clerk
must then enter judgment accordingly. The court must allow costs in
accordance with NRS 18.110 unless the terms of the offer preclude a
separate award of costs. Any judgment entered under this section must be
expressly designated a compromise settlement.

(e) Failure to Accept Offer. If the offer is not accepted within 14
days after service, it will be considered rejected by the offeree and deemed
withdrawn by the offeror. . . . Any offeree who fails to accept the offer
may be subject to the penalties of this rule.

(f) Penalties for Rejection of Offer.

1 (1) In General. If the offeree rejects an offer and fails to obtain a
2 more favorable judgment:

3 (A) the offeree cannot recover any costs, expenses, or attorney
4 fees and may not recover interest for the period after the service of the
5 offer and before the judgment; and

6 (B) the offeree must pay the offeror's post-offer costs and
7 expenses, including a reasonable sum to cover any expenses incurred by
8 the offeror for each expert witness whose services were reasonably
9 necessary to prepare for and conduct the trial of the case, applicable
10 interest on the judgment from the time of the offer to the time of entry of
11 the judgment and reasonable attorney fees, if any be allowed, actually
12 incurred by the offeror from the time of the offer. If the offeror's attorney
13 is collecting a contingent fee, the amount of any attorney fees awarded to
14 the party for whom the offer is made must be deducted from that
15 contingent fee.

16

17 **NRCP 68.**

18 NRCP 68 provides that the Defendant would be entitled to "reasonable attorney
19 fees, if any be allowed." The language of the Rule specifically provides that Court with
20 "discretion," as it relates to attorney's fees, and the Court's discretion will not be
21 disturbed absent a clear abuse of such discretion. *Armstrong v. Riggi*, 92 Nev. 280,
22 549 P.2d 753 (1976); *Schouweiler v. Yancey Co.*, 101 Nev. 827, 712 P.2d 786 (1985);
23 *Bidart v. American Title Ins. Co.*, 103 Nev. 175, 734 P.3d 732 (1987).

24 In evaluating whether to grant an award of attorney's fees, pursuant to
25 *Schouweiler v. Yancey Co.*, 101 Nev. 827, 712 P.2d 786 (1985), the Court must
26 consider: "(1) whether plaintiff's claim was brought in good faith; (2) whether
27 defendant's offer of judgment was brought in good faith in both its timing and amount;
28 (3) whether plaintiff's decision to reject the offer and proceed to trial was grossly
unreasonable or in bad faith; and (4) whether fees sought by the offeror are reasonable
and justified in amount." *Schouweiler* at 833, citing *Beattie v. Thomas*, 99 Nev. 579,
588, 668 P.2d 268 (1983)(the "Beattie Factors").

In analyzing whether to award attorneys' fees, the factors which need to be
considered pursuant to *Brunzell*, include the following: (1) the qualities of the advocate:
his ability, training, education, experience, professional standing and skill; (2) the
character of the work to be done: its difficulty, intricacy, importance, the time and skill
required, the responsibility imposed and the prominence and character of the parties
when they affect the importance of the litigation; (3) the work actually performed by
the lawyer: the skill, time and attention given to the work; and (4) the result: whether

1 the attorney was successful and what benefits were derived. *Schouweiler* at 833-834,
2 citing to *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31 (1969)
3 (quoting *Schwartz v. Schwerin*, 85 Ariz. 242, 336 P.2d 144, 146 (1959)).

4 With regard to the attorney's fees requested, this Motion is different from the
5 Motion for Fees filed by Drs. Concio and Shaw, in that CHH contends that it incurred
6 \$110,930.85 in attorney's fees since 8/28/20 (roughly twice the fees incurred by Drs.
7 Concio and Shaw). In considering the *Beattie* factors, the Court finds and concludes
8 that the plaintiff's claim was brought in good faith. The Court finds and concludes that
9 Defendant's offer of judgment, in the amount of \$0.00, (offering to waive
10 approximately \$58,500.00 in fees and costs), was brought in good faith in both its
11 timing and amount. The Court acknowledges that the parties disagree about this issue,
12 but as much as the Plaintiffs believed they had a valid case, the Defendants disputed
13 any liability. The Court further finds and concludes that Plaintiff's decision to reject the
14 offer and proceed to trial was not grossly unreasonable or in bad faith. Plaintiffs
15 believed they had a valid claim, and the Court cannot find that wanting some recovery,
16 as opposed to \$0.00, to be "grossly unreasonable" or in "bad faith. With regard to a
17 determination of whether the fees sought by the Defendants are reasonable and
18 justified in amount, a *Brunzell* analysis is required. *Beattie v. Thomas*, 99 Nev. 579,
19 588, 668 P.2d 268 (1983).

20 In determining the reasonableness of the fees requested, the Court has analyzed
21 the *Brunzell* factors, as follows: The Court finds that the qualities of defense counsel,
22 his ability, training, education, experience, professional standing and skill, favor an
23 award of fees. When considering the character of the work to be done - its difficulty,
24 intricacy, importance, the time and skill required, (when dealing with a professional
25 negligence/medical malpractice case), and finding that the character or prominence of
26 the parties was unremarkable, the complexity of the case warrants an award of fees.
27 The Court cannot evaluate the work actually performed by the lawyers, in this case, and
28 the skill, time and attention given to the work, without a detailed billing statement.
Although the Defendant has offered to submit a billing ledger to the Court in camera, it
would have been necessary for the Defendant to have submitted such ledger, and
disclosed it to the Plaintiff so that the reasonableness could have been addressed by all
parties, and by the Court. Finally, in considering the result, the Court notes that

1 although the Court found insufficient evidence to establish irrefutably that the statute
2 of limitations had expired, Defense counsel was successful in convincing the Supreme
3 Court of that, and consequently, Defendants prevailed. *Brunzell v. Golden Gate Nat'l*
4 *Bank*, 85 Nev. 345, 349, 455 P.2d 31 (1969). Based upon this NRCP 68 analysis, with
5 the exception of being able to analyze the reasonableness of the fees allegedly incurred,
6 the Court would likely have awarded at least some fees to the Defendant, at least for the
7 period of time after rejection of the Offer of Judgment. Without any evidence of the
8 fees actually accrued, and based on the amount requested, the Court cannot make a
9 finding as to the reasonableness of such fees, and consequently, the Court has no choice
under *Brunzell* and *Beattie*, to deny the request for Fees.

10 **CONCLUSION / ORDER**

11 Based upon the foregoing, and good cause appearing,

12 **IT IS HEREBY ORDERED** that the Defendants' Motion for Fees and Costs is
13 **DENIED.**

14 The Court requests that Plaintiff's counsel prepare and process a Notice of Entry
15 with regard to this Order.

16 Because this matter has been decided on the pleadings, the hearing scheduled
17 for 2/18/22 will be taken off calendar, and consequently, there is no need for any
18 parties or attorneys to appear.

19 Dated this 15th day of February, 2022

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24 Jerry A. Wiese
25 District Court Judge
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1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
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6 Estate of Rebecca Powell,
7 Plaintiff(s)

CASE NO: A-19-788787-C

8 vs.

DEPT. NO. Department 30

9 Valley Health System, LLC,
10 Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 2/15/2022

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11 Telephone: 702.893.3383
12 Facsimile: 702.893.3789
13 *Attorneys for Defendant Valley Health System,*
14 *LLC dba Centennial Hills Hospital Medical*
15 *Center*

9 **DISTRICT COURT**

10 **CLARK COUNTY, NEVADA**

11 **ESTATE OF REBECCA POWELL**, through
12 **BRIAN POWELL**, as Special Administrator;
13 **DARCI CREECY**, individually and as Heir;
14 **TARYN CREECY**, individually and as an
15 Heir; **ISAIAH KHOSROF**, individually and as
16 an Heir; **LLOYD CREECY**, individually;

17 **Plaintiffs,**

18 **vs.**

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

28 **Defendants.**

Case No. A-19-788787-C

Dept. No.: 30

**DEFENDANT VALLEY HEALTH
SYSTEM, LLC DBA CENTENNIAL
HILLS HOSPITAL MEDICAL CENTER'S
NOTICE OF APPEAL**

23 Notice is hereby given that Defendant **VALLEY HEALTH SYSTEM, LLC**, through its
24 counsel, **Lewis Brisbois Bisgaard & Smith LLP**, hereby appeals to the Supreme Court of Nevada
25 from the following District Court, Clark County, Nevada order in this matter:

26 The District Court's Order denying Defendant Valley Health System, LLC's Motion For
27 Attorneys' Fees Pursuant To N.R.C.P. 68, N.R.S. §§ 17.117, 7.085, 18.010(2), and EDCR 7.60,
28

1 entered February 16, 2022, attached hereto as Exhibit A.

2 DATED this 14th day of March, 2022

3
4 LEWIS BRISBOIS BISGAARD & SMITH LLP

5
6 By /s/ Adam Garth
7 S. BRENT VOGEL
8 Nevada Bar No. 6858
9 ADAM GARTH
10 Nevada Bar No. 15045
11 6385 S. Rainbow Boulevard, Suite 600
12 Las Vegas, Nevada 89118
13 Tel. 702.893.3383
14 *Attorneys for Attorneys for Defendant Valley*
15 *Health System, LLC dba Centennial Hills Hospital*
16 *Medical Center*
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2022, a true and correct copy of **DEFENDANT VALLEY HEALTH SYSTEM, LLC DBA CENTENNIAL HILLS HOSPITAL MEDICAL CENTER'S NOTICE OF APPEAL** 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.

Paul S. Padda, Esq.
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Shah, M.D.*

By /s/ Heidi Brown
An Employee of
LEWIS BRISBOIS BISGAARD & SMITH LLP

EXHIBIT A



NOED

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Attorneys for Plaintiffs

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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 (30)

**NOTICE OF ENTRY OF ORDER AND
DECISION REGARDING VALLEY
HEALTH SYSTEM'S MOTION FOR
FEES AND COUNTERMOTION FOR
FEES AND COSTS**

1

Estate of Rebecca Powell v. Valley Health System, LLC et al.
Eighth Judicial District Court, Case No. A-19-788787-C (Dept. 30)
Notice Of Entry Of Order And Decision Regarding Valley Health System's Motion For Fees
PPL #201297-15-06

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1 Notice is hereby provided that the Court filed an Order and Decision pertaining to
2 Valley Health System's Motion for Fees and the Countermotion for Fees and Costs. A copy of
3 that Order and Decision is attached hereto as Exhibit A.
4

5 Respectfully submitted,

6 /s/ Paul S. Padda
7

8 Paul S. Padda, Esq.
9 Srilata Shah, Esq.
10 PAUL PADDA LAW, PLLC
11 4560 South Decatur Blvd., #300
12 Las Vegas, Nevada 89103
13 Tele: (702) 366-1888

14 Counsel for Plaintiffs

15 Dated: February 16, 2022
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1 **CERTIFICATE OF SERVICE**

2
3 Pursuant to the Nevada Rules of Civil Procedure, the undersigned hereby certifies that
4 on this day, February 16, 2022, a copy of the foregoing **NOTICE OF ENTRY OF ORDER**
5 **AND DECISION REGARDING VALLEY HEALTH SYSTEM'S MOTION FOR FEES**
6 **AND COUNTERMOTION FOR FEES AND COSTS** was filed and served through the
Court's electronic filing system upon all parties and counsel identified on the Court's master e-
service list.

7
8 */s/ Shelbi Schram*

9
10 Shelbi Schram, Litigation Assistant
PAUL PADDA LAW

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EXHIBIT A

EXHIBIT A


 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 RE: VALLEY
 HEALTH SYSTEM'S
 MOTION FOR FEES
 AND COUNTERMOTION
 FOR FEES AND COSTS**

INTRODUCTION

The above-referenced matter is scheduled for a hearing on 2/18/22, with regard to Defendant, Valley Health System (Centennial Hospital's) Motion for Attorneys' Fees and Countermotion for Fees and Costs. Pursuant to the Administrative Orders of the Court, as well as EDCR 2.23, these matters may be decided with or without oral argument. This Court has determined that it would be appropriate to decide these matters on the pleadings, and consequently, this Order issues.

FACTUAL AND PROCEDURAL HISTORY

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.

1 However, on May 10, 2017, her condition began to deteriorate and on May 11, 2017, she
2 suffered an acute respiratory failure, resulting in her death.

3 Plaintiffs brought suit on February 4, 2019 alleging negligence/medical
4 malpractice, wrongful death pursuant to NRS 41.085, and negligent infliction of
5 emotional distress. Defendants filed Motions to Dismiss and for Summary Judgment,
6 which this Court denied. After a recent remand from the Nevada Supreme Court, on
7 11/19/21, the Court entered an Order Vacating Prior Order Denying Defendant Valley
8 Health System, LLC DBA Centennial Hills Hospital Medical Center's Motion for
9 Summary Judgment and Granting Said Defendant's Motion for Summary Judgment
10 Per Mandamus of Nevada Supreme Court. A Notice of Entry of Order was entered that
11 same day. On 11/22/21, Defendant Valley Health Systems filed a Motion for Attorneys
12 Fee and Verified Memorandum of Costs. On 12/3/21, Plaintiffs filed a Motion to
13 Extend Time to Respond to Defendants' Valley Health Systems, Dr. Dionice S. Juliano,
14 Dr. Conrado Concio, and Dr. Vishal Shah's Memorandums of Costs. Plaintiffs received
15 an Order Shortening Time on 12/10/21. Following briefing, the Court entered an Order
16 denying Plaintiffs' Motion to Extend Time to Respond, because of a lack of diligence on
17 part of the Plaintiffs. On 12/20/21, Valley filed an Opposition to Plaintiff's Motion to
18 Extend Time to Retax Costs, and Countermotion for Fees and Costs.

19 SUMMARY OF LEGAL AND FACTUAL ARGUMENTS

20 Defendant Valley Health System, LLC d/b/a Centennial Hills Hospital Medical
21 Center (CHH) seeks attorneys' fees pursuant to NRCP 68(f) and NRS 17.117(10). CHH
22 argues that it is entitled to an award of attorneys' fees because Plaintiffs rejected CHH's
23 Offer of Judgment and then failed to obtain a more favorable judgment. See *Albias v.*
24 *Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022 (2006); *Logan v. Abe*, 131 Nev.
25 260, 268, 350 P.3d 1139 (2015).

26 CHH states that it served an Offer of Judgment on Plaintiffs for a waiver of any
27 presently or potentially recoverable costs, in full and final settlement of the Plaintiff's
28 claims. Plaintiffs rejected this Offer of Judgment by failing to accept it within 14 days.
N.R.C.P. 68(e) and N.R.S. 17.117(6). As this Court was directed by the Supreme Court to
vacate its order denying summary judgment to CHH and instead issue an order
granting CHH's summary judgment motion, Plaintiffs failed to obtain more a favorable
judgment than the one offered to them in CHH's Offer of Judgment. Thus, pursuant to

1 N.R.C.P. 68 and N.R.S. 17.117, this Court has discretion to award CHH its attorneys'
2 fees.

3 CHH cites to *Schouweiler v. Yancey Co.*, for the proposition that a Court must
4 consider the following factors in exercising its discretion to award fees: (1) whether
5 the offeree brought his claims in good faith; (2) whether the offeror's offer of judgment
6 was also brought in good faith in both timing and amount; (3) whether the offeree's
7 decision to reject the offer of judgment was in bad faith or grossly unreasonable; and
8 (4) whether the amount of offeror's requested fees is reasonable and justified.
9 *Schouweiler*, 101 Nev. 827, 833, 917 P.2d 786 (1985). CHH argues that all of the
10 Schouweiler factors weigh in favor of CHH.

11 As to the first factor, CHH notes that the Supreme Court determined Plaintiffs
12 were on notice of any alleged malpractice in this case, in possession of records long
13 before the statute of limitations expired, and knowingly initiated complaints to State
14 agencies manifesting definitive knowledge and belief of malpractice. Nevertheless,
15 CHH argues, Plaintiffs chose to initiate a lawsuit "which was dead on arrival,
16 continued to maintain it even after irrefutable evidence demonstrated its untenability,
17 and then used every opportunity to prevent the expenditure of additional resources in
18 order to prove the impropriety of the lawsuit." Accordingly, Plaintiffs' claims were not
19 brought in good faith.

20 With regard to the second factor, CHH argues that its Offer of Judgment was
21 brought in good faith in both timing and amount. At the time of the Offer, CHH had
22 incurred over \$58,000.00 in costs defending Plaintiffs' claims. The Offer was served
23 several days prior to CHH's Motion for Summary Judgment and about one and a half
24 years after the lawsuit's commencement. Before the Motion for Summary Judgment
25 was filed, Plaintiffs were in possession of documents that demonstrated irrefutable
26 evidence of inquiry notice. Plaintiffs were on notice of the statute of limitations issues
27 as early as July 2019 when CHH's prior counsel filed a Motion to Dismiss. Therefore,
28 given Plaintiffs' likelihood of losing on merits, the offered waiver of the right to seek
reimbursement of costs was reasonable in both timing and amount.

For similar reasons, CHH argues that Plaintiffs' decision to reject the offer of
judgment was in bad faith and grossly unreasonable. Instead of abandoning their

1 untimely filed action, Plaintiffs' decision to pursue an untenable case caused CHH to
2 incur substantial legal costs and expenses to seek dismissal.

3 CHH argues that the fourth factor regarding the reasonableness of CHH's
4 requested attorneys' fees also weighs in favor of CHH. Pursuant to NRCP 68, CHH may
5 recover their attorneys' fees from the date of service of the Offer of Judgment to the end
6 of the matter. In this case, CHH served an Offer of Judgment on 8/28/20 that expired
7 on 9/11/20. CHH states it incurred a total of \$110,930.85 in attorneys' fees alone (not
8 inclusive of expenses) from 8/28/20 to the present billing cycle (which does not
9 include all fees incurred in October 2021). Additionally, CHH incurred \$31,401.10 in
disbursements including expert fees and other expenses since 8/28/20.

10 CHH argues that the amount of its bills is reasonable, given the amount of time
11 and energy needed to defend this case, engage in extensive written discovery, extensive
12 motions and appeals practice, and, expert time and expenses, due to Plaintiffs' refusal
13 to stipulate to stay the litigation while the summary judgment issue made its way
14 through the court system. Additionally, medical malpractice cases are complex, involve
15 substantial amounts of expert testimony, and require a great deal of preparation. CHH
16 states that documents are available for in camera review by this Court, but were not
17 attached to the Motion in order to preserve attorney-client privilege and protect
information contained within the descriptions of the attorney billing.

18 With regard to the *Brunzell vs. Golden Gate* analysis, CHH indicates that
19 attorneys Mr. Garth and Mr. Vogel are experienced litigators that focus exclusively on
20 medical malpractice. Both have practiced many years and are partners at Lewis
21 Brisbois. They both billed \$225/hour on this matter. Where appropriate, work was also
22 assigned to associate attorneys (\$193.50/hour) and paralegals (\$90/hour).

23 CHH notes that medical malpractice cases are complex and require an in-depth
24 understanding of both unique legal issues as well as the medical care and course that is
25 at issue. Plaintiffs claimed that they were entitled to \$105,000,000.00 in damages
26 including \$172,728.04 billed by CHH as a recoverable expense, plus a loss of earning
capacity of \$1,348,596.

27 There were multiple highly skilled expert witnesses presented by both parties.
28 Further, nearly 14 months have passed since CHH's Offer of Judgment expired,
including the participation in motion practice regarding a motion for summary

1 judgment, two motions to stay proceedings (one in this Court and one in Supreme
2 Court), a writ petition to the Nevada Supreme Court, as well as extensive written
3 discovery. CHH argues that its requested attorneys' fees are well below the amounts
4 Nevada courts have found reasonable. Defendants are only requesting attorneys' fees at
5 a rate of \$225 and \$193.50 per hour, and a paralegal rate of \$90 per hour. CHH argues
6 that a consideration of the *Brunzell* factors shows that the recovery of the entire billed
7 amount of fees from August 28, 2020 to present is entirely appropriate. *Brunzell*, 85
8 Nev. 345, 455 P.2d 31 (1969).

9 In addition to all NRCP Rule 68 post offer fees and costs, CHH requests that
10 sanctions be imposed against Plaintiffs' counsel for all pre-NRCP Rule 68 costs and fees
11 totaling \$58,514.36 in accordance with NRS 7.085. CHH cites to EDCR 7.60, which
12 provides a further avenue of deterrence to attorneys, like Plaintiffs' counsel who engage
13 in these unnecessary and flagrantly frivolous lawsuits, which are dead before they are
14 even filed. Accordingly, CHH argues that an award of \$110,930.85 in attorneys' fees per
15 N.R.C.P. 68 and N.R.S. §§ 17.117, plus \$58,514.36 in pre-NRCP 68 offer fees and
16 expenses pursuant to N.R.S. §§ 7.085, 18.010(2) and EDCR 7.60, is justified. CHH
17 argues that it is entitled to an award of his attorney's fees and costs under NRS
18 §18.010(2)(b), as Plaintiffs maintained the lawsuit without reasonable grounds or to
19 harass the Defendants.

20 CHH's separately filed a Verified Memorandum of Costs indicates that it seeks
21 costs, pursuant to NRS 18.005 and 18.020, as well as NRCP 68 and NRS 17.117, in the
22 amount of \$42,492.03. A majority of the costs requested (\$41,724.10) are for expert
23 fees. CHH argues that the experts all meet the factors set forth in *Frazier v. Drake*.

24 In Opposition, Plaintiffs argue that the medical malpractice, wrongful death, and
25 negligent infliction of emotional distress claims on behalf of the estate and surviving
26 children of Rebecca Powell were not frivolous, and the claims for wrongful
27 death/medical malpractice and negligent infliction of emotional distress were brought
28 in good faith. Because this Court denied several dispositive motions before the Nevada
Supreme Court ultimately directed this Court to vacate its Order denying CHH's
Motion for Summary Judgment and enter judgment in favor of all the Defendants,
CHH did not "win" this matter on the merits.

1 Plaintiffs argue that the dismissal of the case on an incorrect interpretation of
2 the facts and application of inquiry notice to all the named Plaintiffs by the Supreme
3 Court does not make the claims of Plaintiffs any less meritorious. Further, pursuant to
4 NRCP 68, and NRS 17.117(10), a party is not entitled to attorney's fees simply because it
5 served an offer of judgment on the opposing party and that party failed to achieve a
6 more favorable verdict. The purpose of NRCP 68 is to encourage settlement; it is not to
7 force Plaintiffs' unfairly to forego legitimate claims. See *Beattie v. Thomas*, 99 Nev.
8 579, 668 P.2d 268 (1983).

9 Plaintiffs argue that their claims were brought in good faith, as HHS determined
10 that there were deficiencies in Ms. Powell's care and the death certificate was
11 inaccurate. Additionally, this Court repeatedly found merit in Plaintiffs' Complaint and
12 their causes of action for wrongful death, medical malpractice, and negligent infliction
13 of emotional harm.

14 Plaintiffs argue that Defendant's Offer of Judgment, to waive costs and fees, of
15 \$58,514.36 was not reasonable and nor was it in good faith considering Plaintiffs'
16 causes of action for medical malpractice, wrongful death, and negligent infliction of
17 emotional harm. Plaintiffs lost their mother, who was only 41 years old at the time of
18 her death. It was reasonable for Plaintiffs to reject Defendants' Offer of Judgment, as
19 the terms of the Offer of Judgment did not provide for any monetary recovery to
20 Plaintiffs to compensate them for the loss of their mother. CHH indicated at the time it
21 had incurred \$53,389.90 in fees and \$5,124.46 in costs, but no supporting documents
22 were provided. Moreover, this Court denied the Motion for Summary Judgment.
23 Therefore, CHH incorrectly states that given the likelihood of losing on this issue, the
24 offered waiver of right to seek reimbursement of costs was reasonable in both timing
25 and amount. Further, Plaintiffs contend that their decision to reject the Offer of
26 Judgment was not grossly unreasonable nor in bad faith because no amount was being
27 offered in damages to the Plaintiffs.

28 With regard to the fees sought, Plaintiffs argue that CHH won on a technicality
at the Supreme Court, and not on the merits or by way of a jury verdict in favor of
Defendants. Plaintiffs argue that CHH incurred so much in fees because it continued
filing motions based on the same statute of limitations theory. Thus, CHH's fees are
unreasonable and unjustified. Plaintiffs also claim they are unable to properly evaluate

1 the reasonableness of CHH's attorney's fees because Defendant only presented a
2 summary of the fees that were incurred.

3 Plaintiffs argue that it is absurd for CHH to suggest that the provisions of NRS
4 7.085 even apply to the facts of this case, and that Plaintiffs' attorneys violated NRS
5 18.010(2), NRCP 11 or EDCR 7.60. Plaintiffs further argue that CHH has not provided
6 factual support to support the request for pre-NRCP 68 costs and fees pursuant to NRS
7 7.085. Plaintiffs ask that this Court deny the application for fees and costs as the
8 Plaintiffs did not submit frivolous or vexatious claims and did not over burden the
9 limited judicial resources nor did it hinder the timely resolution of meritorious claims.
10 Similarly, Plaintiffs contend that CHH has not provided any factual support for its
11 request for attorneys' fees pursuant to EDCR 7.60 or 18.010(2).

12 In Reply, CHH argues that Plaintiffs' entire opposition is predicated on the false
13 assertion that they possessed a viable case in the first instance. CHH argues that,
14 "Plaintiffs' entire argument is that because this Court repeatedly denied dismissal
15 attempts by the respective defendants despite clear, convincing, and irrefutable
16 evidence of inquiry notice which each and every plaintiff possessed, they are somehow
17 absolved from either their malpractice or unethical practice of pursuing a case which
18 was dead on arrival when filed."

19 CHH argues that the Nevada Supreme Court held that the "district court
20 manifestly abused its discretion when it denied summary judgment." CHH argues that
21 this matter should have been dismissed a year ago at the latest.

22 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

23 With regard to the requested costs, in *Frazier v. Drake*, 131 Nev. 632, 357 P.3d
24 365 (NV.Ct.of App., 2015), the Court noted that NRS 18.005(5) provides for the
25 recovery of "reasonable fees of not more than five expert witnesses in an amount of not
26 more than \$1,500 for each witness unless the court allows a larger fee after
27 determining that the circumstances surrounding the expert's testimony were of such
28 necessity as to require the larger fee." *Id.*, at 644. The Court went on to state the
following:

... we conclude that any award of expert witness fees in excess of \$1,500
per expert under NRS 18.005(5) must be supported by an express,
careful, and preferably written explanation of the court's analysis of
factors pertinent to determining the reasonableness of the requested fees
and whether "the circumstances surrounding the expert's testimony were