IN THE SUPREME COURT OF THE STATE OF NEVADA

JOON YOUNG KIM, M.D., an individual; FIELDEN, HANSON, ISAACS, MIYADA, ROBISON, YEH, LTD., a Nevada Professional Corporation, d/b/a USAP-Nevada,
Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA ex rel. THE COUNTY OF CLARK, AND THE HONORABLE CARLI L. KIERNY,
Respondent,

and

LIVIU RADU CHISIU, as Special Administrator of the ESTATE OF ALINA BADOI, deceased; LIVIU RADU CHISIU, as Parent and Natural Guardian of SOPHIA RELINA CHISIU, a minor, as Heir of the ESTATE OF ALINA BADOI, Deceased;
Real Parties In Interest.

Supreme Court No.:

District Court No.: A-18-775572-C

PETITIONER'S APPENDIX- VOL. III 1-224

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CHRONOLOGICAL INDEX TO PETITIONER'S APPENDIX

DOCUMENT DESCRIPTION[1]	**LOCATION**[2]
Complaint, 6/5/2018	Vol. 1, 1-14
Exhibit 1 to Complaint- Dr. Beilin report	Vol. 1, 15-17
Exhibit 2 to Complaint- Dr. Hirschfeld report	Vol. 1, 18-46
Deposition transcript of Plaintiff Liviu Radu Chisiu, 12/4/2019	Vol. 1, 47-96
Notice of Entry of Order Granting Defendant Dignity Health d/b/a St. Rose Dominican Hospital's Motion for Judgment on the Pleadings as to Plaintiffs' Claims for Negligent Credentialing and Negligent Hiring, Training, Supervision, and Joinder Thereto, 3/17/2021	Vol. 3, 212-224
Dignity Health Motion for Summary Judgment, 10/18/2021	Vol. 1, 97-114
Exhibit D to Dignity Health Motion for Summary Judgment- Declaration of Amy Vanik with Exhibits 1-6	Vol. 1, 115-149
Exhibit E to Dignity Health Motion for Summary Judgment- Deposition transcript of Viorica Habara excerpts	Vol. 1, 150-153
Exhibit F to Dignity Health Motion for Summary Judgment- Plaintiff's Initial Disclosures with Certificate of Custodian of Records	Vol. 1, 154-157
Dr. Kim Joinder to Motion for Summary Judgment, 10/25/2021	Vol. 1, 158-160
Plaintiff Opposition to Motion for Summary Judgment, 11/8/2021	Vol. 2, 1-16
Exhibits 1-4 to Plaintiff's Opposition to Motion for Summary	Vol. 2, 17-100
Dignity Health Reply in support of Motion for Summary Judgment, 12/1/2021	Vol. 2, 101-110
Hearing Transcript of 12/8/2021	Vol. 2, 111-146
Plaintiff's Supplement Brief, 1/10/2022	Vol. 2, 147-174
Dignity Health Supplement Brief, 1/24/2022	Vol. 2, 175-186
Dr. Kim Response to Plaintiff's Supplemental Brief, 1/24/2022	Vol. 2, 187-201
Exhibit A to Dr. Kim Response to Plaintiff's Supplemental Brief- *Estate of Rebecca Powell v. Valley Health Systems, LLC* Complaint, case no. A-19-788787-C	Vol. 2, 202-231

[1] Documents provided in chronological order of filing pursuant to NRAP 30(c)(1)

[2] All pages bates stamped per volume, e.g., "1PET APP," "2PET APP," etc.

ALPHABETICAL INDEX TO PETITIONER'S APPENDIX

DOCUMENT DESCRIPTION[3]	**LOCATION**[4]
Complaint, 6/5/2018	Vol. 1, 1-14
Exhibit 1 to Complaint- Dr. Beilin report	Vol. 1, 15-17
Exhibit 2 to Complaint- Dr. Hirschfeld report	Vol. 1, 18-46
Deposition transcript of Plaintiff Liviu Radu Chisiu, 12/4/2019	Vol. 1, 47-96
Dignity Health Motion for Summary Judgment, 10/18/2021	Vol. 1, 97-114
Exhibit D to Dignity Health Motion for Summary Judgment- Declaration of Amy Vanik with Exhibits 1-6	Vol. 1, 115-149
Exhibit E to Dignity Health Motion for Summary Judgment- Deposition transcript of Viorica Habara excerpts	Vol. 1, 150-153
Exhibit F to Dignity Health Motion for Summary Judgment- Plaintiff's Initial Disclosures with Certificate of Custodian of Records	Vol. 1, 154-157
Dignity Health Reply in support of Motion for Summary Judgment, 12/1/2021	Vol. 2, 101-110
Dignity Health Supplement Brief, 1/24/2022	Vol. 2, 175-186
Dr. Kim Joinder to Motion for Summary Judgment, 10/25/2021	Vol. 1, 158-160
Dr. Kim Response to Plaintiff's Supplemental Brief, 1/24/2022	Vol. 2, 187-201
Exhibit A to Dr. Kim Response to Plaintiff's Supplemental Brief- *Estate of Rebecca Powell v. Valley Health Systems, LLC* Complaint, case no. A-19-788787-C	Vol. 2, 202-231
Exhibit B to Dr. Kim Response to Plaintiff's Supplemental Brief- *Estate of Rebecca Powell v. Valley Health Systems, LLC* Valley Health Systems, LLC's Reply re Motion for Summary Judgment Based Upon The Expiration of Statute of Limitations, 10/21/2020	Vol. 3, 1-24
Exhibit C to Dr. Kim Response to Plaintiff's Supplemental Brief- *Estate of Rebecca Powell v. Valley Health Systems, LLC* Valley Health Systems, LLC's Motion for Summary Judgment Based Upon The Expiration of Statute of Limitations, 9/2/2020	Vol. 3, 25-43

[3] Documents provided in alphabetical order pursuant to NRAP 30(c)(2)

[4] All pages bates stamped per volume, e.g., "1PET APP," "2PET APP," etc.

Exhibit E to Dr. Kim Response to Plaintiff's Supplemental Brief- *Estate of Rebecca Powell v. Valley Health Systems, LLC* Plaintiff's Opposition to Valley Health Systems, LLC's Motion for Summary Judgment Based Upon The Expiration of Statute of Limitations, 9/16/2020	Vol. 3, 44-57
Exhibit F to Dr. Kim Response to Plaintiff's Supplemental Brief- *Estate of Rebecca Powell v. Valley Health Systems, LLC* Order denying Motion for Motion for Summary Judgment Based Upon The Expiration of Statute of Limitations, 10/29/2020	Vol. 3, 58-66
Exhibit G to Dr. Kim Response to Plaintiff's Supplemental Brief- *Estate of Rebecca Powell v. Valley Health Systems, LLC* Valley Health Systems, LLC's Petition for Writ of Mandamus, 12/22/2020	Vol. 3, 67-106
Exhibit H to Dr. Kim Response to Plaintiff's Supplemental Brief- *Estate of Rebecca Powell v. Valley Health Systems, LLC* Real Parties In Interest Answering Brief, 3/30/2021	Vol. 3, 107-146
Hearing Transcript of 12/8/2021	Vol. 2, 111-146
Hearing Transcript, 2/2/2022	Vol. 3, 147-187
Notice of Entry of Order Granting Defendant Dignity Health d/b/a St. Rose Dominican Hospital's Motion for Judgment on the Pleadings as to Plaintiffs' Claims for Negligent Credentialing and Negligent Hiring, Training, Supervision, and Joinder Thereto, 3/17/2022	Vol. 3, 212-224
Notice of Entry of Stipulation and Order for Dismissal Without Prejudice of Plaintiffs' Cause of Action for "Fraudulent Concealment and/or Omissions" Against All Defendants, 8/25/2022	Vol. 3, 201-211
Notice of Entry of Order Regarding Defendant Dignity Health d/b/a St. Rose Dominican Hospital's Motion for Summary Judgement and Defendant Joon Young Kim's Joinder Thereto, 4/29/2022	Vol. 3, 188-200
Plaintiff Opposition to Motion for Summary Judgment, 11/8/2021	Vol. 2, 1-16
Exhibits 1-4 to Plaintiff's Opposition to Motion for Summary	Vol. 2, 17-100
Plaintiff's Supplement Brief, 1/10/2022	Vol. 2, 147-174

Exhibit B

ROPP
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DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF REBECCA POWELL, through BRIAN POWELL, as Special Administrator; DARCI CREECY, individually and as Heir; TARYN CREECY, individually and as an Heir; ISAIAH KHOSROF, individually and as an Heir; LLOYD CREECY, individually;, Plaintiffs, vs. VALLEY HEALTH SYSTEM, LLC (doing business as "Centennial Hills Hospital Medical Center"), a foreign limited liability company; UNIVERSAL HEALTH SERVICES, INC., a foreign corporation; DR. DIONICE S. JULIANO, M.D., an individual; DR. CONRADO C.D. CONCIO, M.D., an individual; DR. VISHAL S. SHAH, M.D., an individual; DOES 1-10; and ROES A-Z;, Defendants.	Case No. A-19-788787-C Dept. No.: 30 **DEFENDANTS VALLEY HEALTH SYSTEM, LLC AND UNIVERSAL HEALTH SERVICES, INC.'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED UPON THE EXPIRATION OF THE STATUTE OF LIMITATIONS** Hearing Date: October 28, 2020 Hearing Time: 9:00 a.m.

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

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

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

DATED this 21st day of October, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Adam Garth*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

(footnote continued)

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

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

II. LEGAL ARGUMENT

A. Motion to Dismiss Standard vs. Summary Judgment Standard

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

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

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

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

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

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

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

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

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

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

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

B. <u>Fraudulent Concealment Must Be Pled With Particularity</u>

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

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

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

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

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

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

(footnote continued)

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

(Emphasis supplied).

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

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

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

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

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

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

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

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

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

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

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

(footnote continued)

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

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

"Only when the evidence irrefutably demonstrates that a plaintiff was put on inquiry notice of a cause of action should the district court determine this discovery date as a matter of law." *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 258, 277 P.3d 458, 466 (2012). "[A] person is put on 'inquiry notice' when he or she should have known of facts that 'would lead an ordinarily prudent person to investigate the matter further.' Black's Law Dictionary 1165 (9th ed. 2009). We reiterated in *Massey* that these facts need not pertain to precise legal theories the plaintiff may ultimately pursue, but merely to the plaintiff's general belief that someone's negligence may have caused his or her injury. 99 Nev. at 728, 669 P.2d at 252." *Winn, supra* at 252-53, 277 P.3d 458, 462 (2012). The evidence presented here in reply and in CHH's motion in chief irrefutably demonstrates that Plaintiffs' possessed inquiry notice as late as June 11, 2017, and as early as May, 2017. The one

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

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

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

(footnote continued)

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

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

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

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

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

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

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

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

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

D. <u>Plaintiff's Lack of Diligence Precludes Tolling of the Statute of Limitations</u>

According to the Nevada Supreme Court:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> [W]e must determine whether Szymborski's claims involve medical diagnosis, judgment, or treatment or are based on Spring Mountain's performance of nonmedical services. See *id*.; see also *Gold v. Greenwich Hosp. Assn*, 262 Conn. 248, 811 A.2d 1266, 1270 (Conn. 2002) (determining that **the plaintiff's complaint was for medical malpractice because the "alleged negligence [was] substantially related t**o **medical diagnosis and involved the exercise of medical judgment**"); *Gunter v. Lab. Corp. of Am.*, 121 S.W.3d 636, 640 (Tenn. 2003) ("**When a plaintiff's claim is for injuries resulting from negligent medical treatment, the claim sounds in medical malpractice.** When a plaintiff's claim is for injuries resulting from negligent acts that did not affect the medical treatment of a patient, the claim sounds in ordinary negligence.") (Citation omitted).

Id. at 1284 (emphasis added).

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

III. CONCLUSION

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

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

DATED this 21st day of October, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Adam Garth*

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2020, a true and correct copy of **DEFENDANTS VALLEY HEALTH SYSTEM, LLC AND UNIVERSAL HEALTH SERVICES, INC.'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED UPON THE EXPIRATION OF THE STATUTE OF LIMITATIONS** was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

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Exhibit C

MSJ

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

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

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

DATED this 2nd day of September, 2020

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By */s/ Adam Garth*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

II. STATEMENT OF UNDISPUTED FACTS

A. Procedural History

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

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

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

[2] Exhibit "A", ¶ 28

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

[4] Exhibit "A"

(footnote continued)

of the statute of limitations.[5]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(footnote continued)

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

B. Undisputed Facts Demonstrating Untimely Filing

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

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

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

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

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

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

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

[15] Exhibit "A", ¶ 18

[16] Exhibit "A", ¶ 18

[17] Exhibit "A", ¶ 18

[18] Exhibit "A", ¶ 21

[19] Exhibit "A", ¶ 22

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

[21] Exhibit "A", ¶ 22

(footnote continued)

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

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

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

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

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

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

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

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

[23] Exhibit "A", ¶ 22

[24] Exhibit "A", ¶¶ 44-45, 52-53

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

[26] Exhibit "M", ¶ 7

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

(footnote continued)

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

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

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

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

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

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

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

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

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

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

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

[32] Exhibit "M", ¶ 12

[33] Exhibit "M", ¶ 13

[34] Exhibit "M", ¶ 14

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

(footnote continued)

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

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

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

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

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

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

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

III. LEGAL ARGUMENT

A. Summary Judgment Standard

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

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

[37] Exhibit "A"

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

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

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

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

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

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

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

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

B. <u>Plaintiffs' Causes of Action Are Subject to NRS 41A's Requirements</u>

NRS 41A.097 states in pertinent part:

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

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

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

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

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

Generally, "[a]llegations of breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for medical malpractice." *Szymborski*., 403 P.3d at 1284 (citing *Papa v. Brunswick Gen. Hosp*., 132 A.D.2d 601, 517 N.Y.S.2d 762, 763 (1987) ("When the duty owing to the plaintiff by the defendant arises from the physician-patient relationship or is

substantially related to medical treatment, the breach thereof gives rise to an action sounding in medical malpractice as opposed to simple negligence."); *Estate of French v. Stratford House*, 333 S.W.3d 546, 555 (Tenn. 2011) ("If the alleged breach of duty of care set forth in the complaint is one that was based upon medical art or science, training, or expertise, then it is a claim for medical malpractice.")); see also *Lewis v. Renown Reg'l Med. Ctr*., 432 P.3d 201 (Nev. 2018) (holding that Plaintiffs' elder abuse claim under NRS 41.1495 sounded in professional negligence where it involved alleged failures to check on the patient while under monitoring). For example, in *Lewis v. Renown*, the Nevada Supreme Court recognized that a claim for elder abuse arising out of alleged failure to properly check or monitor a patient or otherwise provide adequate care sounded in professional negligence. *See generally Lewis v. Renown* , 432 P.3d 201 (Nev. 2018). Since the gravamen of Plaintiff's claim was professional negligence, the Court affirmed the District Court's dismissal of the elder abuse claim on statute of limitations grounds. *Id*. In reaching this holding, the Court reasoned as follows:

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

Id. (emphasis added).

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

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

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

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

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

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

[40] Exhibit "A" hereto, ¶¶ 34-40

[41] Exhibit "A", ¶¶ 41-48; 49-56

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

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

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

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

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

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

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

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

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

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

(footnote continued)

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

DATED this 2nd day of September, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Adam Garth*

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 2020, a true and correct copy of **VALLEY HEALTH SYSTEM, LLC AND UNIVERSAL HEALTH SERVICES, INC.'S MOTION FOR SUMMARY JUDGMENT BASED UPON THE EXPIRATION OF THE STATUTE OF LIMITATIONS** was served by electronically filing with the Clerk of the Court using the Odyssey E-File & Serve system and serving all parties with an email-address on record, who have agreed to receive electronic service in this action.

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Exhibit E

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

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

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

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

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

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

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

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

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

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

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

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

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

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

II.

ARGUMENTS

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

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

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

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

Under this Court's Eighth Judicial District Court Rule ("EDCR") 2.24(a) "[n]o motions once heard and disposed of may be renewed in the same cause, ***nor may the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor***, after notice of such motion to the adverse parties."[4] This rule exists for a reason: namely so parties are not required to waste time, money and limited resources litigating issues that have already been decided. The point of seeking leave first is so the Court and non-moving party understand what issues the moving party seeks to litigate and whether it has any new evidence to offer. Otherwise, allowing parties to re-label previously denied motions would result in an inequitable waste of a non-moving parties time and resources. That is exactly what has occurred here.

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

[4] Emphasis supplied.

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

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

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

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

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

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

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[5] *See* App. 4.

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

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

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

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

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

[8] VHS MSJ, Exhibit M.

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

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

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

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

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

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

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III.

CONCLUSION

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

Respectfully submitted,

/s/ Paul S. Padda

Paul S. Padda, Esq.
James P. Kelly, Esq.
4560 South Decatur Boulevard, Suite 300
Las Vegas, Nevada 89103
Attorneys for Plaintiffs

Dated: September 16, 2020

CERTIFICATE OF SERVICE

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

/s/ Jennifer Greening

Jennifer Greening, Paralegal
PAUL PADDA LAW, PLLC

DECLARATION OF PAUL S. PADDA, ESQ.

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

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

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

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

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

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

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

Paul S. Padda, Esq.

Dated: September 16, 2020

Exhibit F

DISTRICT COURT
CLARK COUNTY, NEVADA
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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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Based upon the foregoing, and good cause appearing,

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

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

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

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

Dated this 28th day of October, 2020.

Dated this 29th day of October, 2020

_____

JERRY A. WIESE II
DISTRICT COURT JUDGE
EIGHTH JUDICIAL DISTRICT COURT
DEPARTMENT XXVI

829 39C 6C8 X2D26
Jerry A. Wiese
District Court Judge

Exhibit G

IN THE SUPREME COURT OF THE STATE OF NEVADA

VALLEY HEALTH SYSTEM, LLC (doing business as "Centennial Hills Hospital Medical Center"), a foreign limited liability company,
Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA ex rel. THE COUNTY OF CLARK, AND THE HONORABLE JUDGE JERRY A. WIESE II,
Respondent,

and

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

Real Parties In Interest,

and

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,
Additional Parties In Interest.

Supreme Court No.:

District Court No.: A-19-788787-C

PETITION FOR WRIT OF MANDAMUS

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Attorneys for Petitioners

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court: Lewis Brisbois Bisgaard & Smith LLP; Paul Padda Law, PLLC; John. H. Cotton & Associates

3. If litigant is using a pseudonym, the litigant's true name: N/A

DATED: December 22, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

/s/ Adam Garth

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTORY AUTHORITIES

RULES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

RELIEF SOUGHT

Petitioner hereby petitions for a writ of mandamus requiring the district court to vacate its order of December 17, 2020, in the case of Estate of Rebecca Powell, et al. v. Valley Health System, LLC, et al, Clark County Case No. A-19-788787-C. The order denied Petitioner an award of summary judgment against the Real Parties in Interest (Plaintiffs) based upon the expiration of the statute of limitations contained in NRS 41A.097 (2)(a) and (c).

This petition is based upon the ground that the district court's order is without legal and factual bases, and Respondent manifestly abused his discretion by denying Petitioner's motion for summary judgment on a case dispositive issue when all admissible evidence demonstrated contrary to Respondent's findings. This petition is also based upon the ground that Petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law.

ROUTING STATEMENT

This matter is presumptively retained by the Nevada Supreme Court pursuant NRAP 17(a)(12). The Petition for Writ of Mandamus ("Petition") raises as a principal issue a question of statewide public importance.

The Petition raises the issues of (1) what constitutes irrefutable evidence of inquiry notice in a professional negligence case for purposes of the commencement of the running of the statute of limitations as defined in NRS 41A.097 and whether such notice may thereafter be tolled, and (2) the obligations of an opponent of a

motion for summary judgment to come forth with admissible evidence to properly oppose said motion when a prima case for summary judgment has been made by the moving party. These issues have been raised throughout this Petition.

ISSUES PRESENTED

1. At what point does a plaintiff receive irrefutable evidence of inquiry notice for purposes of the commencement of the statute of limitations in a professional negligence case and once received, can it be tolled?

2. In opposing a motion for summary judgment, must a party provide admissible evidence?

INTRODUCTION

Petitioner Valley Health System, LLC (doing business as "Centennial Hills Hospital Medical Center") (hereinafter "CHH"), a foreign limited liability company, hereby respectfully petitions this Court for the issuance of a Writ of Mandamus pursuant to Nev. Rev. Stat. § 34.150 et seq., Nev. R. App. P. 21 and Nev. Const. art. VI, § 4, directing Respondent to issue an Order granting Petitioner's Motion for Summary Judgment Based upon the Expiration of the Statute of Limitations due to Respondent's failure to recognize irrefutable evidence of inquiry notice supplied by the Plaintiffs which commenced the running of the statute of limitations, and by extension, the expiration of the statute of limitations 8 months prior to the commencement of this action.

A. Procedural History

Petitioner is a Defendant in a case entitled ESTATE OF REBECCA POWELL, through BRIAN POWELL, as Special Administrator; DARCI CREECY, individually and as Heir; TARYN CREECY, individually and as an Heir; ISAIAH KHOSROF, individually and as an Heir; LLOYD CREECY, individually;, Plaintiffs, vs. VALLEY HEALTH SYSTEM, LLC (doing business as "Centennial Hills Hospital Medical Center"), a foreign limited liability company; UNIVERSAL HEALTH SERVICES, INC., a foreign corporation; DR. DIONICE S. JULIANO, M.D., an individual; DR. CONRADO C.D. CONCIO, M.D., an individual; DR. VISHAL S. SHAH, M.D., an individual; DOES 1-10; and ROES A-Z;, Defendants

(Nevada Eighth Judicial District Court Case No. A-19-788787-C).

The Complaint in this matter was filed February 4, 2019 by Real Parties in Interest ESTATE OF REBECCA POWELL, through BRIAN POWELL, as Special Administrator; DARCI CREECY, individually and as Heir; TARYN CREECY, individually and as an Heir; ISAIAH KHOSROF, individually and as an Heir; LLOYD CREECY, individually (collectively "Plaintiffs"). All Plaintiffs, except Plaintiff Lloyd Creecy, alleged the following causes of action against CHH and the remaining co-defendants in their Complaint: (1) negligence/medical malpractice and (2) wrongful death. Plaintiffs Darci Creecy, Taryn Creecy and Isaiah Khosrof alleged a separate cause of action for negligent infliction of emotional distress against all Defendants, and Plaintiff Lloyd Creecy alleged his own cause of action for negligent infliction of emotional distress against all Defendants.

On September 2, 2020, CHH filed its Motion for Summary Judgment Based Upon the Expiration of the Statute of Limitations. Petitioners' Appendix Vol. I, No. 1, pp. 2-165.

On September 3, 2020, co-defendants filed their joinder in support of CHH's aforesaid Motion. Petitioners' Appendix Vol. I, No. 2, pp. 167-169.

Plaintiffs filed their opposition to CHH's Motion for Summary Judgment on September 16, 2020. Petitioners' Appendix Vol. II, No. 3, pp. 171-270.

On October 21, 2020, CHH filed its reply to Plaintiffs' Opposition to CHH's Motion for Summary Judgment after Respondent continued the originally scheduled

hearing on said motion until October 28, 2020. Petitioners' Appendix Vol. II, No. 4, pp. 272-344.

Co-defendants filed their joinder to CHH's aforesaid reply on October 21, 2020. Petitioners' Appendix Vol. III, No. 5, pp. 346-349.

On October 26, 2020, Respondent sua sponte issued a minute order continuing the hearing on all pending motions for summary judgment, including CHH's Motion, until November 4, 2020. Petitioner's Appendix Vol. III, No. 6, p. 351.

Without conducting the scheduled hearing on November 4, 2020, Respondent issued an order on October 29, 2020 denying CHH's Motion for Summary Judgment, the Notice of Entry of which was served and filed on November 2, 2020. Petitioners' Appendix Vol. III, No. 7, pp. 353-364.

Plaintiffs' claims all derive from an incident which occurred at CHH's hospital on May 11, 2017 when Plaintiffs' decedent, Rebecca Powell, passed away from acute respiratory failure. Ms. Powell was brought to CHH's emergency room on May 3, 2017 following an attempted suicide by prescription drug overdose. Plaintiffs allege Defendants were responsible for administration of Ativan to Ms. Powell during her stay at CHH, and thereafter failed to adequately monitor her, which Plaintiff claim resulted in her acute respiratory failure and the inability to revive her leading to her death. Petitioners' Appendix Vol I, No. 1, pp. 26-49.

Petitioner CHH's Motion for Summary Judgment asked the Respondent District Court to grant summary judgment in its favor because irrefutable evidence

demonstrated that Plaintiffs filed their Complaint eight (8) months after the expiration of the statute of limitations which commenced running twenty (20) months earlier, when Plaintiffs were on inquiry notice of their claims. Petitioners' Appendix Vol. I, No. 1, pp. 2-165 and Vol. II, No. 4, pp. 272-344.

The uncontroverted evidence demonstrated that Plaintiffs initiated two (2) separate State investigations alleging the very misconduct by CHH and its personnel which form the basis of the allegations contained in their Complaint. Plaintiffs' first complaint and request for investigation was initiated with the Nevada Department of Health and Human Services (sometime before May 23, 2017) (Petitioner's Appendix Vol II, No. 4, pp. 298, 327). Plaintiffs' second complaint and investigation request was initiated with the Nevada State Board of Nursing Board on June 11, 2017 Petitioner's Appendix Vol II, No. 4, pp. 298, 325-326).

Moreover, in May, 2017, shortly after Ms. Powell's death, Plaintiffs petitioned the Probate Court and obtained an order permitting them to obtain Ms. Powell's complete CHH medical record (Petitioners' Appendix Vol I., No. 1, pp. 152-155) upon which Plaintiffs' medical expert based his opinions that Defendants were negligent in their care and treatment of Ms. Powell. Petitioners' Appendix Vol. I, No. 1, p. 44, ¶6(B).

B. <u>Respondent's Order Giving Rise to Petition</u>

Respondent incorrectly found that a question of fact existed as whether the Plaintiffs were on inquiry notice of their claims in May and June of 2017 after

requesting and receiving Ms. Powell's medical records and initiating the two State investigations in which they alleged professional negligence against CHH and its personnel. Petitioners' Appendix Vol. III, No. 7, pp. 358-359.

Respondent based its decision on Plaintiffs' counsel's mere representation that the Plaintiffs themselves were confused by a death certificate and coroner's report as to Ms. Powell's cause of death. Petitioners' Appendix Vol. III, No. 7, pp. 358-359.

Plaintiffs submitted not one shred of admissible evidence to contradict their own reports irrefutably demonstrating their inquiry notice. Likewise, Respondent failed to identify one shred of admissible evidence supplied by Plaintiffs to support the presence of a factual issue. Respondent failed to properly consider that once inquiry notice is obtained there is no mechanism for tolling that notice. There is no sworn statement from any Plaintiff nor anyone with personal knowledge asserting that they never received the records, another factor which Respondent ignored.

Petitioners thereafter filed a motion for a stay with Respondent to permit this writ to be submitted. Said motion was scheduled to be heard on November 25, 2020, but the Court below issued a written decision on November 24, 2020 without a hearing, denying the request for a stay, the final order having been signed on December 17, 2020. Petitioners' Appendix Vol. III, No. 8, pp. 366-375.

Respondent manifestly abused its discretion by finding that "Although the Complaints filed by Brian Powell, suggest that Plaintiff may have at least been on

inquiry notice in 2017, the fact that the family was notified shortly after the decedent's death that the cause of death was determined to be a 'suicide,' causes this Court some doubt or concern about what the family knew at that time period" (Petitioners' Appendix, Vol. III, No. 7, p. 358), especially since the finding was not based upon any admissible evidence, but rather Plaintiffs' counsel's personal opinion and argument as to the alleged "confusion" that lacks any evidentiary value whatsoever.

Respondent further manifestly abused its discretion by finding that a State agency report making findings of deficiency was required for Plaintiffs to be on inquiry notice despite the report to said agency by Plaintiffs which alleged the very deficiencies forming the basis for the allegations in Plaintiffs' Complaint. Petitioners' Appendix, Vol. III, No. 7, p. 359.

Petitioner has suffered significant damages and will suffer future significant damages as a result of the actions of the Respondent as it is now forced to proceed to trial under the erroneous ruling. If Respondent had decided the Motion for Summary Judgment in accordance with Nevada law, it would have been completely case dispositive, eliminating the need to proceed with any further discovery and dispensing with the need to incur enormous additional expenses associated with the defense of a case which was dead on arrival.

A Writ of Mandamus is proper to compel the performance of acts by Respondent from the office held by Respondent.

Petitioner has no plain, speedy, or adequate remedy at law to compel the Respondent to perform its duty.

Petitioner's request for a Writ of Mandamus is necessary in order to compel Respondent to comply with the dictates of its office, to prevent further harm and injury to Petitioner and to compensate Petitioner for his damages.

Petitioner requests the issuance of a Writ of Mandamus directing Respondent to issue an Order granting his Motion for Summary Judgment.

This Petition is made and based upon the Affidavit following this Petition, the Petitioner's Appendix filed herewith and the Memorandum of Points and Authorities filed herewith.

STATEMENT OF FACTS

Plaintiffs commenced this action on February 4, 2019 by the filing of the Complaint. Based upon the Complaint and the accompanying medical affidavit, Rebecca Powell overdosed on Benadryl, Cymbalta, and Ambien on May 3, 2017.[1] Plaintiffs' further allege that EMS was called and came to Ms. Powell's aid, discovering her with labored breathing and vomit on her face.[2] Plaintiffs further allege that Ms. Powell was transported to CHH where she was admitted.[3]

Plaintiffs claim on May 10, 2017, Ms. Powell complained of shortness of breath, weakness, and a drowning feeling, and Defendant Vishal Shah, MD, ordered Ativan to be administered via IV push.[4] Plaintiffs assert that on May 11, 2017, Defendant Conrado Concio, MD, ordered two doses of Ativan via IV push.[5]

To assess her complaints, Plaintiffs alleged that a chest CT was ordered, but chest CT was not performed due to Ms. Powell's anxiety, and she was returned to her room.[6] Plaintiffs further alleged that Ms. Powell was placed in a room with a

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[1] Petitioner's Appendix Vol. I, No. 1, p. 26, ¶ 18

[2] Petitioner's Appendix Vol. I, No. 1, p. 26, ¶ 18

[3] Petitioner's Appendix Vol. I, No. 1, p. 26, ¶ 18

[4] Petitioner's Appendix Vol. I, No. 1, p. 27, ¶ 21

[5] Petitioner's Appendix Vol. I, No. 1, pp. 27-28, ¶ 22

[6] Petitioner's Appendix Vol. I, No. 1, pp. 27-28, ¶ 22; see also Petitioner's Appendix Vol. I, No. 1, p. 45

(footnote continued)

camera monitor.[7]

Plaintiffs' expert stated in his affidavit used to support the Complaint that pursuant to the doctor's orders, a dose of Ativan was administered at 03:27.[8] Thereafter, Ms. Powell allegedly suffered acute respiratory failure, which resulted in her death on May 11, 2017.[9]

On May 25, 2017, MRO, a medical records retrieval service responsible for supplying medical records to those requesting same on behalf of CHH, received a request for medical records from Plaintiff Taryn Creecy along with a copy of a court order requiring that Centennial Hills Hospital provide a complete copy of Rebecca Powell's medical chart.[10]

On June 2, 2017, the request for the medical records for Mrs. Powell was processed by MRO personnel.[11] On June 5, 2017, MRO determined that the records for Mrs. Powell were requested by Taryn Creecy, her daughter, that the records were requested to be sent to a post office box, and verified the court order for same.[12] On

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[7] Petitioner's Appendix Vol. I, No. 1, pp. 27-28, ¶ 22

[8] Petitioner's Appendix Vol. I, No. 1, p. 45

[9] Petitioner's Appendix Vol. I, No. 1, pp. 27-28, ¶ 22

[10] *See* Petitioner's Appendix Vol. I, No. 1, pp. 146-161, specifically ¶ 6 on pp. 147-148

[11] Petitioner's Appendix Vol. I, No. 1, p. 148, ¶ 7

[12] Petitioner's Appendix Vol. I, No. 1, p. 148, ¶ 8, and pp. 151-155

(footnote continued)

June 7, 2017, MRO invoiced Ms. Creecy which included all fees associated with the provision of 1165 pages of Mrs. Powell's medical records from CHH. The 1165 pages invoiced represented the entirety of medical records for Mrs. Powell with no exclusions.[13] [14] On June 12, 2017, MRO received payment for the 1165 pages of records and the next day, June 13, 2017, MRO sent out the complete 1165 pages to Ms. Creecy to the address provided on the request.[15]

MRO received the package back from the United States Postal Service due to undeliverability to the addressee on June 23, 2017.[16] MRO contacted Ms. Creecy on June 28, 2017 regarding the returned records, and she advised MRO that the post office box to which she requested the records be sent was in the name of her father, Brian Powell, and that the Post Office likely returned them since she was an unknown recipient at the post office box. She thereafter requested that MRO resend the records to him at that post office box address.[17] On June 29, 2017, MRO re-sent the records addressed to Mr. Powell at the post office box previously provided, and

[13] Petitioner's Appendix Vol. I, No. 1, p. 148, ¶ 9 and p. 157

[14] Petitioner's Appendix Vol. I, No. 1, p. 164-165, ¶ 4

[15] Petitioner's Appendix Vol. I, No. 1, p. 148, ¶ 10 and p. 159

[16] Petitioner's Appendix Vol. I, No. 1, p. 148, ¶ 11 and p. 161

[17] Petitioner's Appendix Vol. I, No. 1, p. 148, ¶ 12

(footnote continued)

MRO never received the records back thereafter.[18]

MRO provided copies of all medical records for Mrs. Powell and no records for this patient were excluded from that packet.[19] [20] CHH's custodian of records stated that she compared the 1165 pages of records supplied in June, 2017 to Ms. Creecy to CHH's electronic medical records system and she verified that the totality of the medical records for Ms. Powell was provided to Ms. Creecy without excluding any records.[21]

Contemporaneously with Plaintiffs' obtaining Ms. Powell's medical records from CHH, Plaintiff Brian Powell personally initiated two investigations with State agencies including the Nevada Department of Health and Human Services ("HHS") and the Nevada State Nursing Board. Plaintiffs failed to disclose Mr. Powell's complaint to HHS, but they did disclose HHS's May 23, 2017 acknowledgement of his complaint alleging patient neglect (presumably the complaint Mr. Powell initiated was prior to May 23, 2017).[22] Mr. Powell's complaint to the Nursing Board dated June 11, 2017 alleges that CHH's nursing staff failed to properly monitor Ms.

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[18] Petitioner's Appendix Vol. I, No. 1, p. 149, ¶ 13

[19] Petitioner's Appendix Vol. I, No. 1, p. 149, ¶ 14

[20] Petitioner's Appendix Vol. I, No. 1, p. 164-165, ¶ 4

[21] Petitioner's Appendix Vol. I, No. 1, p. 164-165, ¶ 4

[22] Petitioner's Appendix Vol. II, No. 4, p. 327

(footnote continued)

Powell, that her care was "abandoned by the nursing staff", and that she passed away as a result of these alleged failures. Moreover, Mr. Powell stated "Now I ask that you advocate for her, investigate, and ensure that this doesn't happen again."[23]

On February 4, 2019, which was one year, eight months, and twenty-four days after Ms. Powell's death, Plaintiffs filed the subject Complaint.[24] Plaintiffs included the Affidavit of Sami Hashim, MD, which sets forth alleged breaches of the standard of care.[25]

NRS 41A.097 (2)(a) and (c) requires that an action based upon professional negligence of a provider of health be commenced the earlier of one year from discovery of the alleged negligence, but no more than three years after alleged negligence. An action which is dismissed and not refiled within the time required by NRS 41A.097 (2)(a) and (c) is time barred as a matter of law.

Plaintiffs' claims sound in professional negligence, which subjects the claims to NRS 41A.097(2)'s one-year statute of limitations requirement. Since Plaintiffs failed to file their Complaint within one-year after they discovered or through the use of reasonable diligence should have discovered the injury, CHH's Motion for Summary Judgment should have been granted by Respondent.

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[23] Petitioner's Appendix Vol. II, No. 4, pp. 325-326

[24] Petitioner's Appendix Vol. I, No. 1, pp. 21-41

[25] Petitioner's Appendix Vol. I, No. 1, pp. 43-49

STATEMENT OF REASONS THE WRIT SHOULD ISSUE

A. Writ of Mandamus Standard

A writ of mandamus is an extraordinary remedy that may be issued to compel an act that the law requires. *Cote H. v. Eighth Judicial Dist. Court,* 175 P.3d 906, 907-08, 124 (Nev. 2008). A writ of mandamus may also issue to control or correct a manifest abuse of discretion. *Id.* . A writ shall issue when there is no plain, speedy and adequate remedy in the ordinary course of law. Nev. Rev. Stat. § 34.170; *Sims v. Eighth Judicial Dist. Court,* 206 P.3d 980, 982 (Nev. 2009). This Court has complete discretion to determine whether a writ will be considered. *Halverson v. Miller,*186 P.3d 893 (Nev. 2008) ("the determination of whether to consider a petition is solely within this court's discretion."); *Sims*, 206 P.3d at 982 ("it is within the discretion of this court to determine whether these petitions will be considered.").

This Court should exercise its discretion to consider and issue a Writ of Mandamus in this case directing Respondent to grant Petitioner's Motion for Summary Judgment. The Respondent manifestly abused its discretion when it denied their Motion. This clear error of law will cause Petitioner to proceed through extensive discovery and the extraordinary expenses associated therewith as well as to trial on a case which was filed well beyond the expiration of the statute of limitations. There is no adequate, speedy remedy available at law to address this continuing injury to Petitioner.

Petitioner is aware that this Court may exercise its discretion to decline to hear

these issues unless they are brought before it on appeal. However, these issues are better addressed at the current time. This issue is appropriate for interlocutory review because it involves (1) an issue, if decided in favor of Petitioner, that is entirely case dispositive, (2) clarifies the standard of irrefutable evidence of inquiry notice articulated in *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 258, 277 P.3d 458, 466 (2012) by assessing evidence in which the Plaintiffs admit to possessing the very notice they now claim to lack, (3) determining whether after acquiring inquiry notice, said notice can be later tolled, and (4) setting the standard on those opposing motions for summary judgment that requires the submission of admissible evidence. Additionally, it addresses a recurring and important issue of the statutory scheme regarding professional negligence as well as pressing public policy issues regarding the protection of medical providers in this state. This Court has repeatedly stated that a writ of mandamus is an appropriate remedy for important issues of law that need clarification or that implicate important public policies. *Lowe Enters. Residential Ptnrs., L.P. v. Eighth Judicial Dist. Court*,118 Nev. 92, 97 (2002) ("We have previously stated that where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be justified."); *Business Comput. Rentals v. State Treasurer*,114 Nev. 63, 67 (1998) ("Additionally, where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction, our consideration of a petition for

extraordinary relief may be justified.").

Thus, in accordance with the above authorities, Petitioner respectfully requests that this Court choose to accept this Petition for Writ of Mandamus for review.

B. Respondent Manifestly Abused its Discretion by Denying Petitioner's Motion for Summary Judgment Based Upon the Expiration of the Statute of Limitations

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

There is no question that this matter involves a provider of health care as defined by NRS 41A.017. Petitioner, therefore, falls within the protections afforded by NRS Chapter 41A, including the one year discovery rule contained in NRS 41A.097(2)'s statute of limitations.

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

"This does not mean that the accrual period begins when the plaintiff

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

The date on which the one-year statute of limitation begins to run may be decided as a matter of law where uncontroverted facts establish the accrual date. *See Golden, supra.* at *2 (Nev. App. Oct. 13, 2017) ("The date on which the one-year statute of limitation began to run is ordinarily a question of fact for the jury, and may be decided as a matter of law only where the uncontroverted facts establish the accrual date.") (citing *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 251, 277 P.3d 458, 462 (2012) (recognizing that the district court may determine the accrual date as a matter of law where the accrual date is properly demonstrated)); *see also*

Dignity Health v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark, No. 66084, 2014 WL 4804275, at *2 (Nev. Sept. 24, 2014).

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

While this is a motion for summary judgment (unlike a motion to dismiss when the averments in the Complaint need to be taken as true), the standard is more favorable to the moving party since once a prima facie case that no genuine issue of material fact exist, the non-moving party is obligated to come forth with sufficient **and** admissible evidence demonstrating the presence of a material issue of fact. Petitioner presented its prima facie case, and Plaintiffs failed to submit any admissible evidence in opposition which relates to the issue before the Court.

In this case, NRS 41A.097(2)'s one-year statute of limitations began to run on the date of Ms. Powell's death (May 11, 2017). Per the Complaint, most of the individually named Plaintiffs contemporaneously observed the alleged negligence and Ms. Powell's rapid deterioration leading up to her death on May 11, 2017.[26]

Since Plaintiffs allege that they contemporaneously observed the alleged negligence and deterioration of Ms. Powell leading up to her death, the Plaintiffs knew, or should have known, of facts that would put a reasonably person on inquiry notice by May 11, 2017. Plaintiffs were aware of facts that would lead an ordinarily prudent person to investigate the matter further at that time.

In fact, Taryn Creecy specifically requested copies of Ms. Powell's complete medical records from CHH on May 25, 2017, two weeks after Ms. Powell's death.[27] Ms. Creecy went to Probate Court to and obtained a court order directing the production of Ms. Powell's records from CHH.[28] Plaintiffs obtained all of Ms. Powell's medical records as late as June, 2017. The declarations of both Gina Arroyo and Melanie Thompson[29] conclusively establish that Plaintiffs received a

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[26] *See* Petitioner's Appendix Vol. I, No. 1, p. 27, ¶ 20 (died on May 11, 2017); *see also* Petitioner's Appendix Vol. I, No. 1, p. 37 ¶¶ 45-46 and p. 39, ¶¶ 52-53 (allegedly contemporaneously observing Ms. Powell rapidly deteriorate and die).

[27] *See* Petitioner's Appendix Vol. I, No. 1, pp. 146-161

[28] Petitioner's Appendix Vol. I, No. 1, pp. 151-155

[29] Petitioner's Appendix Vol. I, No. 1, pp. 146-165

complete copy of Ms. Powell's medical records from CHH in June, 2017 and Plaintiffs sought them in May, 2017.

In fact, the affidavit of Plaintiffs' expert, Dr. Sami Hashim, states in clear terms the following:

> **Based upon the medical records**, the patient did not and with high probability could not have died from the cause of death stated in the Death Certificate. The patient died as a direct consequence of respiratory failure directly **due to below standard of care violations as indicated by her medical records and reinforced** by the Department of Health and Human Services – Division of Health Quality and Compliance Investigative Report.[30]

(Emphasis supplied).

Dr. Hashim noted that he primarily relied upon the very medical records which Plaintiffs obtained in May/June, 2017, and the HHS Report was only a "reinforcement" of what was contained in the medical records.

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

> Under Nevada law, the one-year statute of limitations begins to run when the plaintiff "knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action." *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983). Our supreme court has clarified that the plaintiff need not know the "precise legal theories" underlying her claim, so long as the plaintiff has a "general belief that someone's negligence may have caused his or

[30] Petitioner's Appendix Vol. I, No. 1, p. 44, ¶6(B)

> her injury." *Winn*, 128 Nev. at 252-53; 277 P.3d at 462. Thus, at its core the one-year statute of limitation requires the "plaintiff to be aware of the cause of his or her injury." *Libby*, 130 Nev. at 365, 325 P.3d at 1279 (addressing the rule from Massey and Winn). The district court may determine the accrual date as a matter of law if the evidence irrefutably demonstrates that date. *Winn*, 128 Nev. at 253, 277 P.3d at 463.

This case is predicated on Plaintiffs' claim of improper patient monitoring. Plaintiffs' received the complete copy of Ms. Powell's medical records in June, 2017.[31] They went to Probate Court to obtain a Court order to obtain them in May, 2017.[32] Plaintiff Brian Powell specifically wrote a complaint to the Nevada Nursing Board accusing CHH personnel of malpractice and requesting an investigation on June 11, 2017.[33] The Nevada Department of Health and Human Services specifically acknowledged Mr. Powell's separate complaint of patient neglect on May 23, 2017 with a promise to investigate same.[34]

Respondent's finding that Plaintiffs were somehow misled by the death certificate and the coroner's report defies the evidence. Furthermore, Respondent's conclusion that the February 5, 2018 HHS report created an issue of fact as to when

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[31] Petitioner's Appendix Vol. I, No. 1, pp. 146-165

[32] Petitioner's Appendix Vol. I, No. 1, pp. 151-155

[33] Petitioner's Appendix Vol. II, No. 4, pp. 325-326

[34] Petitioner's Appendix Vol. II, No. 4, p. 327

(footnote continued)

Plaintiffs were first on inquiry notice is equally erroneous. Once inquiry notice was received, the clock started running. **Plaintiffs' own documents demonstrate they possessed that very notice as late as June 11, 2017, but other documents show they knew as early as either Mrs. Powell's date of death on May 11, 2017, or on May 23, 2017, when the State acknowledged their complaint of patient neglect.[35] At the latest, they had until June 11, 2018 to file their Complaint. However, it was not filed until almost eight months later**.

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

In the instant case, Dr. Hashim's own affidavit stated that he possessed

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

(footnote continued)

sufficient information from the CHH medical records themselves, which Plaintiffs had in their possession in May/June, 2017.[36] The statute of limitations began running as late as when they received the CHH records in May/June, 2017. Moreover, Plaintiffs themselves initiated two State investigations concerning the care of Ms. Powell, and alleged in both requests that they suspected negligence. This definitively proves they possessed inquiry notice long before they claim, because they were aware of facts that would lead an ordinarily prudent person to investigate the matter further. Plaintiffs obtained all they needed to investigate the claims immediately after Ms. Powell's death and were in possession of all they needed and admittedly were on inquiry notice as late as June 11, 2017. Plaintiffs did nothing for **20 months after being placed on inquiry notice**, and they failed to timely file their lawsuit.

C. A Party Opposing a Motion for Summary Judgment Must Do So With Admissible Evidence and Declarations By Those With Personal Knowledge of the Facts

As expressed by the California Second District Court of Appeal:

> When a defendant moves for summary judgment, "'its declarations and evidence must either establish a complete defense to plaintiff's action or demonstrate the absence of an essential element of plaintiff's case. If plaintiff does not counter with opposing declarations showing there are triable issues of fact with respect to that defense or an essential element of its case, the summary judgment must be granted.'" (*Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal. App. 3d 1505, 1510–1511 [285 Cal. Rptr. 385],

[36] Petitioners' Appendix Vol. I, No. 1, p. 44, ¶6(B)

> quoting *Gray v. America West Airlines, Inc.* (1989) 209 Cal. App. 3d 76, 81 [256 Cal. Rptr. 877].)

Taylor v. Trimble, 13 Cal. App. 5th 934, 939, 220 Cal. Rptr. 3d 741, 745 (2017).

In the milestone case *Wood v. Safeway, Inc.*,121 Nev. 724, 731 (2005), this Court held that "[t]he substantive law controls which factual disputes are material" to preclude summary judgment, and that "[a] factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* .

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

See NRCP 56(e)." *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

Plaintiffs' counsel's opinions and assertions, which were all that was submitted by Plaintiffs (except for an inadmissible copy of the HHS report) should have been disregarded by Respondent, since counsel is not a competent affiant regarding admissible facts at trial on the subject of the relatedness of damages to the case at issue. *See, Schafer v. Manufacturers Bank*, 104 Cal. App. 3d 70, 76 (1980); *see also, Nini v. Culberg*, 183 Cal. App. 2d 657, 661-662 (1960); *Weir v. Snow*, 210 Cal. App. 2d 283, 294-295 (1962). Respondent's denial of the motion was an abuse of discretion because after Petitioner demonstrated a prima facie case for summary judgment, it was incumbent upon Plaintiffs to come forth with their own declarations concerning inquiry notice, and explain why their complaints to the State agencies did not commence the running of the statute of limitations. This they failed to do, thus dooming Plaintiffs' prospects for opposing Petitioner's motion. By Respondent ignoring this glaring deficiency, it was a manifest abuse of discretion. A Writ of Mandamus is the proper remedy to address it.

CONCLUSION

In accordance with the above, Petitioner respectfully requests that this Court grant its Petition for Writ of Mandamus and order the Respondent to grant Petitioners' Motion for Summary Judgment.

Dated this 22nd day of December, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Adam Garth*

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AFFIDAVIT OF VERIFICATION IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Adam Garth, Esq., being first duly sworn, deposes and states:

1. I am an attorney of record for Petitioner and make this Affidavit pursuant to Nev. R. App. P. 21(a)(5).
2. The facts and procedural history contained in the foregoing Petition for Writ of Mandamus and the following Memorandum of Points and Authorities are based upon my own personal knowledge as counsel for Petitioner. This Affidavit is not made by Petitioner personally because the salient issues involve procedural developments and legal analysis.
3. The contents of the foregoing Petition for Writ of Mandamus and the following Memorandum of Points and Authorities are true and based upon my personal knowledge, except as to those matters stated on information and belief.
4. All documents contained in the Petitioner's Appendix, filed herewith, are true and correct copies of the pleadings and documents they are represented to be in the Petitioner's Appendix and as cited herein.
5. This Petition complies with Nev. R. App. P. 21(d) and Nev. R. App. P.

32(c)(2).

FURTHER YOUR AFFIANT SAYETH NAUGHT.

ADAM GARTH, ESQ.

Subscribed and sworn before me
This 22nd day of December, 2020.

Notary Public, in and for said County and State

JODI LYNN MORALES
NOTARY PUBLIC
STATE OF NEVADA
APPOINTMENT NO. 20-5266-01
MY APPT. EXPIRES MARCH 13, 2024

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point type

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more, and contains 6,305 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 22nd day of December, 2020.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ *Adam Garth*

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CERTIFICATE OF MAILING

I hereby certify that on this 22nd day of December, 2020, I served the forego

PETITION FOR WRIT OF MANDAMUS REGARDING LACK OF EXPERT OR EVIDENTIARY SUPPORT IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT upon the following parties by placing a true and correct copy thereof in the United States Mail in Las Vegas, Nevada with first class postage fully prepaid:

The Honorable Jerry A. Wiese II
The Eighth Judicial District Court
Regional Justice Center
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Las Vegas, Nevada 89101
Respondent

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/s/ *Roya Rokni*

_____

An employee of LEWIS BRISBOIS BISGAARD & SMITH, LLP

Exhibit H

IN THE SUPREME COURT OF THE STATE OF NEVADA

VALLEY HEALTH SYSTEM, LLC (doing business as "Centennial Hills Hospital Medical Center"), a foreign limited liability company,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA ex rel. THE COUNTY OF CLARK, AND THE HONORABLE JUDGE JERRY A. WIESE II,

Respondent,

and

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

Real Parties In Interest,

and

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,

Additional Parties In Interest.

Electronically Filed
Mar 30 2021 03:33 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No. 82250

District Court No. A-19-788787-C

REAL PARTIES IN INTEREST'S, 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, ANSWER TO VALLEY HEALTH SYSTEMS, LLC's PETITION FOR WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

ESTATE OF REBECCA POWELL, through BRIAN POWELL, as Special Administrator; DARCI CREECY, individually and as Heir; TARYN CREECY, individually and as an Heir; ISAIAH KHOSROF, individually and as an Heir; LLOYD CREECY, individually, were represented in the District Court by Paul Padda Law PLLC and are represented in this Court by Paul Padda Law, PLLC.

None, other than the following attorneys/firms of record:

DATED: March 30, 2021

PAUL PADDA LAW, PLLC

/s/ Srilata R. Shah

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

STATE STATUTES

RULES AND REGULATIONS

MISCELLANEOUS

II. RELIEF REQUESTED

ESTATE OF REBECCA POWELL, through BRIAN POWELL, as Special Administrator; DARCI CREECY, individually and as Heir; TARYN CREECY, individually and as an Heir; ISAIAH KHOSROF, individually and as an Heir; and LLOYD CREECY, Real Parties in Interest ("Plaintiffs"), request this Court to deny the petition of writ of mandamus of VALLEY HEALTH SYSTEM, LLC (doing business as "Centennial Hills Hospital Medical Center") ["Centennial Hills"/ "Petitioner"] and allow this case to proceed on its merits through trial in the Eighth Judicial District Court of Clark County, Nevada.

The District Court's Order filed on October 29, 2020[1] denying Centennial Hill's Motion for Summary Judgment on the issue of the expiration of the Statute of Limitations correctly found and stated that "This Court is not to grant a Motion to Dismiss or a Motion for Summary Judgment on the issue of the violation of the Statute of Limitations, unless the facts and evidence irrefutably demonstrate that Plaintiff was put on inquiry notice more than a year prior to filing of the complaint. This Court does not find that such evidence is irrefutable, and there remains a genuine issue of material fact as to when the Plaintiffs were actually put on inquiry notice. Such issue is an issue of fact and appropriate for determination by the trier

[1] Notice of Entry of the Order was filed on November 2, 2020. App. 353.

of fact. Consequently, Summary Judgment would not be appropriate, and the Motion for Summary Judgment, and Joinders thereto must be denied." App. 355.[2]

In denying Centennial Hills Motion for Summary Judgment, the District Court evaluated the controlling caselaw regarding inquiry notice in a Medical Malpractice and Wrongful Death suit. Upon review, issues of fact were found to exist due to (1) the June 28, 2017 Certificate of Death issued by the State of Nevada Department of Health and Human Services ["HHS"] listing Ms. Powell's cause of death as "suicide" and (2) the February 5, 2018 HHS Report of Investigation stating that Ms. Powell's previously determined cause of death was incorrect.

No abuse of discretion or error of law was committed by the District Court in denying Centennial Hills Motion for Summary Judgment. Extraordinary relief is unwarranted as Centennial Hills has a plain, speedy and adequate remedy available in the ordinary course of law namely a trial and an appeal.

This matter is currently set for jury trial on May 23, 2022. Initial expert disclosures are to be made on or before June 18, 2021, rebuttal expert disclosures are due on August 27, 2021, and discovery is to be completed on or before October 28, 2021.

[2] App = Petitioner's Appendix

III. ROUTING STATEMENT

In its writ petition, Petitioner, Centennial Hills, requests that the Supreme Court retain original jurisdiction pursuant to NRAP 17(a)(12) allegedly raising a question of statewide public importance. Pet. at 1.

Plaintiffs disagree with Centennial Hills' assessment of its presented issues as satisfying the standards in NRAP 17(a)(12) as this writ is nothing more than Centennial Hills requesting this Court to substitute its own discretion and reverse the District Court's Order denying Centennial Hills' Motion for Summary Judgment.

Notwithstanding the foregoing, the issue of what constitutes inquiry notice has previously been decided by this Court in a professional negligence case for the purposes of establishing the statute of limitations as defined by NRS 41A.097 (2) and (c) and whether such notice may thereafter be tolled. *See* Massey v. Linton, 99 Nev. 723 (1983), Winn v. Sunrise Hospital and Medical Center, 128 Nev. 246, 252 (2012), Pope v. Gray, 760 P.2d 763 (Nev 1988) and Sunrise Mountainview Hosp., Inc. v. Eighth Judicial Dist. Court of State, 381 P.3d 667, (Nev. 2012). Centennial Hills fails to present any new issues requiring clarification for this Court's consideration. In denying the Motion for Summary Judgment, the District Court properly applied the controlling case law and reviewed verified documents presented by Plaintiffs subsequently finding issues of fact to exist. As this

Honorable Court recognizes, an appellate court is not an appropriate forum in which to resolve disputed questions of fact.

Centennial Hills comes to this Honorable Court for the extraordinary relief of a writ of mandamus simply because they do not agree with the analysis of the facts by the District Court in denying its Motion for Summary Judgment in which Centennial Hills alleged that Plaintiffs did not timely file their Complaint in compliance with NRS 41A.097 (2)(a) and (c).

This Petition should be denied as no question of statewide public importance is presented that needs clarification and an adequate remedy of law exists, specifically, trial on the merits and an appeal post trial.

IV. STATEMENT OF FACTS

This is a medical malpractice/wrongful death case where it is alleged that Ms. Rebecca Powell, age 42, died while in the care of Centennial Hills on account of negligence by the hospital and its medical personnel. Ms. Powell was the mother of three children, Isiah, Taryn and Darci. App. 199.

On May 3, 2017, Ms. Powell was found by EMS at her home. App. 222. Ms. Powell was unconscious, labored in her breathing, and had vomit on her face. App. 222. EMS provided emergency care and transported her to Centennial Hills where she was admitted. App. 222. Ms. Powell continued to improve during her admission. App. 223. However, on May 10, 2017, Ms. Powell complained of shortness of

breath, weakness, and a "drowning" feeling. App. 223. In response to these complaints, Defendant Dr. Shah ordered Ativan to be administered via an IV push. On May 11, 2017, Dr. Concio ordered two more doses of Ativan and ordered several tests, including a chest CT to be performed. App. 223. However, the CT could not be performed due to Ms. Powell's inability to remain still during the test. App. 223. Ms. Powell was returned to her room where she was supposed to be monitored by a camera. App. 224. Another dose of Ativan was ordered at 3:27 AM on May 11, 2017. Shortly thereafter, Ms. Powell suffered acute respiratory failure, resulting in her death on May 11, 2017. App. 224.

According to Plaintiff, Brian Powell, Ms. Powell's former husband, he could not visit with Ms. Powell while she was in the hospital because he was "turned away by the nurses." App. 267. However, he has stated under oath that, following Ms. Powell's death on May 11, 2017, "I did meet with Taryn, Isaiah and one of Rebecca's friends to speak with the doctor and risk manager after Rebecca's death, but they didn't provide any information." App. 268, 270. At this time, the family received no concrete facts or answers from Centennial Hills or its medical personnel as to the circumstances surrounding her death.

In search of further answers, Plaintiff Brian Powell filed a complaint with the HHS sometime before May 23, 2017 requesting that the agency investigate the care and services received by the Ms. Powell. App. 327. Plaintiff, Taryn Creecy, ordered

Ms. Powell's medical records on May 25, 2017, however, there were issues with delivery, and it is unclear exactly when Plaintiff received them. Additionally, Plaintiff Brian Powell filed a Complaint with the Nevada State Board of Nursing on June 11, 2017. App. 325.

On June 28, 2017, approximately six weeks after the death of Ms. Powell, Plaintiffs received the Certificate of Death, issued by HHS which stated Ms. Powell's cause of death as a **suicide** due to "Complications of Duloxetine (Cymbalta) Intoxication." App. 185.

By letter dated February 5, 2018, HHS notified Mr. Powell that it conducted an "investigation" of the facility and concluded that Centennial Hills committed "**violation(s) with rules and/or regulations."** App. 186. HHS's report noted several deficiencies in the medical care provided to Ms. Powell including, among other things, that Ms. Powell was exhibiting symptoms that should have triggered a higher level of care ("the physician should have been notified, the RRT activated, and the level of care upgraded"). App. 187. The HHS Report of Investigation stands in stark contrast to the Certificate of Death which inaccurately declared Ms. Powell's death a suicide. App. 185, 186-198. This was the first time that Plaintiffs learned the cause of death listed on Ms. Powell's Certificate of Death was inaccurate.

Within one year of the HHS investigative report dated February 5, 2018, Plaintiffs timely filed a Complaint in the Eighth Judicial District Court on February 4, 2019 in compliance with NRS 41 A.097(2)(a) and (c). App. 199.

V. PROCEDURAL HISTORY

On February 4, 2019, Plaintiffs, Estate of Rebecca Powell through Brian Powell, Special Administrator, children of Ms. Powell, Darci Creecy, Taryn Creecy and Isaiah Khosrof and father of Ms. Powell, Lloyd Creecy filed suit alleging negligence/medical malpractice, wrongful death pursuant to NRS 41.085, and negligent infliction of emotional distress against Defendants, Valley Health Systems (doing business as "Centennial Hills Hospital Medical Center"), Universal Health Services, Inc., Dr. Dionice S. Juliano, M.D., Dr. Conrado C.D. and Dr. Vishal S. Shah M.D. and Doe Defendants. In compliance with NRS 41A.071, the Complaint included an affidavit from Dr. Sami Hashim in support of their first cause of action alleging negligence/medical malpractice. App. 199.

The District Court matter is before Judge Jerry A. Weise, II ["Judge Wiese"] in Department 30.

On June 12, 2019, Defendants Dr. Concio and Dr. Juliano, filed a motion to dismiss pursuant to Nevada Rules of Civil Procedure ["NRCP"] 12(b)(5) alleging that Plaintiffs failed to timely file their Complaint within the statute of limitations pursuant to NRS 41A.097(2) and failed to meet the threshold requirements of NRS

41A.071 for the claims of negligent infliction of emotional distress and professional negligence. App. 228.

On June 13, 2019 Defendant Dr. Shah filed a joinder to Dr. Concio and Dr. Juliano's motion to dismiss. RP.App. 1.[3] On June 26, 2019, Defendant Centennial Hills also filed a joinder to Dr. Concio and Dr. Juliano's motion to dismiss. RP.App. 4.

On June 19, 2019, Defendant Centennial Hills filed a separate motion to dismiss pursuant to NRCP 12(b)(5) alleging Plaintiffs failed to timely file their Complaint within the statute of limitations time of one year pursuant to NRS 41A.097(2) and requested dismissal of Plaintiffs' Complaint. App. 238.

On August 13, 2019, Plaintiffs filed their opposition to the motion to dismiss filed by Defendants. App. 250.

On September 23, 2019, Defendant, Universal Health Services, Inc. joinders to Defendants Dr. Concio and Dr. Juliano's motion to dismiss. RP.App. 7.

On September 23, 2019, Defendant Universal Health Services, Inc. filed a joinder to motion to dismiss. RP.App. 7.

On September 25, 2019, counsel for Centennial Hills presented oral arguments to the District Court on their motion to dismiss. RP.App. 10.

[3] RP.App. = Real Parties In Interest's Appendix

After considering the papers on file and arguments of counsel, the District Court issued an Order dated February 6, 2021. Under the Findings of Fact and Conclusions of Law, Judge Wiese addressed the statute of limitations arguments noting that **the Supreme Court has been clear that the standard of when a claimant "knew or reasonably should have known" is generally an issue of fact for a jury to decide.** However, the District Court also noted that in this case, it does appear that the Complaint was not filed until a substantial period after the date of Rebecca Powell's death. Therefore, Judge Wiese advised that Defendants may revisit the statute of limitations issue in the future through a motion for summary judgment at which point the Court would reconsider the issue at that time. RP.App. 27 at 18:4-13.

Judge Wiese denied Centennial Hills' motion to dismiss Plaintiffs' Complaint based upon NRS 41A.097(2) and NRCP 12(b)(5). RP.App. 28 at 19:25-20:2.

In an Order dated February 6, 2021, the Court denied Defendants Dr. Concio and Dr. Juliano's motion to dismiss Plaintiffs' Complaint, and subsequent joinders. RP.App. 422. In a companion Order dated February 6, 2021, the Court also denied Centennial Hills' motion to dismiss Plaintiffs' Complaint, and subsequent joinders to that motion. RP.App. 429.

Dr. Concio, Dr. Juliano and Dr. Shah filed their answer on October 2, 2019. RP.App. 39.

On December 5, 2019, the parties stipulated to dismiss Defendant, Universal Health Services from the action without prejudice. App. 263.

On April 15, 2020, Centennial Hills filed its Answer to Plaintiffs Complaint. RP.App. 52.

In July of 2020, Centennial Hills served 86 requests for production of documents including 16 additional special requests to Plaintiffs. Discovery requests also included requests for responses to interrogatories to Plaintiffs. Responses to the discovery were provided in August and September of 2020 by Plaintiffs.

On September 2, 2020, Centennial Hills and Universal Health Services filed a Motion for Summary Judgment based upon the expiration of the Statute of Limitations contained in NRS 41A.097. App. 2. Under the statement of undisputed facts, Centennial Hills sets out the several motions to dismiss filed by Centennial Hills, co-defendants, joinders and the denial of the motions by the Court after hearing oral argument. App. 4-6. On September 3, 2020, co-defendants Dr. Concio, Dr. Shah, and Dr. Juliano joined Centennial Hills' Motion for Summary Judgment. App. 167.

On September 16, 2020 Plaintiffs filed their opposition to Centennial Hills' Motion for Summary Judgment. App.171. The opposition detailed the standard of review applicable when dealing with questions of fact and cited the seminal cases that discuss inquiry notice. Plaintiffs also pointed out that Centennial Hills had

previously raised the identical arguments in their prior motion to dismiss and joined co-defendants motion also seeking a dismissal based on the expiration of the statute of limitations. Because the prior motions to dismiss were denied by the Court after hearing oral arguments from counsel, Plaintiffs also requested reasonable fees and costs for the violation of EDCR 2.24 which disallows the filing of the same motion without seeking leave of Court. App. 171.

On October 21, 2020, Centennial Hills filed its reply to Plaintiffs opposition. App. 272. On October 21, 2020, co-defendants Dr. Concio, Dr. Shah, and Dr. Juliano filed a joinder to Centennial Hills' reply. App. 346.

In an Order dated October 29, 2020, Judge Wiese denied several motions and joinders including Centennial Hills' Motion for Summary Judgment, the subject of the instant writ.[4] App. 355. A Notice of Entry of the Order was filed on November 2, 2020. App. 353.

On November 5, 2020, Centennial Hills filed a motion seeking a stay of the lower court proceedings pending a resolution of an appellate issue pursuant to NRAP 8(a)(1)(A). RP.App. 63.

On November 19, 2020, Plaintiffs filed an opposition to Centennial Hills motion requesting a stay. RP.App. 404.

[4] The October 29, 2020 Order Granted Defendant Dr. Juliano's Motion for Summary Judgment. Dr. Juliano was dismissed from the action without prejudice.

On December 17, 2020, the District Court denied Centennial Hills Motion for Stay. In denying the stay the District Court again reiterated its reasoning for denying Centennial's Motion for Summary Judgment by stating that "the Court cannot find that the Defendants are likely to prevail on the merits, as this Court previously found, and continues to believe, that the Death Certificate identifying Ms. Powell's cause of death as a "suicide," may have tolled the statute of limitations, in that such a conclusion or determination by the Medical Examiner, would clearly not suggest "negligence" on the part of any medical care provider. Although the Defendants suggest that the Plaintiffs possessed inquiry notice much earlier, the Court could not find that the families questioning of the cause of death equated with inquiry notice of negligence. Consequently, this Court concluded that when the Plaintiffs knew or should have known, of the alleged negligence of the Defendants, was an issue of fact which overcame the Defendants' Motion for Summary Judgment. Consequently, the Court cannot find that there is a likelihood of success on the merits." RP.App. 418.

VI. Order Denying Centennial Hills Motion for Summary Judgment

Pursuant to administrative order 20-01 and subsequent administrative orders, Honorable Jerry Wiese decided Centennial Hills Motion for Summary Judgment on the papers.

In an Order filed October 29, 2020, Judge Wiese properly held that **"This Court is not to grant a Motion to Dismiss or a Motion for Summary Judgment**

on the issue of a violation of the Statute of Limitations, unless the facts and evidence irrefutably demonstrate that Plaintiff was put on inquiry notice more than one year prior to the filing of the complaint. This Court does not find that such evidence is irrefutable, and that there remains a genuine issue of material fact as to when the Plaintiffs were actually put on inquiry notice. Such issue is an issue of fact, appropriate for determination by the trier of fact. Consequently, Summary Judgment would not be appropriate, and the Motion for Summary Judgment, and the Joinders thereto, must be denied." (Emphasis added.) App. 355.

In their writ, Centennial Hills incorrectly represents to this Court that the District Court based its decision on counsel's mere representations rather than evidence. In fact, Plaintiffs provided several exhibits accompanying their September 16, 2020 Opposition to Centennial Hills' Motion for Summary Judgment including (1) a copy of the Certificate of Death issued by HHS dated June 28, 2017 (App. 185); (2) the 16-page HHS investigation report citing violations by Centennial Hills dated February 5, 2018 (App. 186-198); (3) Plaintiffs' verified Complaint filed February 4, 2019 that included the 7-page notarized affidavit from Dr. Sami Hashim (App. 199-227); and (4) verified interrogatory responses of Plaintiff Brian Powell, Special Administrator (App. 267-270).

Centennial Hills requests a *vacatur* of the District Court's October 29, 2020 Order merely because the District Court did not agree with their contention that Plaintiff Taryn Creecy's request for medical records and Plaintiff Brian Powell's initiation of complaints with state agencies equated to inquiry notice.

Petitioner's writ should be denied as it seeks extraordinary interlocutory relief that is not mandated when a plain, speedy and adequate remedy at law is available. The writ also fails because the District Court committed no error, nor abused its discretion in denying Petitioner's Motion for Summary Judgment.

Contrary to Petitioner's statement, the District Court properly denied Petitioner's Motion for Summary Judgment, a determination of the case on its merits is preferred, expense of litigating a case is not a determinative factor in accepting a writ of petition.

This Answer is made and based upon the Affidavit following this Answer, Petitioner's Appendix, Real Parties In Interests' Appendix and the Memorandum of Points and Authorities filed herewith.

VII. BASIS FOR OPPOSITION AND DENIAL OF THE PETITION FOR WRIT OF MANDAMUS

The instant writ for petition seeks a reversal of the lower court's ruling denying Petitioner's Motion for Summary Judgment, which would result in the dismissal of Plaintiffs' negligence/medical malpractice and wrongful death

complaint. Plaintiffs urge this Court to deny Centennial Hills writ petition as (1) the petition improperly requests extraordinary interlocutory relief when there is an adequate remedy at law available, (2) fails to demonstrate an abuse of discretion or clear error committed by the District Court, and (3) fails to present a question of statewide public importance needing clarification.

VIII. STANDARD OF REVIEW FOR WRIT OF MANDAMUS

A writ of mandamus is available "to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *See* Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Where there is no plain, speedy, and adequate remedy in the ordinary course of law, extraordinary relief **may** be available. Id.

Importantly, writ petitions are not appropriate to resolve outstanding factual issues. *See* Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981). ("As we have repeatedly noted, an appellate court is not an appropriate forum in which to resolve disputed questions of fact."). Writ relief is typically available only when there is no plain, speedy, and adequate remedy in the ordinary course of law. *See* NRS 34.170; NRS 34.330; Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). And, generally, an appeal is an adequate legal remedy precluding writ relief. *See* Pan v. Eighth Judicial Dist. Court, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). Even if the appellate process

would be more costly and time consuming than a mandamus proceeding, it is still an adequate remedy. *See* County of Washoe v. City of Reno, 77 Nev. 152, 156, 360 P.2d 602 (1961). In that regard, this Court avoids piecemeal appellate review and Seeks to review possible errors only *after* a final judgment has been entered. *See* Moore v. Eighth Judicial Dist. Court, 96 Nev. 415, 417, 610 P.2d 188, 189 (1980). Further, it is within the complete discretion of this Court to determine whether a petition will be considered. *See* Smith v. Eighth Judicial Dist. Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). The Petitioner carries the burden of demonstrating that extraordinary relief is warranted. *See* Pan v. Eighth Judicial Dist. Court, 120 Nev. 222, 228, 88 P.3d 840, 844

As a general rule, "judicial economy and sound judicial administration militate against the utilization of mandamus petitions to review orders denying motions to dismiss and motions for summary judgment." *See* State ex rel. Dep't of Transp. v. Thompson, 99 Nev. 358, 362, 662 P.2d 1338, 1340 (1983), as modified by State v. Eighth Judicial Dist. Court, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002).

A. Petitioner Is Not Entitled To The Extraordinary Interlocutory Relief Requested In The Petition For Writ Of Mandamus As An Adequate Remedy At Law Exists

This Court has often held that it will *rarely* grant emergency or extraordinary interlocutory relief, particularly when the issues are factually and legally disputed, and when there is no need to create an emergency remedy when a sufficient remedy

exists at law. *See* e.g., Child v. Lomax, 124 Nev. 600, 604-605, 188 P.3d 1103, 1106-1107 (2008) (holding that "Mandamus is an extraordinary remedy, generally available only when a petitioner lacks a plain, speedy, and adequate alternative legal remedy").

A writ of mandamus is available "to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *See* Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Where there is no plain, speedy, and adequate remedy in the ordinary course of law, extraordinary relief may be available. Id. Writ relief is typically available only when there is no plain, speedy, and adequate remedy in the ordinary course of law. *See* NRS 34.170; NRS 34.330; Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). And, generally, **an appeal is an adequate legal remedy precluding writ relief**. *See* Pan v. Eighth Judicial Dist. Court, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). Even if the appellate process would be more costly and time consuming than a mandamus proceeding, it is still an adequate remedy. *See* County of Washoe v. City of Reno, 77 Nev. 152, 156, 360 P.2d 602 (1961).

The interlocutory relief requested should be denied as Petitioner has an adequate remedy at law available, namely a trial currently set for May 23, 2022 and a post-trial appeal.

B. Petitioner Is Not Entitled To The Extraordinary Interlocutory Relief Requested In The Petition For Writ Of Mandamus As There is No Showing of Abuse of Discretion Or Clear Error By The District Court

Petitioner argues that Judge Wiese manifestly abused his discretion when he denied their Motion for Summary Judgment, therefore this Court should hear this writ. What Petitioner is requesting this Court to do is exercise its discretion to hear a writ *every time* a District Court denies a Motion for Summary Judgment. Such a request is absurd. Request is also made to hear the writ on the basis that the District Court's clear error of law will cause Petitioner to proceed through extensive discovery, and the expense associated with trial on a case which was filed well beyond the expiration of the statute of limitations. Here, Petitioner wants this Court to adopt its own theories regarding when Plaintiffs were placed on inquiry notice and dismiss the case which involved the wrongful death of Rebecca Powell, a 42-year-old woman.

The granting of the instant writ petition will result in the dismissal of the Plaintiffs' Complaint. A writ of mandamus that seeks a dismissal of the complaint is an extraordinary request for it essentially asks this Court to replace the District Court's discretion for its own, even though the District Court is the trier of fact and is closer to the evidence, witnesses, and arguments in the case. In this matter, there

is no justification for this Court to veer from its long-held disinclination to grant a writ of mandamus on a motion for summary judgment.

The District Court below prepared a detailed Order setting forth the factual basis for denying Centennial Hills' Motion for Summary Judgment. Now Petitioner attempts to use this Court as a venue to reargue its Motion for Summary Judgement. In the District Court, Plaintiffs clearly presented genuine issues of material facts in opposition to Petitioner's Motion for Summary Judgment. The District Court properly weighed the facts and denied Centennial Hills' Motion. This writ petition attempts to rebut the factual recitations contained in the October 29, 2020 Order, which is contrary to the purpose of a writ petition. Centennial Hills improperly asks this Court to reweigh the facts already determined by the District Court, which this Court *cannot do*. *See* Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 604, 637 P.2d at 536 (1981). ("As we have repeatedly noted, an appellate court is not an appropriate forum in which to resolve disputed questions of fact."); Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc., 128 Nev. 289, 299, 279 P.3d 166, 172–173 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance.") (citing Zugel v. Miller, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983)); 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE, § 3937.1 (2d ed. 1996) ("Appellate procedure is not geared to factfinding."); *See also* Anderson v. Bessemer, 470 U.S.

564, 575, 105 S.Ct. 1504 (1985) (explaining that a trial court is better suited as an original finder of fact because of the trial judge's superior position to make determinations of credibility and experience in making determinations of fact).

Centennial Hills argues at length that the Court abused its discretion by rearguing the points presented in its Motion for Summary Judgment. Centennial Hills simply cannot overcome the factual issues outlined by the District Court, particularly in the context of a writ petition. *See* Law Offices of Barry Levinson, P.C. v. Milko, 124 Nev. 355, 365, 184 P.3d 378, 385 (2008) ("[I]t is not the role of this court to reweigh the evidence."); NEC Corp. v. Benbow, 105 Nev. 287, 290, 774 P.2d 1033, 1035 (1989) ("Neither the credibility of the witnesses nor the weight of the evidence may be considered" on appeal.). As such, this Court should decline Petitioner's invitation to reweigh factual issues that have already been determined by the District Court. Therefore, this Court should reject Centennial Hills' petition on the grounds that it attempts to have this Court reweigh facts, while ignoring the District Court's factual recitations.

More importantly there is no irrefutable evidence in this case showing that Plaintiffs were on inquiry notice more than a year prior to the filing the complaint. Therefore, the determination does not move to a legal question but instead remains an issue of fact for a jury to decide. Petitioner is simply seeking to deprive Plaintiffs of a trial by a jury and a determination of the case on its merits.

C. Petitioner Is Not Entitled To The Extraordinary Interlocutory Relief Requested In The Petition For Writ Of Mandamus As There Is No Issue of Statewide Importance Requiring Clarification

Plaintiffs urge this Court to exercise its discretion and deny Centennial Hills' writ petition as they fail to present a question of statewide public importance that needs clarification.

NRS 41A.097 provides in pertinent part:

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

Petitioner incorrectly poses an issue for the Court to decide which is nothing more than a red herring as the facts of this case do not need any clarification. The standard for inquiry notice has been clarified by this Court in several medical malpractice cases. Centennial Hills simply does not present any new issues for this Court to entertain.

In Sunrise Mountainview Hosp., Inc. v. Eighth Judicial Dist. Court of State, 381 P.3d 667, (Nev. 2012), this Court denied Petitioner's writ of mandamus petition which challenged a district court order denying a motion to dismiss in a medical malpractice case. Petitioner moved to dismiss the Plaintiff's complaint on the ground that Plaintiff's second amended complaint was time-barred by NRS 41A.097(2). Specifically, Sunrise contended that because Plaintiff "discovered" his "injury" at the time of his February 2010 cancer diagnosis, his June 2011 claim was barred by NRS 41A.097(2)'s 1–year discovery period. Sunrise argued that the district court was compelled to dismiss the claims against it in the second amended complaint because, from the face of the complaint, the claims were filed more than one year after Plaintiff knew or should have known of his injury.

This Courts in denying the writ petition in Sunrise, stated that in Winn v. Sunrise Hospital & Medical Center, 128 Nev. ——, ——, 277 P.3d 458, 462 (2012), this Court considered what it means to "discover" one's "injury" for purposes of triggering NRS 41A.097(2)'s 1–year discovery period. In doing so, this Court reiterated that "a plaintiff 'discovers' his injury 'when he knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on *inquiry notice* **of his cause of action**.' " Id. (quoting *Massey v. Litton,* 99 Nev. 723, 728, 669 P.2d 248, 252 (1983) Emphasis added.). In other words, for a plaintiff to "discover" his injury, he must not only realize that he has been harmed,

but he must also "ha[ve] facts before him that would have led an ordinarily prudent person to investigate further into whether [his] injury may have been caused by someone's negligence." Id. at ____, 669 P.2d at 462.

This Court stressed in Winn that the triggering date for the 1–year discovery period is generally a question of fact, and that this date may be determined as a matter of law "[o]nly when the evidence irrefutably demonstrates that a plaintiff was put on inquiry notice of a cause of action." Id. at ____, 277 P.3d at 466. Thus, in Winn, this Court concluded that the district court had improperly determined the discovery date as a matter of law when the only evidence supporting the determination was that the plaintiff had been informed of an unexpectedly bad surgery result. Id. at ____, 277 P.3d at 463.

In denying the writ petition in Sunrise, this Court stated that nothing on the face of Plaintiff's second amended complaint supports petitioner's argument that Plaintiff was put on inquiry notice as a matter of law merely by learning of his cancer diagnosis. Although the complaint states that Plaintiff was diagnosed with colon cancer in February 2010, the physical harm is but one step of the analysis, as there remains to consider the question of when Plaintiff could attribute this diagnosis to his doctor's negligence. *See* Massey v. Litton, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983) The trier of fact must determine when Plaintiff knew or should have known of facts giving rise to his claims. *See* Bemis v. Estate of Bemis, 114 Nev.

1021, 1026, 967 P.2d 437, 441 (1998). The district court was, therefore, not obligated to dismiss the complaint pursuant to clear authority under a statute or rule. Accordingly, this Court concluded that intervention by way of extraordinary relief was not warranted, and the petition was denied.

The medical providers of this state are well protected by NRS 41A.097(2). The District Court in denying Petitioner's Motion for Summary Judgment did not violate any law but properly determined that irrefutable evidence was not presented by Centennial Hills that warranted a granting of their Motion for Summary Judgment.

D. The District Court Properly Denied Petitioner's Motion for Summary Judgment and Found Genuine Issues of Fact

As this Court is aware in evaluating a motion for summary judgment, pleadings and documentary evidence must be construed in the light which is most favorable to the party against whom the motion for summary judgment is directed. *See* Mullis v. Nevada National Bank, 98 Nev. 510, 512 (1982). "Litigants are not to be deprived of a trial on the merits if there is the slightest doubt as to the operative facts." *See* Perez v. Las Vegas Medical Center, 107 Nev. 1, 4 (1991). The party seeking summary judgment bears the initial burden of proof to show there are no genuine issues of material fact. *See* Cuzze v. University and Community College System of Nevada, 123 Nev. 598, 602 (2007). With respect to discovery-based

causes of action, such as medical malpractice claims, NRS 41A.097 provides that a cause of action against a health care provider may not be commenced more than 3-years after the date of injury or 1 year after the plaintiff discovers, or through the use of reasonable diligence, should have discovered the injury - whichever occurs first. A person is put on inquiry notice of an injury, triggering the 1-year statute, when he or she should have known of facts that would lead an ordinarily prudent person to investigate the matter further." *See* Winn v. Sunrise Hospital & Medical Center, 129 Nev. 246, 252 (2012). Although the 1-year accrual date for NRS 41A.097 is normally a question for the trier of fact, a district court may decide the accrual date as a matter of law but only when the evidence is irrefutable. Id.

In this instance, the District Court was presented with evidence and facts as to when the Plaintiffs were placed on inquiry notice. The District Court repeatedly denied motions filed by counsel from several Defendants challenging the filing of the Plaintiffs Complaint within the statute of limitations. The District Court heard oral arguments from counsel on this particular issue and denied the motions to dismiss and Motion for Summary Judgment based on the facts in this case. The facts considered included but are not limited to the Plaintiffs initially being informed by HHS six weeks after the death of Ms. Powell that the cause of death was "suicide." It was not until further investigation was requested by Ms. Powell's ex-husband into concerns about Centennial Hills did HHS investigate the medical facility in detail

and find several violations committed by Centennial Hills, including negligence resulting in the wrongful death of Ms. Powell.

Centennial Hills alleges that Plaintiffs did not offer any admissible evidence in opposition to the Motion for Summary Judgment. This is plainly not true. The District Court reviewed the State of Nevada Death Certificate, a self-authenticating document, listing Ms. Powell's cause of death as a "suicide." The document bears an attestation as to its authenticity and is signed by both the Registrar of Vital Statistics and Dr. Jennifer N. Corneal. App. 185. In evaluating this important item of evidence, the District Court sagely concluded that "the fact that the family was notified shortly after the decedent's death that the cause of death was determined to be a 'suicide,' causes this Court some doubt or concern about what the family knew at that time period." App. 358-359. In addition to the Death Certificate, Plaintiffs also submitted the sworn interrogatory answers of Plaintiff Brian Powell, Special Administrator of Ms. Powell's Estate, who testified that he could not visit Ms. Powell in the hospital because he was "turned away" and that the risk manager "didn't provide any information" pertaining to Ms. Powell's death. App. 267. Plaintiffs also included the notarized seven-page affidavit of Dr. Sami Hashim attached to the verified Complaint in support of the medical malpractice cause of action. App. 221. Finally, Plaintiffs submitted the sixteen-page investigative report

from HHS dated February 5, 2018 that contradicted its prior Certificate of Death which incorrectly stated the cause of death as suicide. App. 186-198.

Although Centennial Hills bore the burden of proof as the party seeking summary judgment, it provided no persuasive evidence to support its arguments of inquiry notice apart from two declarations from individuals named Gina Arroyo and Melanie Thompson, each claiming to have been involved with merely providing medical records to Ms. Powell's family. Notably, neither declarant provided definitive statements as to when those records were received by the family.

Centennial Hills now urges this Court to reverse the District Court ruling and grant its Motion for Summary Judgment on the theory that a mere request for medical records, or filing of complaints with state agencies by Plaintiffs, suggests that they somehow knew, or suspected negligence was involved in the death of their loved one. These arguments were made before the District Court and rejected. The District Court denied Centennial Hills' Motion for Summary Judgment because it failed to provide *irrefutable proof* that Plaintiffs received inquiry notice prior to February 5, 2018.

In Massey v. Linton, 99 Nev. 723 (1983), the Nevada Supreme Court held that a Plaintiff "discovers" his injury "when he knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on ***inquiry notice of his cause of action***." (Emphasis added.) The time does not begin when

plaintiff discovers the precise facts pertaining to his legal theory but when there is a general belief that negligence may have caused the injury. Id. at 728. "While difficult to define in concrete terms, a person is put on "inquiry notice" when he or she should have known of facts that 'would lead an ordinary prudent person to investigate the matter further." *See* Winn v. Sunrise Hospital and Medical Center, 128 Nev. 246, 252 (2012) (*quoting* Black's Law Dictionary 1165 (9th ed. 2009). **The Nevada Supreme Court has held that the accrual date for NRS 41A.097's one-year discovery period ordinarily presents a question of fact to be decided by the jury.** *See* Winn, 128 Nev. at 258. "Only when the evidence irrefutably demonstrates that a plaintiff was put on inquiry notice of a cause of action should the district court determine this discovery date as a matter of law." Id.

In the Order filed October 29, 2020, Judge Wiese properly held that, "This Court is not to grant a Motion to Dismiss or a Motion for Summary Judgment on the issue of a violation of the Statute of Limitations, unless the facts and evidence irrefutably demonstrate that Plaintiff was put on inquiry notice more than one year prior to the filing of the complaint. This Court does not find that such evidence is irrefutable, and that there remains a genuine issue of material fact as to when the Plaintiffs were actually put on inquiry notice. Such issue is an issue of fact, appropriate for determination by the trier of fact. Consequently, Summary Judgment

would not be appropriate, and the Motion for Summary Judgment, and the Joinders thereto, must be denied." App. 359.

The District Court properly found that Centennial Hills failed to present irrefutable facts to demonstrate that the Plaintiffs were placed on inquiry notice of the cause of action prior to February 5, 2018.

IX. CONCLUSION

Petitioners have not demonstrated that this matter deserves the extraordinary review and relief from this Court. Therefore, based on the record and the arguments presented, Real Parties in Interest respectfully ask this Court to deny the Petition for Writ of Mandamus.

DATED: March 30, 2021

PAUL PADDA LAW, PLLC

/s/ Srilata R. Shah

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

X. ATTORNEY'S CERTIFICATE PER NRAP 28.2

1. I hereby certify that this response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type of style requirements of NRAP 32(a)(6) because:

   This response has been prepared in a proportionally spaced typeface using Times New Roman, 14 point as provided in Microsoft Word.

2. I further certify that this response complies with the page- or type-volume limitations of NRAP 32(a)(7)(A)(1) because it is either:

   Proportionately spaced, has a typeface of 14 points or more, and contains 6693 words; and does not exceed 30 pages, exclusive of the Verification and Certificate of Service.

3. Finally, I recognize that under NRAP 32, I am responsible for timely filing this response and that the Supreme Court of Nevada may impose sanctions for failing to timely file a response. I therefore certify that the information provided in this response is true and complete to the best of my knowledge, information, and belief.

DATED: March 30, 2021.

/s/ Srilata R. Shah
Attorney for Real Parties in Interest

XI. CERTIFICATE OF SERVICE

Pursuant to NRAP 21 this REAL PARTIES IN INTEREST'S, 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, ANSWER TO VALLEY HEALTH SYSTEMS, LLC's PETITION FOR WRIT OF MANDAMUS is being served by the following means:

Electronic notification will be sent to the following:

S. Vogel, Esq.
Paul S. Padda, Esq.
John Cotton, Esq.

Notification by traditional means (U.S. Mail) will be sent to the following:

Adam Garth, Esq.
Brad Shipley, Esq.
Lewis Brisbois Bisgaard & Smith LLP
6385 South Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118

DATED: March 30, 2021.

/s/ Jennifer C. Greening
Employee of Paul Padda Law, PLLC

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

ESTATE OF ALINA BADOI, LIVIU RADU CHISIU, Plaintiffs, vs. DIGNITY HEALTH, JOON YOUNG KIM, M.D., U.S. ANESTHESIA PARTNERS, INC., Defendants.	)	CASE NO. A-18-775572-C DEPT. NO. II **Transcript of Proceedings**

BEFORE THE HONORABLE CARLI KIERNY, DISTRICT COURT JUDGE

ALL PENDING MOTIONS

WEDNESDAY, FEBRUARY 2, 2022

APPEARANCES (ALL VIA VIDEO CONFERENCE):

For the Plaintiffs: KENDELEE LEASCHER WORKS, ESQ.
R. TODD TERRY, ESQ.

For the Defendants: TYSON J. DOBBS, ESQ.
ADAM A. SCHNEIDER, ESQ.

RECORDED BY: JESSICA KIRKPATRICK, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording; transcript produced by transcription service.

WEDNESDAY, FEBRUARY 2, 2022, AT 10:21 A.M.

THE COURT: Page 4. Sorry.

MS. WORKS: Good morning, Your Honor. Kendelee Works and Todd Terry on behalf of plaintiffs.

THE COURT: Hello, Mr. -- Ms. Works and Mr. Terry. Who do we have for defendants?

MR. DOBBS: Your Honor, Tyson Dobbs for Dignity Health.

THE COURT: Okay.

MR. SCHNEIDER: Morning, Your Honor. Adam Schneider, bar number 10216, for Dr. Kim and U.S. Anesthesia Partners.

THE COURT: Okay. We are on -- we've gotten sort of halfway through this argument. And, then, ultimately, we broke for supplemental briefing, which I've read through. And there were a couple of new issues brought up. And, so, at this point, I was going to turn it over to either Mr. Terry or Ms. Works, if they wanted to highlight anything in their supplemental briefing.

It looks like there was a different claim regarding just basically more elaboration based on the concealment of records, which I will consider because that was something that was brought up initially. If that's something that they -- if you want to add it on to that.

And there's also a request for NRCP 56(d) relief.

So, those are the two things that were brought up that really weren't argued. So, whoever is arguing for plaintiff, did you want to start there?

MS. WORKS: Sure, Your Honor. And I think I was actually expecting to go second. And what I intended to highlight, really, that I think the defense doesn't want to talk about a whole lot. I know we're here to discuss *Valley*. But I think we need to go back to the beginning, Judge, --

THE COURT: Okay.

MS. WORKS: -- which is: What are we here for? It's a Motion for Summary Judgment. And that standard is one that's reviewed de novo on appeal.

But the main crux of that standard is that the plaintiff gets the benefit of all reasonable, factual inferences. And I think that that's what's forgotten in the defense briefing. And the reason is very poignant, that the plaintiff gets the benefit of all reasonable, factual inferences. Because injured parties, as a matter of public policy, have a right to be heard by a jury where there's a cognizable claim for relief. And if it's a tie or even a close call, then plaintiff wins on a Motion for Summary Judgment.

And we would urge Your Honor to find that it's not

even a close call. This isn't a case like *Valley*. But even if the Court finds it is a close call, that means it's an issue of fact for the jury, unless, under *Valley*, there is irrefutable evidence that the plaintiff was on notice of a potential claim more than a year before the lawsuit was filed. And, here, the lawsuit was filed one year and one day after Alina died. So, there is no irrefutable evidence here, Your Honor.

And the defense argument that we can't proffer an Affidavit from our client within the supplemental briefing is absolutely incorrect. Of course, on a Motion for Summary Judgment, we can proofer an Affidavit, a sworn piece of testimony from our client, because that's exactly the point of summary judgment. That's in the rule. And the Affidavit from Leo was proffered this -- in response to this supplemental -- or, within the supplemental briefing, in response to arguments made by defense counsel at the last hearing, mischaracterizing his earlier testimony.

And, by the way, let's not forget, Your Honor, that even if the Affidavit is inconsistent with the earlier testimony, that means there's refutable evidence. And that is prime fodder for cross-examination at the time of trial. And I'm sure that the fine defense counsel on the other side will make a lot of hate with that at the time of trial if Leo's testimony at deposition versus his Affidavit

versus trial proves to be inconsistent.

I would urge the Court to look at the Affidavit and find that it's actually entirely consistent. Not knowing exactly what happened and having questions is not inconsistent with his Affidavit testimony. And he shouldn't be held higher to a -- to a higher standard, even in his -- than Alina's physicians, who all said that they didn't know what was happening. But we can certainly put our client on the stand at the time of trial. That just means, Your Honor, that there are genuine issues of material fact.

And, again, if it's a close call, plaintiff wins. Here, unlike *Valley*, and if we want to get into the *Valley Hospital* comparison, the defense does an artful job of spinning the facts there to make it sound a lot like this case.

But, the reality is, Your Honor, in the *Valley Health* -- the new case, which is an unpublished opinion but, nevertheless, if that's the one we're here to talk about and that's what we're looking at, Mr. Powell, who was the administrator of the estate and the husband's decedent in the *Valley* case, was a nurse. He filed a complaint with the Nursing Board one and a half years before he ever filed the Complaint with the District Court, the one that was ultimately the product of dismissal or summary judgment.

So, we can't hold Leo in this case to the same standard as the nurse administrator in *Powell*. Particularly when he, over a year and a half before he filed the Complaint in *Valley*, had to go through the process of determining whether or not there was potential negligence on the part of the nurses, whether there was potential wrongful conduct, and whether or not it gave rise to a claim for damages and a claim for malpractice. And that was the evidence that was presented before the Board.

And while the defense argues, hey, look, the Court in *Valley* said that the decedent's estate may have been on notice even earlier than that Complaint, that's -- and, so, here, that's what the Court has to find, that Leo was on notice, despite the fact that there was no administrative complaint ever filed. There was no determination by Leo, nor could he make one, given that he's not a medical professional, that the defendants' negligence was the cause of his wife's death.

He requested records prior to her death. But she then had a period of recovery. So, you can't hold him to a standard when the doctors -- under *Pope*, it would be tolling. Because the doctors are telling him, during the course of her treatment, they don't know what the cause of not her death -- because, remember, she's still alive, what the cause of the issues that she's experiencing early on

is. So, even under *Pope*, you have a tolling for that period of days. That gets us past the one day that defense argues we were late in filing the Complaint.

But, nevertheless, the inquiry notice that the Court said in a footnote in an unpublished opinion in *Valley*, that's not the case here. And if it was -- if it was arguably inquiry notice, then it was tolled based on *Pope* because of what the doctors were telling Leo about Alina's condition at the time.

So, you don't have irrefutable evidence. You can't hold Leo to the same standard as the nurse in *Powell*. There was no Complaint filed. That was -- that was what the Court -- the Supreme Court in *Powell* said, was the irrefutable evidence, the filing of the first complaint with the Medical Board. The Court noted in a footnote that it may have been inquiry notice earlier. But that's not irrefutable evidence. And that, Your Honor, is why the Supreme Court didn't say that there was irrefutable evidence that the plaintiff, Mr. Powell, was on inquiry notice prior to the date of the filing of the Complaint. The Supreme Court could have said that in the *Valley* case but it didn't do that.

And this Court can't say that now, that there was inquiry notice, more than a year prior to the filing of the Complaint, because there's not irrefutable evidence. There

are facts that can go either way. That is refutable evidence. Those are issues of fact for a jury. And, so, summary judgment is entirely inappropriate here.

With respect to Your Honor's questions as far as the concealment and the tolling, you -- although there was a request for the records earlier on, the code note regarding her death didn't even happen until two or three days after her death. And, so, when Leo requests the records the first time, it's not necessarily because he knows that something is absolutely wrong or he knows there's medical malpractice, particularly when Alina's doctors are telling him that they don't know what the case is. That whether that's intentional concealment or not, perhaps it is, perhaps it isn't, that's an issue that we can shake out through additional discovery, which was part of the NRCP 56 request and that we can shake out at the time of trial.

Whether them telling -- you know, whether the doctor is saying, hey, we don't know what the cause is, we don't know what the issue is, whether that's willful blindness, whether it's intentional concealment, or they just don't know, that's an issue of fact for trial. But if the doctors are telling Leo that at the time, we can't hold a plaintiff, an injured plaintiff, who is trying to navigate the waters of caring for his first child and

possibly losing his life partner and the mother of his child, we can't hold him to a higher standard than the doctors. And the doctors are telling him they don't know what the issue is.

And the defense counsel on this side, I'm certain, I probably heard him make that argument multiple times, is that just because there is an adverse outcome doesn't mean there's negligence. Just because a patient isn't getting better doesn't necessarily mean there's negligence. So, -- and when the defense are going to proffer that same argument, I'm certain, at the time of trial in this case, we can't hold Leo to a different standard. We can't, as a matter of public policy, hold plaintiffs to a different standard.

If Your Honor finds for the defendants on this Motion, what we're effectively saying to litigants all down the road and to Leo, is that: Hey, you should know more than the doctors. You should automatically assume every time there's an adverse outcome or a patient isn't recovering the way that one was expected to recover, that there is medical malpractice. That's not a public policy this Court -- or, even, I would think defense counsel wants to send to future litigants down the road.

And, so, you can't have inquiry notice of a wrongful death action based on malpractice before the death

even occurs, Your Honor. And that's what the defense is asking you to find here. You can't have the records related to the death and the cause of death before the death happens. So, simply because there was a request for medical records earlier on and the plaintiff was potentially concerned, prior to Alina actually having a period of recovery, does not mean that that request for medical records should trigger the statute of limitations.

There is a dispute, Your Honor, with respect to when -- again, another factual dispute that can be fleshed out through further discovery and at the time of trial. There is a factual dispute with respect to -- with respect to when the records were actually requested and the date on which they were received. Again, we're looking at a one-day difference in the statute of limitations.

So, all of these things are very relevant because this, unlike *Powell*, is not a year and a half after the first Nursing Board complaint. This is one day -- one year and one day after Alina's death, that the lawsuit was filed in this case. And, certainly, less than a year after all of the records were received. The Coroner's Report you don't even have until August. So, we're certainly two months before the statute in that circumstance.

And, so, those are all issues of fact. They can be fleshed out through a jury. But plaintiff is entitled

to have a jury decide issues of fact if the evidence is not irrefutable. And, here, Your Honor, the evidence is absolutely refutable. The Court consider -- can consider and should consider Leo's Affidavit to that end. He can get up on the stand at the time of trial and change his mind. And I expect defense counsel to cross-examine him like crazy on that. But, ultimately, that's an issue of credibility for a jury to decide, not for defense counsel, not for this Court, for a jury to decide.

And, so, summary judgment is entirely inappropriate, given that there are issues of fact. There's not irrefutable evidence of inquiry notice more than one year prior to the filing of the Complaint. And we would ask that the Motion be denied.

I'm happy to answer any additional questions, Your Honor.

THE COURT: Sure.

MS. WORKS: If not, I would submit with that.

THE COURT: And, ultimately, the caselaw doesn't seem to support that the standard is when they know of actually -- the actual injury. It's when you know of facts that would lead an ordinary prudent -- ordinarily prudent person to investigate further.

So, when, you know, you're getting kind of this feeling in your gut of something being wrong, when I read

the cases that are cited and when I look at that *Powell* case, and my big sticking point here is really the surgeon's conversation, that Leo had with the surgeon around -- sometime around May 17th or 18th, and learns that the dura had been perforated. He knew before that something was a little bit off because, you know, she comes into this hospital, she's healthy, she's going to have a baby, it's the greatest time. And, then, everything goes just severely downhill.

So, you know, if I'm looking for a feeling that things aren't going right, I think that starts happening very early in -- into her hospitalization. And, so, if that's what I'm looking for, then I think that's met pretty quickly. And you're saying, ultimately, you know, maybe there was this feeling. But we didn't know for sure. The doctors didn't know for sure. Leo didn't know for sure. And I 100 percent agree with you that no one knew for sure. But they knew something was wrong and needed investigation.

MS. WORKS: Your Honor, respectfully --

THE COURT: So, that's sort of where I'm concerned. And that's where -- you know, that's what I was using the *Powell* case for. That's what I was looking for when we were talking about inquiry notice.

MS. WORKS: And, respectfully, Your Honor, I would point you, actually, back to that *Powell* case.

THE COURT: Okay.

MS. WORKS: And I'm looking at page 2 of the decision. It's a citation to *Winn*.

THE COURT: Okay.

MS. WORKS: And it's -- I'm looking at a Lexis printout. I'm not sure where Your Honor would be looking.

THE COURT: Mine's Westlaw.

MS. WORKS: But it is right above -- right above footnote 3. And it's citing to *Winn* and it says:

> Explaining that a plaintiff's general belief that someone's negligence may have caused his or her injury triggers inquiry notice.

And, so, respectfully, it is based on knowledge of the injury that the knowledge, that the negligence may have caused his or her injury. And, so, here, you don't have an injury until the time of her death.

And, particularly, because although I understand Your Honor's concern with the timeline --

THE COURT: Yeah.

MS. WORKS: -- of that feeling and is everything okay. But I think every single person who has a loved one in the hospital and something's not going right is going to say: Gosh, what's going on? Is there an issue with the doctors, or, is this person getting the right care? That can't be the trigger for a medical malpractice action every

time somebody thinks: Man, this is not the outcome we expected, it's got to be malpractice. You can't hold a plaintiff to that standard, especially when the doctors are telling that plaintiff: Hey, we don't know what the cause is, we don't know exactly what's wrong.

So, he asks [indiscernible] -- and, Your Honor, that in itself, the conversation with the surgeon could be the concealment. That's an issue of fact for the jury to decide. Was that an intentional concealment? Was that an intentional misrepresentation? Did the doctor -- did the surgeon actually know that there was an issue but decide at that point in time he didn't want to reveal it? We don't know. But that's not an issue for the Court or the lawyers to decide. That's for a jury. And, so, it is the injury that triggers the notice.

But, remember in the timeline, too, that, yes, there is this perhaps gut feeling earlier on. He has the conversation. Perhaps -- you know, that inquiry arguably doesn't give him faith, or gives him faith, one way or another, but that they just -- the doctors don't even know what's going on. So, how can he? But, then, there is a period of recovery.

I recall that Leo is told that Alina may be going home within a couple of days. And, so, during that time, even, from the time that he said we -- hey, we don't know

what's wrong, she starts to get increased sensation and feeling in her legs, things seem to be improving. And, then, it's three or four days later that you have her -- maybe in just a couple days later, that you have her death. And that's the injury. Under *Valley*, and the *Powell* case, that's what triggers the inquiry notice is that injury.

And there is not a complete set of medical records provided until weeks or months later that would enable a plaintiff to go to a medical expert. Because the plaintiff -- even under the statute, a plaintiff can't just go sue. They've got to get a medical expert to say: Hey, here's the issue. And, so, if you don't even have a complete set of medical records or an autopsy citing a cause of death, you certainly can't go present that to an expert.

Now, that's distinct from *Powell* because *Powell*, remember, a year and a half, had enough -- sufficient evidence, a sufficient set of medical records, be it complete or not, recall he's a nurse, in order to make a claim -- a complaint before the Nursing Board. And, so, that's a year and a half prior to the filing of the District Court Complaint that he has all of that evidence.

Here, Leo doesn't even have all the medical records, as a layperson, or an autopsy to even say what the cause of death was, the death being the injury, until months after the death. And, so, although there may have

been this gut feeling, that gut feeling, as a matter of public policy, cannot be this trigger of a statute of limitations. Because if that's the case, you're very rarely going to have any medical malpractice action that can survive a statute of limitations and this type of argument.

And whether that gut feeling was truly inquiry notice or not, a gut feeling gives rise to an issue of fact. Did Leo really have reason to believe, should he have brought the claim earlier, that's an issue of fact to be decided by a jury, not the Court, not the defense lawyers.

And, so, given the circumstances of this case, the plethora of distinctions from *Powell*, the Motion should be denied. And, again, it's the cause of his or her injury, not just, hey, I think something might be amiss.

THE COURT: Understood. Thank you, Ms. Works for clarifying that. That was very helpful.

MS. WORKS: Thank you, Your Honor.

THE COURT: Turning to Mr. Dobbs.

MR. DOBBS: Yes.

THE COURT: Your response?

MR. DOBBS: Yes, Your Honor.

I think I'll start with what Your Honor said. And I believe you're right on with inquiry notice isn't about

proving your case. You don't have to prove causation, you don't have to prove negligence to have inquiry notice. Inquiry notice is when you have the facts before you that would lead an ordinary, prudent person to investigate further into whether plaintiff's injury -- and this is from *Winn*. It states:

May have been caused by someone's negligence.

And this Court, it stated exactly, it's a commonsense analysis here, that the plaintiff came into the hospital, ambulated in for a scheduled delivery of her child. And right after the delivery she becomes paralyzed. She's paralyzed and she's -- and, then, they're told by the neurosurgeon that the epidural was misplaced, caused bleeding in the spine, and that's why she's in that condition.

The plaintiff's deposition testimony was very clear that, as of that time, as of that conversation with the neurosurgeon on May 17th, -- or, I'm sorry. It should be May 18th in the morning. That he believes something had not been done right. And what he said was basically: Hey, when you walk into the hospital healthy and -- to have a baby, and then right after you're paralyzed, yes, something isn't right. And he said that into -- in response to the question: Why did you request the medical records while Alina was still hospitalized? So, he told us. He told us

unambiguously: I requested the records because I believed something was done incorrectly.

And that something turned out to be the very thing that is the basis of their Complaint, which is that the epidural was misplaced and caused a bleed, which led to paralysis and which ultimately led to the plaintiff's death.

So, this Court asked us to analyze the case under *Powell* because *Powell* seemed to be very significant. And it seemed to be very similar. And the similarities with *Powell* here are, one, that the plaintiff actually observed the alleged negligence as it happened. We know that plaintiff, Mr. Leo Chisiu, he was there at all pertinent times during the hospitalization. He was there when the anesthesiologist was initially reluctant to place the epidural. He was there when the neurosurgeon tells him that the bleeding and paralysis was caused by misplacement of the epidural. He was there for her death. He was there for the subsequent surgeries. So, just like in *Powell*, he was there and witnessed every act of negligence that's alleged in the Complaint.

The most critical similarity with *Powell* is the plaintiff's subjective belief of negligence. Now, plaintiffs' counsel would like to make significant the fact that the plaintiff in *Powell* filed a complaint with the

Nursing Board. Indeed, he did. And we don't have a Nursing Board complaint here. But that's not what is important in *Powell*. What is important in *Powell* that the Nursing Board complaint was evidenced that the plaintiff held a subjective belief that somebody had committed an act of negligence. That's what we have here from Mr. -- plaintiff, Mr. Leo Chisiu's deposition testimony. He unambiguously and undeniably held a subjective belief that something was done incorrectly that had caused Alina's condition, caused her paralysis and ultimately led to her death. That's what important, what his subjective belief was. And we have that here.

And I think one of the critical reasons why this Court asked us to do the supplemental briefing about the *Powell* case is that one of the critical similarities is that there was no official cause of death about -- there was no official cause of death in *Powell* until after the plaintiff had formed a subjective belief about negligence. In that case, the plaintiff had filed the complaint with the Nursing Board saying: Hey, this is what I think the problem was. Then, after that, certificate of death comes out and it says: Actually, it was suicide. So, it contradicted the plaintiff's subjective belief.

Well, here, we have the same thing. Plaintiff held the subjective belief about negligence as of May 17th.

And they don't get the autopsy results later. And, so, the question was: All right, well, does that make a difference? Well, under *Powell*, it doesn't make a difference because the plaintiff's subjective belief is what's determinative.

And I think what's -- in addition to *Powell*, what we have here is that the official cause of death in *Powell* actually contradicted what plaintiff thought happened. Here, the official cause of death corroborates what plaintiff thought happened, that an epidural led to a bleed, that led to plaintiff's death.

So, we actually have more here. Also, I'd like to point out that plaintiff's counsel said that: Oh, they had all the medical records in *Powell*. That's not the case, Your Honor. The plaintiff here had the medical records before Ms. Badoi died. Indeed, he requested the medical records because he thought something was done incorrectly. In *Powell*, the Court found inquiry notice before the -- they -- the plaintiff even had the medical records. There was a lot of discussion in the briefing and in the Court's order that they had made a request for medical records. But it wasn't clear that they were ever received. Well, the Court didn't find that critical in that case because plaintiff had already expressed their belief about the negligence.

Here, not only did plaintiff have a subjective belief that somebody had done something incorrectly. Plaintiff had requested and received all of the medical records then available through June 2nd, the day prior to her death. And, then, the date of death then occurs on June 3rd, which is right after that.

And, so, this case has more evidence of inquiry notice than even *Powell* had. *Powell* doesn't -- what *Powell* helps us understand is that you don't need all of the medical records if you actually believe that somebody's negligence caused your injury. And, so, I think those are critical similarities with *Powell*. And I think that's what this Court wanted us to address.

Plaintiff's counsel makes much of the deal that a gut feeling is not the trigger. But I disagree. I think what the inquiry notice statute says is, is when it -- do you have the facts sufficient to investigate further? And we know plaintiff was investigating. So, yes, they had all the facts they needed. They had requested and received the pertinent medical records. And, so, yes, they did have all the information necessary to trigger inquiry notice.

And we're -- again, we are not arguing that notice occurred or that the statute of limitations starts prior to the plaintiff's death. The death, as was the case, I believe it's in the -- in the *Gilloon* case, death was the

final trigger here to start the statute of limitations.

I wanted to address what counsel stated about the -- that the plaintiff had improvement during the hospitalization. In -- and I've got the pages of the deposition transcript, Your Honor. We attached the entirety of plaintiff's deposition transcript because I believe it provides additional evidence to support the inquiry notice starting as of plaintiff's death. And, let me -- I'm just trying to find it. I apologize.

So, they said that plaintiff had a short period of recovery. And they cited a physical therapy note. Well, at plaintiff's deposition, on pages 122, 123, and 184 and 185, what we know is that all of the physical therapy was done while the plaintiff was in a hospital bed. This wasn't the plaintiff getting out of the bed and walking up and down the hall. She was, for all intents and purposes, unable to move.

Also, plaintiff testified that he did not see improvement much -- and I think it was much improvement. I'm sorry. In her condition throughout the hospitalization. So, the cherry picking of the medical records to say, oh, yeah, the plaintiff improved so, I mean, there was no reason for him to suggest or to suspect negligence, is just not accurate.

Also, plaintiff cites in their briefing a medical

record that suggests that the plaintiff was downgraded from the ICU to the maternal baby floor. What plaintiff omits -- and I'll give you the deposition pages as well, pages 116, 180, and 182, was that the plaintiff was downgraded, yes, but was readmitted within hours because she became confused. And when she was readmitted to the ICU, she then underwent brain surgery, Your Honor. And, so, plaintiff's cherry picking of records isn't helpful here.

And, then, lastly, I want to address the plaintiff's suggestion that they didn't know of the injury, that the injury was caused by any negligence. In plaintiff's deposition, he offered testimony that plaintiff underwent three procedures during the hospitalization. The -- after the delivery. So, you have the delivery. And, then, the day after -- or, two days later, you had the laminectomy because of the bleed in the spine. A few days later, she had the brain surgery. And, then, the day prior to her death, she had a second laminectomy in her -- to address the first laminectomy. So, she's -- so they're clearing out more blood in the spine.

Plaintiff's deposition testimony -- and I'll give you the pages here as well. They're pages 102, 103, 106, 116, 117, and 184. And I'm providing those for the record. What his testimony was is that he was told the brain surgery was -- he was told by a physician at the hospital

that the brain surgery was related to the first laminectomy surgery he had. He also testified that the subsequent surgeries were all related. And that he -- that plaintiff's death at the end was related to the last surgery that occurred.

And, so, what's disingenuous, Your Honor, is for plaintiffs to suggest: Well, we didn't know -- he didn't know that the death was related to any negligence. That's just not an accurate representation of his testimony. Mr. Chisiu was under the belief at all times that everything was related, that the epidural caused the cascade of events that led to plaintiff's death. And that's clear from reading his deposition testimony.

And the attempt by plaintiffs to offer a contradictory Affidavit after the fact, to basically contradict what he said in his deposition, it's just not allowed under the law. We cited the cases, Your Honor. You've got the *Abu Dhabi* [phonetic] case. We've got the *Sunset Station* case. All of those cases stand for the proposition that you can't, in -- to oppose a Motion for Summary Judgment, contradict prior sworn testimony that you've given. And, in this case, plaintiff has given unambiguous testimony that he knew something was not done correctly at the hospital. And that's why he began investigating before plaintiff even died.

To offer the self-serving Affidavit after the fact should just be disregarded and just completely ignored, frankly. It's not valid evidence that can be considered by this Court to oppose the Motion for Summary Judgment.

Finally, Your Honor, I'll address the concealment. I think it's interesting that plaintiffs -- you know, it took all this briefing. We're now in the supplemental briefing and, finally, there's -- what they're offering as, hey, the records that were concealed were the code blue note and the discharge summary. Well, as we stated in our briefing, plaintiff acknowledges these records were not even created until after the plaintiff's death. And, so, when plaintiff first requested records before her death, those -- they couldn't have been concealed because they didn't exist yet. So, it's just -- it's not a valid argument that you could conceal these records.

What's also important is that, on the one hand, plaintiffs argue that these records, the code blue note and the discharge summary, just show that the doctors were confused about the cause of death. But, then, they also want to say that: Hey, well, these records were concealed from us and prevented us from understanding the cause of death and getting an Expert Affidavit. Well, you can't have it both ways, Your Honor. Either the records were critical and showed you something that you didn't know and

were concealed from you or they didn't show anything and that led you to extend the inquiry notice date.

So, it's our position that the records here, the code blue note and the discharge summary, they may be relevant to inquiry notice, but I don't believe that they help in any way because the plaintiff had a general belief that someone's negligence caused her injury. But they aren't relevant to concealment because there's nothing there that was concealed.

And, frankly, the -- if you look at the plain language of what the statute says about concealment, -- and I'm just going to try to find it here, Your Honor. I'm sorry.

For -- to get tolling for concealment, you need -- you have to show -- the plaintiff has to show that:

The provider of healthcare has concealed any act, err, or omission upon which the action is based.

Again, they're pointing to the code blue note and the discharge summary as the documents that allegedly were concealed.

It's admitted by plaintiffs in their briefing that those documents don't contain any act, err, or omission upon which this action is based. Plaintiff at all times had all the records related to the epidural placement, which is the only act upon which this Complaint is based.

So, the discharge summary and the code blue, all they say is: Hey, we don't know what caused the plaintiff's injury. So, to suggest that those records demonstrate concealment is just not correct, Your Honor. And it should be disregarded as well.

And let me -- I'm just looking at my notes to see if there is anything else I wanted to address that was raised.

It -- Your Honor, the last thing I'll say is, is this is -- this case isn't one in which we're asking the Court to find that plaintiff had to have the same level of knowledge as a doctor. There's no -- the ruling here isn't going to say: Oh, well, now plaintiffs have to have medical knowledge or they're going to lose out on their claims. That's not the case. The case law is clear is that it's: Do you have facts before you that would just put a reasonable person on notice that something may be amiss? You don't need to have all the evidence to support your cause of action. You don't need to prove your case at that stage.

And, in this case, the plaintiff had all of the facts, had the medical records, had the firsthand observants, had the -- and he's offered the testimony that knew or believed something was done incorrectly that led to her unfortunate demise.

So, unless Your Honor has anything further, I'll go ahead and defer to Adam Schneider.

THE COURT: So, when I listen to Ms. Works and I read the supplemental, there's this real differentiation from the plaintiff and sort of a lumping together from you of the injury and the death. And, ultimate -- well, okay. I said that wrong. The paralysis and the death, to create the ultimate injury.

If the injury is the paralysis, let's say that the paralysis occurs, she's able to be discharged, the death does not occur. I mean, that's absolutely where it stops. I agree with you on that. But the injury is the death here. And the death doesn't occur until later, until there's these somewhat intervening factors that the -- the plaintiff brings up.

So, do those factors, you know, really -- how is Leo -- how is a layperson to really have known when there's these intervening factors if there's negligence relating to the death versus relating to the paralysis? If that makes sense. I'm sort of formulating this as I listen.

MR. DOBBS: Yes. Yeah. And the -- yes. It does make sense, Your Honor. And I believe we can't view the death in a vacuum. We can't look at this in a vacuum and say: Oh, well, you've got a death that's completely unrelated to this initial alleged negligence. I believe

the deposition testimony of plaintiff acknowledged or represents that plaintiff believed all of the medical treatment, starting with the delivery, and then the epidural, and the paralysis, all of that was related.

And if we're looking at this from a commonsense perspective, Your Honor, the patient came in, like you said, walked into the hospital, was expecting to have the baby, and then be out of the hospital the next day. Well, the plaintiff had the epidural placed, and then becomes paralyzed, and then is in the hospital for three weeks, has three surgeries in the meantime, and the death is the final act there that kind of triggers the statute of limitations. So, I think, to suggest that: Oh, just because they knew that the epidural caused a bleed that caused her to be paralyzed doesn't mean that she knew that the death was caused.

Well, clearly, nobody knew precisely what caused her death. Even the autopsy just -- what it basically says, Your Honor, is that the death occurred from a pulmonary embolism that happened after she had bleeding in her spine. That's basically what it says. And that's the knowledge that plaintiff had from the get-go, is that, yes, we had a epidural that caused the bleed, that caused paralysis, and then the patient died.

So, I believe you can't view this case in a vacuum

and say: Oh, well, the death is completely separate here. Plaintiff's deposition testimony is clear that everything was related. And he understood everything was related. And, so, the injury itself, I agree that it -- we couldn't start the statute of limitations until the death. But I believe, in this case, where you've got all these facts leading up to that death, you don't need additional -- a specific deposition testimony that's says: Oh, yes, I -- in addition to also believing that it caused paralysis, I believe it caused her death. It's just got to be facts that put you on notice as to: Hey, you need to investigate this further.

Indeed, *Winn* says, Your Honor, that you just have to have the facts that it may have caused your injury. And that's what happens here, is that they had facts that showed that the negligence may have caused an injury, which included the paralysis leading up to death.

And, just to clarify something, Your Honor, I noticed in the briefing when they -- they cite the *Winn* case, they're saying: Hey, you can't expect an ordinary person to investigate the same day as a plaintiff suffers an injury. And what they -- they use the term injury in the briefing. Well, in that case, in *Winn*, they didn't use the term injury. What they said is: You can't expect a patient to begin investigating the same day that they're

informed that the surgery went drastically wrong. That's what the case said. It didn't say: Oh, you can't expect them to investigate the same day as the injury.

So, in our case, the plaintiff was informed that the epidural or the delivery went drastically wrong on May 18th when the neurosurgeon says: Hey, the epidural caused a bleed and that's why your -- your spouse is paralyzed. That's the time that they're informed that something went drastically wrong.

So, by the time the death comes, three weeks later, there's no -- you don't get a -- it's not that -- by that time they should have been investigating, Your Honor. And, so, this is certainly different facts than the *Winn* case in particular. But it's also in line with *Winn* and with *Powell*. So, --

THE COURT: Understood.

MR. DOBBS: -- that's our take on that, Your Honor.

THE COURT: Okay. Thank you, Mr. Dobbs.

Turning to you, Mr. Schneider.

MR. SCHNEIDER: Thank you, Judge.

I really don't need to belabor anything else that Mr. Dobbs has cited for the Court. But there's a couple of issues that I wanted to address that Ms. Works had raised. And they're primarily just bullet points because I do

believe that they've kind of been discussed prior.

But the first one is that Ms. Works takes the time to try to distinguish *Powell* from this case by virtue of plaintiff Powell being a nurse and Mr. Chisiu not being a nurse. And I think it's important that -- to note for the Court that completely overlooked by the plaintiff and Ms. Works is that Mr. Chisiu's personal friend and nurse was witnessing the care and tells Ms. Chisiu: Something is going wrong here. So, in that sense, -- and I'm kind of glad Ms. Works had raised that because it actually makes *Powell* even more similar to what we have here.

Another thing that I also wanted to address is this notion that plaintiff raises relative to this sort of public policy argument of: Well, plaintiffs will be held to different standards than treating physicians. That's clearly not what *Powell* says, nor is that what the defendants are saying here. And nor has that what the Nevada Appellate Courts have said.

And, so, this actually segues back to the prior hearing where we had discussed a Nevada Board of Appeals case, *Johnson versus Callahan*. And, in *Johnson versus Callahan*, the fact pattern of that case was essentially when a subsequent remedial surgeon tells the plaintiff something went wrong with your prior medical care, that triggers inquiry notice. That is exactly what we have in

this case, by plaintiff's own sworn testimony.

The only spin out of that is Mr. Chisiu's sham Affidavit. Plaintiffs aren't allowed to manufacture their own issue of fact to avoid summary judgment. The law is absolutely clear on that. You cannot say: Well, what I meant to say a year ago was X, Y, Z now that I'm facing summary judgment.

And I also want to just kind of make mention that before Your Honor is a substantial amount of *Powell*-related briefing, both at the Trial Court level and at the Appellate Court level. And that's for a reason, Your Honor, which is the more the Court looks at *Powell* on either a granular level or an overarching level, you'll see how similar these fact patterns are. I mean, the arguments that Ms. Works had raised, we don't live in that world anymore. We don't get the -- the plaintiffs don't have the ability to say: Well, by virtue of there being a delayed autopsy, that gives me an extension, that gives me a tolling period, if you will, to avoid the statute of limitations. Those days are over.

And if you'll notice, what the plaintiffs are putting forth to you right now are the exact arguments that the Supreme Court said was a manifest abuse of discretion for Judge Wiese to agree with.

And, so, with that, I'll leave it back to you,

Judge.

THE COURT: All right. Thank you, Mr. Schneider.

I understand this is a little unusual because it was plaintiff who had requested the supplemental briefing. Ms. Works, was there any final word that you wanted to give and sort of, like, correct any, like factual errors or anything like that, that you believe were argued?

MS. WORKS: Yes, Your Honor. There are.

First, factually, I would point the Court to page 109 of Leo's deposition transcript. And he is specifically asked whether anyone -- whether he's aware of any medical provider being critical of Dr. Kim and the epidural. And he says: No, he's not aware of anybody being critical of Dr. Kim and the placement of the epidural.

So, Seiff never -- and Dr. Seiff never said the epidural caused the paralysis. In fact, even in his deposition, -- and I can give you the citation to that page, he doesn't know what caused the paralysis. So, nobody knows at the time, even if the paralysis was the injury.

But, I think, as the Court questioned defense counsel earlier, here, this is a wrongful death action based on medical malpractice. And the injury is the death. And there were a number of intervening factors in the meantime. But, even back then, after the epidural, once

there is the paralysis, nobody is telling Leo what caused that paralysis.

And that leads me back to the concealment argument, Your Honor. And I believe Mr. Dobbs read off the concealment statute. And it's: Did the medical providers conceal act or omission? Okay. So, it's not concealing a record, Judge. It's if you left something out of a record. So, if these medical providers and Leo knew way back when, prior to the death, that the epidural was the cause of the paralysis, well, there's your concealment right there because that's nowhere in the records.

And, in fact, Dr. Seiff maintains even during his deposition in this lawsuit that he can't say absolutely that the epidural caused the paralysis or that he made those determinations back then. And, so, there's your concealment. It's not just: Hey, I didn't give you the record. I could have a complete set of records all day long. But if the doctors or nurses failed to document what happened or what they perceive to be the reason for an outcome, that's a concealment. That's concealing medical malpractice.

And, in fact, a concealment case is often based on an omission from a record. And, so, there's the issue right there. There's a concession. There's no evidence in the record that the epidural is what caused the paralysis

or certainly that the epidural caused the death.

And, in fact, even if we look at the death certificate, which came later but, nevertheless, it lists as the cause of death:

> Due to or as a consequence of acute spastic paraparesis following intradural hemorrhage associated with epidural anesthesia.

Now, associated, I think defense counsel would agree with me all day long that something is associated with a procedure does not mean that it's medical malpractice, does not mean that it's negligence. And that's even on the certificate of death, Your Honor.

So, there's no point in time in which somebody says to Leo: Hey, the placement of that epidural caused your wife's paralysis, which, in turn, caused her death. And they're not saying that then, they're certainly not going to concede it now, and I guarantee they don't concede it at the time of trial.

And back at this point in time when Leo was trying to care for his newborn child, he is trying to navigate the painful waters of his wife -- or, his life partner being in this condition, to hold him to a standard that says, hey, as soon as you had a gut feeling, you should have been out trying to find an expert to look at records that caused an injury that hasn't even happened yet because maybe it's

going to be complete paralysis. Maybe she's going to die. He doesn't know. He doesn't know what the outcome is.

And the case law is clear. Even if the Court and defense counsel are hedging their bet on the *Valley Health* case, it's clear that they're quoting to *Winn* and talking about plaintiff's general belief that someone's negligence may have caused his or her injury. And, here, the ultimate injury is death. It's Alina's wrongful death caused by defendant's medical malpractice that gives rise to this lawsuit.

And there was no evidence back then that would have led Leo to believe that the epidural caused the paralysis and was going to cause his wife's -- or, was going to cause Alina's death, before Alina ever died. It's simply a factual impossibility. And, so, it would hold him to that standard.

And, as a matter of public policy, send a message to litigants that, yes, as soon as you have a gut feeling, you better be out investigating it, is simply not the intent of the medical malpractice statues. It's inconsistent with the tolling and the discovery rule.

And, again, I would point the Court back to *Pope* because *Pope* is still good law. And what *Pope* says is: That statute of limitations is tolled while you're still treating, particularly where the doctor is not telling you,

hey, I committed malpractice. Hey, I'm the reason, or, this doctor's the reason for the adverse outcome. And, here, you don't have the ultimate adverse outcome until the time of Alina's death. But, nevertheless, under *Pope*, you've got a tolling. That tolling gets us past the one day past the one year from death in and of itself.

But, regardless, under even *Valley*, you don't have irrefutable evidence. And I think that's only amplified by the length of the argument here today, the back and forth about: Hey, Dr. Seiff said this. Hey, the plaintiff's deposition testimony says this. Somebody else said that. Those are all genuine issues of fact. That's not irrefutable evidence. And that's the distinction between the *Valley Health* case.

And, again, I point the Court to footnote 3 in the *Valley* case with respect to Mr. Powell. It says:

> The evidence shows he was -- Brian was likely on inquiry notice even earlier.

Well, that says it's likely. That doesn't state it's irrefutable evidence. And that's why the Court said that the real parties in interest in *Powell* were on inquiry notice by June 11, 2017. That's the date that the Court -- that the Nevada Supreme Court said. Because that's the date of the filing of the Complaint that demonstrated irrefutable evidence that Mr. Powell knew there was a basis

to bring a medical malpractice claim, which he still didn't do for another year and a half.

And, so, that's why you have that outcome under *Powell*, under those particular circumstances. You don't have that irrefutable evidence here. And, so, it cannot be judgment as a matter of law.

THE COURT: All right. Thank you, everybody. Great arguments going back and forth. I'm going to take it under advisement. And I will issue an opinion as soon as -- a minute order as soon as I can. I know we're sort of on a time crunch. So, I will keep that in mind and issue it as soon as I can get through just a couple things that were raised.

All right. Thank you, everyone.

MS. WORKS: Thank you, Your Honor.

MR. DOBBS: Yeah. Your Honor, can I just ask one clarification real quick?

THE COURT: Of course. Yeah.

MR. DOBBS: We just had the alternative relief in the Motion on the Judgment on the Pleadings. So, I didn't know if you were going to, after you issued the minute order, did you then address arguments then on that?

THE COURT: We have -- I have entirely -- I have entirely forgotten regarding your alternative prayer. Let me look at that real quick.

[Pause in proceedings]

THE COURT: We haven't argued that at all. Have we?

MR. DOBBS: We have not. And, so, it's up to Your Honor if you want to hear it. I mean, last time we didn't argue it because you said: Hey, it doesn't make sense to argue that before we get the decision --

THE COURT: Yeah.

MR. DOBBS: -- on statute of limitations.

THE COURT: I think that's still the position we're in. So, ultimately, I'll either set a hearing date on that or address it. I will allow additional argument on it. So, I'll either set a -- if it's necessary, I'll set a hearing on it.

MR. DOBBS: Okay. Thank you, Your Honor.

THE COURT: Okay. Thank you for bringing that to my attention. I'll put that as a note to address. Thank you.

MR. DOBBS: Thanks.

PROCEEDING CONCLUDED AT 11:15 A.M.

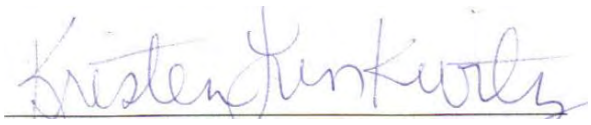
* * * * *

CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.



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DISTRICT COURT

CLARK COUNTY, NEVADA

LIVIU RADU CHISIU, as Special Administrator for the ESTATE OF ALINA BADOI, Deceased; LIVIU RADU CHISIU, as Parent and Natural Guardian of SOPHIA RELINA CHISIU, a minor, as Heir of the ESTATE OF ALINA BADOI, Deceased Plaintiffs, vs. DIGNITY HEALTH, a Foreign Non-Profit Corporation d/b/a ST. ROSE DOMINICAN HOSPITAL – SIENA CAMPUS; JOON YOUNG KIM, M.D., an Individual; U.S. ANESTHESIA PARTNERS, INC., a Foreign Corporation; DOES I through X, inclusive; and ROE BUSINESS ENTITIES XI through XX, inclusive, Defendants.	CASE NO.: A-18-775572-C DEPT NO.: XVII **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE an Order was entered on the 29th day of April, 2022. A copy of which is attached hereto.

DATED this 29th day of April 2022.

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By: */s/: Tyson J. Dobbs*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of HALL PRANGLE & SCHOONVELD, LLC; that on the 29th day of April 2022, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** via the Court e-filing System in accordance with the electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, to the following:

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DISTRICT COURT
CLARK COUNTY, NEVADA

LIVIU RADU CHISIU, as Special Administrator for the ESTATE OF ALINA BADOI, Deceased; LIVIU RADU CHISIU, as Parent and Natural Guardian of SOPHIA RELINA CHISIU, a minor, as Heir of the ESTATE OF ALINA BADOI, Deceased; Plaintiff, vs. DIGNITY HEALTH, a Foreign Non-Profit Corporation d/b/a ST. ROSE DOMINICAN HOSPITAL – SIENA CAMPUS; JOON YOUNG KIM, M.D., an Individual; U.S. ANESTHESIA PARTNERS, INC., a Foreign Corporation; DOES I through X, inclusive; and ROE BUSINESS ENTITIES XI through XX, inclusive, Defendants.	CASE NO. A-18-775572-C DEPT NO. 2 **ORDER REGARDING DEFENDANT DIGNITY HEALTH D/B/A ST. ROSE DOMINICAN HOSPITAL'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT JOON YOUNG KIM'S JOINDER THERETO** **ORDER REGARDING DEFENDANT DIGNITY HEALTH D/B/A ST. ROSE DOMINICAN HOSPITAL'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

This case came before the Court on "Defendant Dignity Health d/b/a St. Rose Dominican Hospital's Motion for Summary Judgment and Alternatively, Motion for Partial Judgment on the

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Pleadings" and "Defendants Kim, M.D. and U.S. Anesthesia Partners, Inc.'s Partial Joinder to Defendant Dignity Health's Motion for Summary Judgment."

Defendant Dignity Health d/b/a St. Rose Dominican Hospital's Motion for Summary Judgment and Defendant Joon Young Kim's Joinder thereto first came before this Court for oral argument, on December 8, 2021. Per the request of Plaintiffs' counsel at the hearing, the Court invited supplemental briefing regarding the Nevada Supreme Court's unpublished decision in *Valley Health Sys., LLC v. Eighth Judicial Dist. Court in & for County of Clark*, 497 P.3d 278 (Nev. 2021), referred to by the parties as the "Powell case". Each party submitted supplemental briefing and the matter came before the Court a second time for oral argument on February 2, 2022.

On February 24, 2022, the Court issued a minute order regarding the Motion for Summary Judgment and set a hearing on Dignity Health's Motion for Judgment on the Pleadings. The Motion for Judgment on the Pleadings thereafter came before this Court for oral argument, on March 16, 2022.

The Court has considered the Motion and all oppositions, replies, supplemental briefing, and oral argument, and rules as follows:

MOTION FOR SUMMARY JUDGMENT

The main point of contention is whether Plaintiff's filing of his Complaint on June 5, 2018 violated the 1-year accrual date for NRS 41A.097. It is undisputed that Ms. Badoi passed away on June 3, 2017, after being admitted to the hospital on May 15, 2017 to give birth to her daughter. Defendants argue that the time to file suit lapsed one year after Ms. Badoi's death on June 3, 2017, on June 4, 2018 (the Court notes here that June 3, 2018 was a Sunday, making June 4, 2018 one year from Ms. Badoi's death, in court days). Defendants assert that the complaint was therefore filed one day late for purposes of NRS 41A.097.

In *Massey v. Litton*, 99 Nev. 723 (1983), the Nevada Supreme Court held that a Plaintiff "discovers" his injury "when he knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action." The time does not begin when plaintiff discovers the precise facts pertaining to his legal theory but

when there is a general belief that negligence may have caused the injury. *Id.* at 728. "While difficult to define in concrete terms, a person is put on "inquiry notice" when he or she should have known of facts that 'would lead an ordinary prudent person to investigate the matter further." *See Winn v. Sunrise Hospital and Medical Center*, 128 Nev. 246, 252 (2012) (quoting Black's Law Dictionary 1165 (9th ed. 2009)). The Nevada Supreme Court has held that the accrual date for NRS 41A.097's one-year discovery period ordinarily presents a question of fact to be decided by the jury. *See Winn*, 128 Nev. at 258. "Only when the evidence irrefutably demonstrates that a plaintiff was put on inquiry notice of a cause of action should the district court determine this discovery date as a matter of law." *Id.*

Plaintiffs argue that the instant motions for Summary Judgment should be denied, as there are genuine issues of material fact regarding when Plaintiff knew of the cause of Ms. Badoi's death. The defense contends that Plaintiff felt something was not right in mid-May 2017, placing him on inquiry notice at that point. After all, Ms. Badoi came into the hospital, healthy, to have her baby. Some thereafter, Ms. Badoi suffered paralysis and a laminectomy had to be performed. A surgeon told Plaintiff around May 17-18, 2017 that Ms. Badoi's dura had been perforated. At his deposition, Plaintiff indicated he had a feeling that "things are not going quite right," which led Ms. Badoi to request medical records. Ms. Badoi's sister, Viorica Habara, received the records June 2, 2017 one day before Ms. Badoi passed away. Thus, Defendants aver that Plaintiff was on inquiry notice as of that date. However, pursuant to the *Gilloon* case, Defendants use the date of Ms. Badoi's death, June 3, 2017 as Ms. Badoi's final injury (her tragic death) was complete at that point.

The Court finds that the evidence before it does not irrefutably demonstrate Plaintiff was put on inquiry notice of Ms. Badoi's ultimate injury on the date of Ms. Badoi's death. If the ultimate injury was Ms. Badoi's paralysis, then Plaintiff missed the deadline to file. However, the ultimate injury was her death. Plaintiff knew in mid-May 2017 that Ms. Badoi's paralysis was something he needed to investigate further, when the surgeon told him her dura had been pierced at the time of her epidural. But he did not necessarily know what caused her death when she passed on June 3, 2017. Ms. Badoi had shown signs of recovery, and Plaintiff was not

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expecting her death. Also, he did not have a complete set of medical records at the time of her death, as the records Ms. Badoi's sister received on June 2, 2017 obviously did not cover her death on June 3, 2017. The Court finds that this case is factually distinguishable from the "Powell case" (*Valley Health System v. Eighth Judicial District Court*). In that case, Ms. Powell passed away on May 11, 2017, and Plaintiff filed suit on February 4, 2019. In an unpublished opinion, the Supreme Court found that Plaintiff was on inquiry notice when he filed a complaint with the nursing board on June 11, 2017, and possibly on inquiry notice on May 23, 2017, when Plaintiff filed a similar complaint with the Nevada Department of Health and Human Services. Both of those dates for potential inquiry notice were AFTER Ms. Powell's death on May 11, 2017. At that point, Plaintiff was aware of facts surrounding Plaintiff's ultimate injury (her death), and was able to synthesize them into a written complaint. That is not what we have here. Here, Plaintiff knew something went wrong to cause her paralysis. But, there is not irrefutable evidence in front of the Court that Plaintiff knew ON June 3, 2017 that Ms. Badoi's death was caused by the same wrongdoing that caused her paralysis, or by any wrongdoing at all. In this case, the defense is essentially saying that Plaintiff was on notice of facts that led to Ms. Badoi's death BEFORE she died. That is factually inapposite to the Powell case. Overall, the Court finds that there are genuine issues of material fact as to when Plaintiff knew the cause of Ms. Badoi's death, rather than irrefutable evidence. It would be improper for the Court to grant summary judgment on these facts, and will leave that question to the jury.

The Motion for Summary Judgment and Joinder thereto are DENIED.

MOTION FOR JUDGMENT ON THE PLEADINGS

Per the stipulation of the parties at the hearing on Dignity Health's Motion for Partial Judgment on the Pleadings, IT IS HEREBY ORDERED AND DECREED THAT Plaintiffs' Complaint against Dignity Health d/b/a St. Rose Hospital – Siena Campus is limited to a cause of action for professional negligence based on a theory of vicarious liability (i.e. actual agency/ostensible agency) for the alleged professional negligence of Defendant Joon Young Kim, M.D.

IT IS SO ORDERED.

Dated this 29th day of April, 2022

B1A C26 F21D AF32
Carli Kierny
District Court Judge

Respectfully Submitted by:

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Nicole M. Etienne

From: Adam Schneider <aschneider@jhcottonlaw.com>
Sent: Friday, April 29, 2022 9:40 AM
To: Tyson Dobbs; Keely Perdue
Cc: Nicole M. Etienne; Todd Terry; Esther Barrios Sandoval
Subject: RE: Badoi v Dignity Health - Order on MSJ

[External Email] CAUTION!.

Confirmed.

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Subject: RE: Badoi v Dignity Health - Order on MSJ

Thanks Keely. Assuming Adam has no objection, we will make the changes and file. Adam, please confirm.

Thanks.

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Subject: Re: Badoi v Dignity Health - Order on MSJ

[External Email] CAUTION!.

Tyson,

Just a couple factual corrections:

- Page 3 line 17 should say ". . .which led ~~him~~ **Ms. Badoi** to request medical records. ~~He~~ **Ms. Badoi's sister, Viorica Habara,** received the records on June 2, 2017 . . ."
- Page 3, line 1 should say ". . . as the records ~~he~~ **Ms. Badoi's sister** received on June 2, 2017 . . ."

With those changes, you can use my e-signature.

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> On Apr 28, 2022, at 1:25 PM, Tyson Dobbs <tdobbs@HPSLAW.COM> wrote:
>
> Just following up on this Keely. The language regarding the MSJ comes directly from the Court's minute order and the language on the MJP is the language agreed to at the hearing. Feel free to give me a call with any questions.
>
> <hps_logo_sm_7a5e5323-7fb9-4eb7-9623-1cb12df58917.jpg>
>
> **Tyson Dobbs**
> *Partner*

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Legal Assistant: Nicole Etienne
O: 702.212.1446
Email: netienne@hpslaw.com

From: Keely Perdue <keely@christiansenlaw.com>
Sent: Wednesday, April 27, 2022 9:56 AM
To: Nicole M. Etienne <netienne@HPSLAW.COM>
Cc: Adam Schneider (aschneider@jhcottonlaw.com) <aschneider@jhcottonlaw.com>; Todd Terry <tterry@christiansenlaw.com>; Esther Barrios Sandoval <esther@christiansenlaw.com>; Tyson Dobbs <tdobbs@HPSLAW.COM>
Subject: Re: Badoi v Dignity Health - Order on MSJ

[External Email] CAUTION!.

Hi Nicole,

Thank you for following up. I'll get you our revisions, if any, later this afternoon or tomorrow.

Thank you,

Keely P. Chippoletti, Esq.
Christiansen Trial Lawyers
710 South 7th Street, Suite B
Las Vegas, NV 89101
Phone (702) 240-7979
Fax (866) 412-6992
keely@christiansenlaw.com

On Apr 26, 2022, at 10:38 AM, Nicole M. Etienne <netienne@HPSLAW.COM> wrote:

Following up on the below.

<hps_logo_sm_18b1d399-6191-4790-9b2f-724e870e59d3.jpg>

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Legal Assistant to:
Casey Tyler
Michael Shannon
Tyson Dobbs

From: Nicole M. Etienne
Sent: Wednesday, April 20, 2022 2:38 PM
To: Keely Perdue <keely@christiansenlaw.com>; Adam Schneider (aschneider@jhcottonlaw.com) <aschneider@jhcottonlaw.com>
Cc: Todd Terry <tterry@christiansenlaw.com>; Esther Barrios Sandoval <esther@christiansenlaw.com>; Tyson Dobbs <tdobbs@HPSLAW.COM>
Subject: Badoi v Dignity Health - Order on MSJ

Good Afternoon,

Please review the attached order. Let me know if you have any revisions. If acceptable, please provide your authorization to electronically sign. Thanks!
<Order re MSJ 4861-7726-7228 v.1.pdf>

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Estate of Alina Badoi, Plaintiff(s)	CASE NO: A-18-775572-C
vs.	DEPT. NO. Department 9
Dignity Health, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District 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:

Service Date: 4/29/2022

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NEO

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Facsimile: 702/832-5910
Attorneys for Defendants
Joon Young Kim, MD and
U.S. Anesthesia Partners, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

LIVIU RADU CHISIU, as Special Administrator of the ESTATE OF ALINA BADOI, deceased; LIVIU RADU CHISIU, as Parent and Natural Guardian of SOPHIA RELINA CHISIU, a minor, as Heir of the ESTATE OF ALINA BADOI, Deceased;

Plaintiff,

v.

DIGNITY HEALTH, a Foreign Non-Profit Corporation d/b/a ST. ROSE DOMINICAN HOSPITAL-SIENA CAMPUS; JOON YOUNG KIM, M.D., an individual; U.S. ANESTHESIA PARTNERS, INC., a Foreign Corporation; DOES I through X and ROE BUSINESS ENTITIES XI through XX,

Defendants.

Case No.: A-18-775572-C
Dept. No.: 9

NOTICE OF ENTRY OF STIPULATION AND ORDER FOR DISMISSAL WITHOUT PREJUDICE OF PLAINTIFFS' CAUSE OF ACTION FOR "FRAUDULENT CONCEALMENT AND/OR OMISSIONS" AGAINST ALL DEFENDANTS

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TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

YOU WILL PLEASE TAKE NOTICE that an Order was entered in the above-entitled matter on the 25th day of August 2022, a copy of which is attached hereto.

Dated this 25th day of August 2022.

JOHN H. COTTON & ASSOCIATES, LTD.

/s/ Adam Schneider
John H. Cotton, Esq.
Adam Schneider, Esq.
Attorneys for Defendants
Joon Young Kim, MD and
U.S. Anesthesia Partners, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August 2022, I served the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER FOR DISMISSAL WITHOUT PREJUDICE OF PLAINTIFFS' CAUSE OF ACTION FOR "FRAUDULENT CONCEALMENT AND/OR OMISSIONS" AGAINST ALL DEFENDANTS** upon the following parties by e-file service to the following as follows:

CHRISTIANSEN LAW OFFICE
810 Casino Center Blvd., Suite 104
Las Vegas, NV 89101
Attorneys for Plaintiffs

HALL PRANGLE & SCHOONVBELD
1160 N. Town Center, Ste. 200
Las Vegas, NV 89144
Attorneys for Defendants
Dignity Health dba St. Rose Dominican Hospital-Siena Campus

/s/ Arielle Atkinson
Employee of John H. Cotton & Associates

ELECTRONICALLY SERVED
8/25/2022 9:13 AM

Electronically Filed
08/25/2022 9:12 AM
CLERK OF THE COURT

SAO
JOHN H. COTTON, ESQ.
Nevada Bar No. 005268
E-mail: jhcotton@jhcottonlaw.com
ADAM SCHNEIDER, ESQ.
Nevada Bar No. 010216
E-mail: aschneider@jhcottonlaw.com
JOHN H. COTTON & ASSOCIATES, LTD.
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Telephone: 702/832-5909
Facsimile: 702/832-5910
Attorneys for Defendants
Joon Young Kim, MD and
Fielden Hanson Isaacs Miyada Robison Yeh, Ltd.
d/b/a USAP-Nevada

DISTRICT COURT

CLARK COUNTY, NEVADA

LIVIU RADU CHISIU, as Special Administrator of the ESTATE OF ALINA BADOI, deceased; LIVIU RADU CHISIU, as Parent and Natural Guardian of SOPHIA RELINA CHISIU, a minor, as Heir of the ESTATE OF ALINA BADOI, Deceased;

Plaintiff,

v.

DIGNITY HEALTH, a Foreign Non-Profit Corporation d/b/a ST. ROSE DOMINICAN HOSPITAL-SIENA CAMPUS; JOON YOUNG KIM, M.D., an individual; FIELDEN, HANSON, ISAACS, MIYADA, ROBISON, YEH, LTD., a Nevada Professional Corporation d/b/a USAP-Nevada; DOES I through X and ROE BUSINESS ENTITIES XI through XX,

Defendants.

Case No.: A-18-775572-C
Dept. No.: 9

STIPULATION AND ORDER FOR DISMISSAL WITHOUT PREJUDICE OF PLAINTIFFS' CAUSE OF ACTION FOR "FRAUDULENT CONCEALMENT AND/OR OMISSIONS" AGAINST ALL DEFENDANTS

IT IS HEREBY STIPULATED by and between Defendants JOON YOUNG KIM, M.D. and FIELDEN, HANSON, ISAACS, MIYADA, ROBISON, YEH, LTD., a Nevada Professional Corporation d/b/a USAP-Nevada, by and through their counsel of record the law firm JOHN H. COTTON & ASSOCIATES, LTD., and DIGNITY HEALTH, by and through its counsel of record the law firm HALL PRANGLE & SCHOONVELD, LLC (herein "Defendants" for

Case Number: A-18-775572-C

purposes of this Stipulation), and Plaintiffs, by and through their counsel of record, CHRISTIANSEN TRIAL LAWYERS (herein collectively "the parties" for purposes of this Stipulation), that Plaintiffs' cause of action for "Fraudulent Concealment and/or Omissions" be dismissed without prejudice as to all Defendants.

The parties agree this Stipulation moots this Court's consideration of pages 14:25-18:8 within "Defendant Dignity Health /d/b/a St. Rose Dominican Hospital's Motion to Dismiss, or Alternatively, Motion to Strike" (herein "MTD"), filed August 23, 2022 as those pages concern the "Fraudulent Concealment and/or Omission" cause of action. This Stipulation thus serves as a withdrawal of that limited section of the MTD only.

Nothing in this Stipulation shall affect any of Plaintiffs' other claims against the Defendants.

//

//

Case name: *Chisiu v. Dignity Health, et al*.
Case no.: A-18-775572-C

DATED 24th day of August, 2022.

CHRISTIANSEN TRIAL LAWYERS

/s/ Keely Chippoletti

PETER S. CHRISTIANSEN, ESQ.
Nevada Bar No. 5254
R. TODD TERRY, ESQ.
Nevada Bar No. 6519
KEELY P. CHIPPOLETTI, ESQ.
Nevada Bar No. 13931
710 South 7th Street, Suite B
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

DATED 24th day of August, 2022.

JOHN H. COTTON & ASSOCIATES

/s/ Adam Schneider

JOHN H. COTTON, ESQ.
Nevada Bar No. 5268
ADAM SCHNEIDER, ESQ.
Nevada Bar No. 10216
7900 West Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Attorneys for Defendant Joon Young Kim, MD and Fielden Hanson Isaacs Miyada Robison Yeh, Ltd. d/b/a USAP-Nevada

DATED 24th day of August, 2022.

HALL PRANGLE & SCHOONVELD

/s/ Tyson Dobbs

TYSON DOBBS, ESQ.
Nevada Bar No. 11953
1140 North Town Center Drive, Suite 350
Las Vegas, Nevada 89144
Attorneys for Defendant Dignity Health d/b/a St. Rose Dominican Hospital – Siena

//

//

Case name: *Chisiu v. Dignity Health, et al*.
Case no.: A-18-775572-C

ORDER

IT IS SO ORDERED.

The movant shall ensure that the mooted pages and lines of the motion are properly identified as mooted when a courtesy copy of the motion is provided to the Court (please see Department guidelines).

Dated this 25th day of August, 2022

3D8 3BC FA3C 18E0
Maria Gall
District Court Judge

Respectfully submitted by:

JOHN H. COTTON & ASSOCIATES, LTD.

/s/ Adam Schneider
John H. Cotton, Esq.
Adam Schneider, Esq.
Attorneys for Defendants
Joon Young Kim, MD and
Fielden Hanson Isaacs Miyada Robison Yeh, Ltd.
d/b/a USAP-Nevada

From: Keely Perdue
To: Tyson Dobbs
Cc: Adam Schneider; Arielle Atkinson
Subject: Re: A-18-775572-C; Chisui/Badoi v. Kim/USAP, et al- SAO re fraudulent concealment as to all Defendants
Date: Wednesday, August 24, 2022 4:40:47 PM

You may use my e-signature as well.

Keely P. Chippoletti, Esq.
Christiansen Trial Lawyers
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keely@christiansenlaw.com

On Aug 24, 2022, at 4:25 PM, Tyson Dobbs <tdobbs@HPSLAW.COM> wrote:

You can use my e-signature.

Thanks.

<hps_logo_sm_7a5e5323-7fb9-4eb7-9623-1cb12df58917.jpg>

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Partner
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From: Adam Schneider <aschneider@jhcottonlaw.com>
Sent: Wednesday, August 24, 2022 3:50 PM
To: Keely Perdue <keely@christiansenlaw.com>; Tyson Dobbs <tdobbs@HPSLAW.COM>
Cc: Arielle Atkinson <aatkinson@jhcottonlaw.com>
Subject: A-18-775572-C; Chisui/Badoi v. Kim/USAP, et al- SAO re fraudulent concealment as to all Defendants

[External Email] CAUTION!.

Counsel- see attached. Please advise if we have your e-signature authority for submission to Department 9. Thank you kindly.

Adam Schneider, Esq.
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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Estate of Alina Badoi, Plaintiff(s)	CASE NO: A-18-775572-C
vs.	DEPT. NO. Department 9
Dignity Health, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Stipulation and 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:

Service Date: 8/25/2022

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Esther Barrios Sandoval	esther@christiansenlaw.com
Nicolle Etienne	netienne@hpslaw.com
Arielle Atkinson	aatkinson@jhcottonlaw.com

TYSON J. DOBBS, ESQ.
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efile@hpslaw.com
Attorneys for Defendant
Dignity Health, a Foreign Non-Profit Corporation
d/b/a St. Rose Dominican Hospital – Siena Campus

DISTRICT COURT

CLARK COUNTY, NEVADA

LIVIU RADU CHISIU, as Special Administrator for the ESTATE OF ALINA BADOI, Deceased; LIVIU RADU CHISIU, as Parent and Natural Guardian of SOPHIA RELINA CHISIU, a minor, as Heir of the ESTATE OF ALINA BADOI, Deceased Plaintiffs, vs. DIGNITY HEALTH, a Foreign Non-Profit Corporation d/b/a ST. ROSE DOMINICAN HOSPITAL – SIENA CAMPUS; JOON YOUNG KIM, M.D., an Individual; U.S. ANESTHESIA PARTNERS, INC., a Foreign Corporation; DOES I through X, inclusive; and ROE BUSINESS ENTITIES XI through XX, inclusive, Defendants.	CASE NO.: A-18-775572-C DEPT NO.: 2 **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an Order Granting DEFENDANT DIGNITY HEALTH d/b/a ST. ROSE DOMINICAN HOSPITAL'S MOTION FOR JUDGMENT ON THE PLEADINGS AS TO PLAINTIFF'S CLAIMS FOR NEGLIGENT CREDENTIALING AND NEGLIGENT HIRING, TRAINING, AND SUPERVISION was entered on the 10th day of February 2021. A copy of which is attached hereto.

HALL PRANGLE & SCHOONVELD, LLC
1140 NORTH TOWN CENTER DRIVE
SUITE 350
LAS VEGAS, NEVADA 89144
TELEPHONE: 702-889-6400 FACSIMILE: 702-384-6025

DATED this 17th day of March, 2021.

HALL PRANGLE & SCHOONVELD, LLC

By: */s/: Tyson J. Dobbs*
TYSON J. DOBBS, ESQ.
Nevada Bar No. 11953
1140 North Town Center Drive, Ste. 350
Las Vegas, Nevada 89144
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of HALL PRANGLE & SCHOONVELD, LLC; that on the 17th day of March 2021, I served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** via the Court e-filing System in accordance with the electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, to the following:

Peter S. Christiansen, Esq.
R. Todd Terry, Esq.
Kendelee L. Works, Esq.
Whitney J. Barrett, Esq.
Keely A. Perdue, Esq.
CHRISTIANSEN LAW OFFICES
810 S. Casino Center Blvd., Suite 104
Las Vegas, Nevada 89101
Attorneys for Plaintiff

/s/ Nicole Etienne
An employee of HALL PRANGLE & SCHOONVELD, LLC

HALL PRANGLE & SCHOONVELD, LLC
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MICHAEL E. PRANGLE, ESQ.
Nevada Bar No. 8619
TYSON J. DOBBS, ESQ.
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Attorneys for Defendant
Dignity Health d/b/a St. Rose Dominican Hospital – Siena Campus

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DISTRICT COURT
CLARK COUNTY, NEVADA

LIVIU RADU CHISIU, as Special Administrator for the ESTATE OF ALINA BADOI, Deceased; LIVIU RADU CHISIU, as Parent and Natural Guardian of SOPHIA RELINA CHISIU, a minor, as Heir of the ESTATE OF ALINA BADOI, Deceased; Plaintiff, vs. DIGNITY HEALTH, a Foreign Non-Profit Corporation d/b/a ST. ROSE DOMINICAN HOSPITAL – SIENA CAMPUS; JOON YOUNG KIM, M.D., an Individual; U.S. ANESTHESIA PARTNERS, INC., a Foreign Corporation; DOES I through X, inclusive; and ROE BUSINESS ENTITIES XI through XX, inclusive, Defendants.	CASE NO. A-18-775572-C DEPT NO. 2 **ORDER GRANTING DEFENDANT DIGNITY HEALTH D/B/A ST. ROSE DOMINICAN HOSPITAL'S MOTION FOR JUDGMENT ON THE PLEADINGS AS TO PLAINTIFFS' CLAIMS FOR NEGLIGENT CREDENTIALING AND NEGLIGENT HIRING, TRAINING, AND SUPERVISION AND DEFENDANT U.S. ANESTHESIA PARTNERS, INC.'S PARTIAL JOINDER THERETO**

This matter having come before the Honorable Carli Kierny, for oral argument, on January 27, 2021, regarding Defendant Dignity Health d/b/a St. Rose Dominican Hospital's Motion for Judgment on the Pleadings as to Plaintiffs' Claims for Negligent Credentialing and

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Negligent Hiring, Training, and Supervision, and Defendant U.S. Anesthesia Partners, Inc.'s Partial Joinder Thereto. Plaintiffs, Liviu Radu Chisiu, as Special Administrator of the Estate of Alina Badoi, Deceased, and Liviu Radu Chisiu, as Parent and Natural Guardian of Sophia Relina Chisiu, a minor, as Heir of the Estate of Alina Badoi, Deceased, appearing by and through their attorney of record, KENDELEE L. WORKS, ESQ. of CHRISTIANSEN LAW OFFICES; and Defendant Dignity Health d/b/a St. Rose Dominican Hospital – Siena Campus, appearing by and through its attorney of record, TYSON J. DOBBS, ESQ. of the law firm HALL PRANGLE & SCHOONVELD, LLC; and Defendant U.S. Anesthesia Partners, Inc. appearing by and through its attorney of record, ADAM SCHNEIDER, ESQ. The Court, having read the pleadings and papers on file herein, and good cause appearing therefore, rules as follows:

Defendants requests for Judgement on the pleadings under Rule 12(c) is not premature. NRCP 12(c) provides that motion for judgment on the pleadings can be filed after the pleadings are closed but within such a time as not to delay trial. NRCP 7 defines the pleadings as: (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer. While Plaintiff contends Defendants NRCP 12(c) motions are premature because the deadline to amend pleading and add parties has not yet expired, they provide no cited authority for this proposition. Furthermore, plaintiff did not ask to continue this motion past February 11 (the date cited in their motion) to add any additional parties or amend their pleadings. If such motion was made, it would have been freely granted. Therefore, the Court finds that Defendants requests are ripe for decision.

Plaintiffs' claims as to negligent credentialing and negligent hiring, training, supervision, or retention both sound in professional negligence, not ordinary negligence.

NRS 41A.015 defines professional negligence as the failure of a provider of health care, in rendering services, to use the reasonable care, skill, or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of healthcare. A claim of negligent hiring, supervision or training does not fall under NRS 41A.015, but is rather classified as ordinary negligence, where the underlying facts of the case do not fall within this

definition. *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 647 (2017). The Plaintiffs contend that the negligent hiring, training, supervision or retention claims are ordinary negligence.

To determine whether a claim sounds in professional or ordinary negligence, the Court must look to whether Plaintiffs' claims involved medical diagnosis, judgment, or treatment, or were based on the performance of nonmedical services. *Id.* at 641. If an alleged breach involves medical judgment, diagnosis, or treatment, it is likely a claim for medical malpractice. *Id*. There are circumstances where the negligence alleged involves a medical diagnosis, judgment, or treatment but the jury can evaluate the reasonableness of the health care provider s actions using common knowledge and experience, a situation that was addressed by the Nevada Supreme Court in *Estate of Curtis v. South Las Vegas Medical Investors LLC*, 136 Nev. Adv. Op. (2020). The court further held that negligent hiring, training, and supervision claims cannot be used to circumvent NRS Chapter 41A's requirements governing professional negligence lawsuits when the allegations supporting the claims sound in professional negligence. Where the allegations underlying negligent hiring claims are inextricably linked to professional negligence, courts have determined that the negligent hiring claim is better categorized as vicarious liability rather than an independent tort.

Applying that rule here, Plaintiffs' complaint alleged that defendants had a duty to exercise due care in the selection, training, supervision, oversight, direction, retention and control of its employees and/or agents, retained by it to perform and provide services. Plaintiffs further alleged that the breach of that duty caused Ms. Badoi's death. However, if the underlying negligence did not cause Alina's death, no other factual basis is alleged for finding Defendants liable for negligent hiring, training, and supervision. As the NV Supreme Court stated in *Zhang*, the medical injury could not have resulted from the negligent hiring, training, and supervision without the negligent rendering of professional medical services. Plaintiffs' claims are inextricably linked to the underlying negligence, which is professional negligence. Therefore, the Plaintiffs' complaint is subject to NRS 41A.071's affidavit requirement.

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Plaintiffs' affidavit does not conform with these requirements and this Court has no discretion but to grant the defendants' motion.

NRS 41A.071 provides that if an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without a supporting affidavit from a medical professional. The affidavit must: (1) support the allegations contained in the action; (2) Be submitted by a medical professional who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence; (3) Identify by name or describe by conduct, each provider of health care who is alleged to be negligent; and (4) Set forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise, and direct terms. In the present case, the Plaintiffs' affidavit, completed by licensed anesthesiologist Dr. Yaakov Beilin, is devoid of any support whatsoever for a negligent hiring or credentialing claim. Therefore, the Court finds that Dr. Beilin's affidavit is insufficient to satisfy the requirements of NRS 41A.071, and the Court must dismiss the claims that do not comply with 41A.071.

Accordingly, it is hereby ordered that both Defendant Dignity Health's Motion for Judgment on the Pleadings and Defendant USAP's Partial Joinder to Defendant Dignity Health's Motion are GRANTED and the Plaintiffs' second and fourth claims are dismissed.

Defendant Dignity Health did raise additional issues related to the negligent credentialing claim and the negligent hiring, training, supervision, or retention claim; however, as this decision dismisses those claims, those arguments are presently moot.

IT IS SO ORDERED.

Dated this 10th day of February, 2021

DB8 DE2 96DD 5242
Carli Kierny
District Court Judge

Respectfully Submitted by:

HALL PRANGLE & SCHOONVELD, LLC

/s/ Tyson Dobbs
MICHAEL E. PRANGLE, ESQ.
Nevada Bar No. 8619
TYSON J. DOBBS, ESQ.
Nevada Bar No. 11953
1140 North Town Center Drive, Ste. 350
Las Vegas, Nevada 89144

Approve as to form and content:

JOHN COTTON & ASSOCIATES

/s/ Adam Schneider
Adam Schneider, Esq.
7900 W. Sahara Ave. Suite 200
Las Vegas Nevada 89117
Attorneys for U.S. Anesthesia Partners, Inc.

Approved as to Form and Content:

CHRISTIANSEN LAW OFFICES

/s/ Kendelee Works
PETER S. CHRISTIANSEN, ESQ.
Nevada Bar No. 5254
R. TODD TERRY, ESQ.
Nevada Bar No. 6519
KEELY A. PERDUE, ESQ.
Nevada Bar No. 13931
810 S. Casino Center Blvd., Ste. 104
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

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Nicole M. Etienne

From: Adam Schneider <aschneider@jhcottonlaw.com>
Sent: Tuesday, February 02, 2021 2:50 PM
To: Nicole M. Etienne; Kendelee Works
Cc: Tyson Dobbs
Subject: RE: Badoi -- Order re Mtn for Judgment

[External Email] CAUTION!.

I approve the use of my e-signature.

Adam Schneider, Esq.
JOHN H. COTTON & ASSOCIATES, LTD.
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From: Nicole M. Etienne
Sent: Tuesday, February 2, 2021 2:42 PM
To: Kendelee Works; Adam Schneider
Cc: Tyson Dobbs
Subject: Badoi -- Order re Mtn for Judgment

Good Afternoon,

Attached please find a draft order for the Motion for Judgment on the Pleadings. Please review and let us know if you have any revisions. If acceptable, please advise if we have your permission to use your e-signature. Thank you!

HALL PRANGLE+ SCHOONVELD LLC
WHERE TRIAL LAWYERS ARE THE NORM

1140 North Town Center Dr.
Suite 350
Las Vegas, NV 89144
F: 702.384.6025

Nicole Etienne
Legal Assistant
O: 702.212.1446
Email: netienne@HPSLAW.COM

Legal Assistant to:
Casey Tyler
Michael Shannon
Tyson Dobbs

Nicole M. Etienne

From: Kendelee Works <kworks@christiansenlaw.com>
Sent: Tuesday, February 09, 2021 1:17 PM
To: Tyson Dobbs
Cc: Nicole M. Etienne; Esther Barrios Sandoval; Whitney Barrett; Keely Perdue
Subject: Re: Badoi -- Order re Mtn for Judgment

[External Email] CAUTION!.

Yes, please go ahead and submit. Apologies for my delay.

Thanks,
KLW

On Feb 9, 2021, at 1:12 PM, Tyson Dobbs <tdobbs@HPSLAW.COM> wrote:

Kendelee,

Can we send the order along to the judge? We simply used the judge's language from the minute order. Per the rules today is our deadline to submit the order.

Thanks

<hps_logo_sm_7a5e5323-7fb9-4eb7-9623-1cb12df58917.jpg>

Tyson Dobbs
Partner
O: 702.212.1457
Email: tdobbs@HPSLAW.COM

Legal Assistant: Nicole Etienne
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From: Nicole M. Etienne <netienne@HPSLAW.COM>
Sent: Monday, February 8, 2021 10:52 AM
To: Kendelee Works <kworks@christiansenlaw.com>; Esther Barrios Sandoval

<esther@christiansenlaw.com>
Cc: Tyson Dobbs <tdobbs@HPSLAW.COM>
Subject: FW: Badoi -- Order re Mtn for Judgment

Following up on this please. thanks!

<image001.jpg>

Nicole Etienne
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Legal Assistant to:
Casey Tyler
Michael Shannon
Tyson Dobbs

From: Nicole M. Etienne
Sent: Tuesday, February 02, 2021 2:42 PM
To: Kendelee Works <kworks@christiansenlaw.com>; Adam Schneider <aschneider@jhcottonlaw.com>
Cc: Tyson Dobbs <tdobbs@HPSLAW.COM>
Subject: Badoi -- Order re Mtn for Judgment

Good Afternoon,

Attached please find a draft order for the Motion for Judgment on the Pleadings. Please review and let us know if you have any revisions. If acceptable, please advise if we have your permission to use your e-signature. Thank you!

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Estate of Alina Badoi, Plaintiff(s)	CASE NO: A-18-775572-C
vs.	DEPT. NO. Department 2
Dignity Health, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District 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:

Service Date: 2/10/2021

Peter Christiansen	pete@christiansenlaw.com
Whitney Barrett	wbarrett@christiansenlaw.com
Kendelee Leascher Works	kworks@christiansenlaw.com
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