A. March, April, May, June, July.

Q. All right. And you said he could not hold a conversation.

Is that the same as the gibberish?

A. Yes.

Q. Okay. So that's the same thing.

A. Yes.

Q. And trouble walking, did that also occur all of those four or five times that you saw the other symptoms?

A. Yes.

Q. And the same with the blank stare, that also occurred --

A. Yes.

Q. -- with those other symptoms?

A. Yes.

Q. Those four to five times?

A. Yes.

Q. And all of those four or five symptoms we're talking about, the duration -- these all happened at once?

A. Yes.

Q. And the duration, I think you said, was 30 to 45 minutes.

A. Yes.

MR. CALL: I think it was on average.

THE WITNESS: Average, 30 to 45 minutes.

BY MR. RATH:

Q. Okay. And this period of time, January to August of 2008, was he also getting dizziness?

A. I don't remember.

Q. Okay. Do you recall any facial paralysis during that time?

A. Yes, but the exact dates, I don't remember.

Q. Can you describe the facial paralysis for me.

A. It was with his mouth.

Q. He couldn't move his mouth?

A. Uh-uh. And he had -- like his hands would curl up.

Q. So he couldn't move his jaw open and shut; is that correct?

A. Yes.

Q. Do you need to take a break?

A. No, I'm good.

Q. Was it on one side or both sides or do you know?

A. I don't remember.

Q. And did that happen with that cluster of

other symptoms or did that happen separately?

A. That did not happen with every time it happened. It happened in Italy, and it happened in July at our house.

Q. And the difficulty lifting things, do you know whether that was due to numbness or weakness?

A. I don't know.

Q. You don't know. Okay.

Any visual issues, like blurring vision or double vision that was occurring with these episodes?

A. I don't remember.

Q. Any issues with vision, double vision, blurry vision that occurred outside of these episodes?

A. No.

Q. Apart from these episodes, did he have any other episodes of altered mental status where he seemed to be out of it?

A. No.

Q. To your knowledge, was he suffering from any depression in 2008?

A. No.

Q. Or anxiety?

A. No.

Q. Okay. Do you remember talking to any healthcare providers at Summerlin or them talking to you?

A. I'm sure somebody talked to me. I don't remember.

Q. Do you remember talking to healthcare providers at Desert Springs that day?

A. Yeah. I don't remember.

Q. At some point, did some healthcare provider come out and talk to you at Desert Springs and say here's what's happening with Barry and what's wrong?

A. Yeah. Most of the conversation was with my father-in-law because I was pretty emotional.

Q. Okay. So most of the conversations with the healthcare providers were with Barry's father.

A. Yes.

Q. Do you remember at any point that day at Desert Springs getting a diagnosis or somebody telling you what was wrong with Barry?

A. I don't remember the specific timeline of things happening while we were there.

Q. Tell me the best recollection you have of what happened there.

A. I remember him having the surgery. I

don't remember all the -- I don't remember everything that happened. I was very emotional. I didn't deal with the physicians. My father-in-law did.

Q. At some point, did your father-in-law tell you what was going on with Barry?

A. Yes, but I don't -- I know he told me. I don't remember.

Q. At some point, did you reach an understanding as to what had happened to Barry?

A. I think I did, but not until like the last day. I didn't want to understand what had happened.

Q. So you think that was about the day he passed away?

A. Yeah.

Q. And then at that point, what was your understanding of what had happened?

A. That he was brain dead from the aneurysms had burst.

Q. When did you learn that he had an aneurysm?

A. In the hospital.

Q. Sometime between the time he got to Desert Springs and the time he passed away?

A. Yes.

Q. You don't recall when?

A. The exact time, no.

Q. Okay. Fair enough.

At what point did you think that Dr. Ehrenfeld may have done something wrong?

MR. CALL: I'm going to object, may call for expert medical opinion and also legal conclusion.

BY MR. RATH:

Q. You can answer.

MR. CALL: If it's anything we discussed, attorney-client privilege.

MR. RATH: She can answer the question.

MR. CALL: If it's between what we discussed, then no, you don't answer, if you learned it from us. Go ahead. If you understand the question, go ahead, you can respond to his question.

THE WITNESS: Can I choose not to respond?

BY MR. RATH:

Q. No. At what point -- the question's simple. At what point did you think Dr. Ehrenfeld may have done something wrong?

A. I don't know.

Q. Was it within a month of Barry's passing away?

A. Yes.

Q. Okay. I have a petition you filed here on August 28th of 2008, ex parte petition for order to release medical records. Look at that.

Did you fill that out?

A. Yes.

Q. And is that your signature at the end?

A. Yes.

Q. Okay. And you submitted that to the Court?

A. Yes.

Q. And that was on August 28th of '08; correct?

A. Yes.

Q. And you requested that medical records for Southwest Medical Associates, Desert Springs Hospital, and Summerlin Hospital be released to you; correct?

A. Yes.

Q. And those are Barry's records you're requesting; correct?

A. Yes.

Q. And subsequently, the Court ordered those released -- release of those records to you; correct?

A. Yes.

Q. All right. Why did you file that petition with the Court? Was it to -- tell me why you filed that petition with the Court.

A. To follow up with what had happened.

Q. Okay. Obviously you filed that petition with the Court because you wanted to get Barry's medical records from those three places; fair?

A. Yes.

Q. Did you seek those records on August 28th of 2008 to investigate whether there was a potential claim for medical malpractice?

MR. CALL: I'm going to object as to anything that's attorney-client privilege, anything you've discussed with our office or any other office, you know, but if it's not something --

MR. RATH: Counsel, please don't coach the witness. You stated your objection.

MR. CALL: I'm telling her -- you can make --

BY MR. RATH:

Q. You can answer the question.

MR. CALL: I'm directing her to answer the question unless it's information she's had with our office or any other office, attorney.

THE WITNESS: Can you repeat the question.

MR. RATH: Can you read it back, please.

(The requested portion of the record was read by the court reporter.)

MR. CALL: Same objections.

THE WITNESS: I seeked them out of interest for what had happened.

BY MR. RATH:

Q. When did you first see -- I don't want to know what you told your attorney, absolutely do not want to know that.

When did you first see an attorney regarding the death of your husband?

A. I don't remember the exact date.

Q. Was it in August of 2008?

A. I don't remember the exact month.

Q. Was it in 2008?

A. Yes.

Q. Was it prior to the time that you filed this request for records on August 28th or was it after that?

A. I don't remember.

Q. Okay. But you do recall it was in 2008; correct?

A. Yes.

Q. Did anyone ask you to file this petition to get medical records or did you do it on your own?

A. My family and I decided to do it.

Q. Who in your family did you speak with about getting these records from the Court or through the Court?

A. My father-in-law.

Q. Okay. Did you speak with your father-in-law, Barry Becker, Sr., about going to an attorney?

A. Yes.

Q. When did you have that discussion with him?

A. I don't remember.

Q. And what specifically did you discuss with him on that topic?

A. That they specifically -- I felt as if -- we both felt as if they had not done everything they could have done. We talked about that he had gone in with the same symptoms and they only did

the same tests.

Q. Are you talking about Dr. Ehrenfeld and Dr. Clark?

A. Yes. They never did anything differently.

Q. And this discussion you had with Barry Becker, Sr., that was prior to going to an attorney; correct?

A. Yes.

Q. So that would have been in 2008?

A. I think so.

MR. CALL: I don't want you to guess.

BY MR. RATH:

Q. Was that at about the time you filed this petition with the Court that you had this discussion with Barry Becker, Sr.?

A. This petition?

Q. Yeah.

A. I think so, but I don't remember if it was in 2008 that we seeked out an attorney. I don't recall. I don't remember.

Q. Okay.

A. It may have been in 2009. I don't know.

Q. And who was the attorney you went to see, the first attorney?

A. It's the same attorney, Ed Bernstein.

Q. You went to Ed Bernstein's office?

A. Yes.

Q. Prior to going to Ed Bernstein's office, you had this discussion with Barry Becker, Sr.; correct?

A. Yes.

Q. All right. Do you remember if -- and I asked you what led you to file this petition, and I think you told me you had spoken to the family about it; correct?

A. Correct.

Q. So do you believe it was before or about the time that you filed this petition that you spoke -- had this discussion with Mr. Becker?

A. I think we decided prior to me signing this petition, yes, that's -- yes.

Q. Okay. And what had you decided?

A. That we wanted to look into his records.

Q. And you wanted to look into whether there was a potential claim for medical malpractice at that point?

A. Yes. Or a mistake made or something missed, yes.

Q. Okay. And what was it at that time,

other than what you've told me, that made you think there might be potential malpractice? I'm talking about at the time you got these records on August 28th, 2008.

A. Can you rephrase it --

MR. RATH: Can you read back --

THE WITNESS: -- break it down.

MR. RATH: Can you read back the question.

(The requested portion of the record was read by the court reporter.)

MR. CALL: I'm going to object as may call for attorney-client privilege information.

MR. RATH: I'm asking about prior to her retention of an attorney, so it does not.

MR. CALL: I didn't think that was in the question.

MR. RATH: It was. It was about August 28 of 2008.

MR. CALL: I'm going to still going to make an objection. If she had talked to an attorney before then, it's still attorney-client privilege.

MR. RATH: Well, she's testified that she hadn't, so your objection is for the record.

That's fine.

MR. CALL: It is, Counsel. Okay.

You can answer.

BY MR. RATH:

Q. You can answer. We can read it back if you need.

A. Yes, if you could read it one more time.

MR. RATH: Please read it back one more time.

(The requested portion of the record was read by the court reporter.)

MR. CALL: Also, I'm going to object as vague.

THE WITNESS: Can you repeat it one more time.

(The requested portion of the record was read by the court reporter.)

THE WITNESS: In what regards do you mean by that? Do you mean by my -- what do you mean exactly?

BY MR. RATH:

Q. You testified that you got these records or requested these records from -- strike that.

You testified that when you made this request for the Court to get the records on

August 28, 2008, you were doing it to look into whether there was medical malpractice. And I'm asking you what facts did you have at the time that you thought there might be a potential for medical malpractice in your husband's treatment?

A. What facts --

Q. Other than what you told me.

A. My interests. The fact that the only tests that had been ordered were the same tests, and the fact that I received a phone call from Dr. Ehrenfeld's office after he had passed away for follow-up. And that's all I can remember.

Q. Okay. And I'm not clear on your testimony.

Are you saying you went to an attorney before the end of '08?

A. I'm saying I don't remember when I went to an attorney. I don't remember if it was in 2008 or 2009. I don't remember.

Q. Okay. And I know you said you had a conversation with Barry Becker, Sr., about getting the records; correct?

A. Yes.

Q. And did you have a conversation with him about going to an attorney as well?

A. Yes. I'm not sure if the conversation was at the same time, but yes.

Q. Okay. Was the conversation prior to the end of 2008?

A. Again, I don't remember.

Q. Was it within two months of Barry's passing away?

A. I'd be guessing if I told you.

Q. I'm just asking you to estimate.

A. Maybe. I don't remember.

Q. Was it within three months of Barry's passing away?

A. The same answer. I don't remember.

MR. CALL: It's argumentative. She's already testified she doesn't remember.

BY MR. RATH:

Q. Why did you go to an attorney?

A. Because my husband died from a procedure that he could have had that could have prevented.

Q. What made you think that his death could have been prevented?

A. From when he was in the hospital at Desert Springs.

Q. Did somebody tell you his death could have been prevented?

A. If he would have had a stent, I believe.

Q. Okay. Somebody told you that?

A. Uh-huh. I don't remember if they told me that specifically, no.

Q. How did you come to learn that your husband could have avoided his death by having a stent placed? You said it was at Desert Springs Hospital you learned that; correct?

A. Yes.

Q. And you learned that at Desert Springs while your husband was a patient there; correct?

MR. CALL: I'm going to object it misstates testimony.

MR. RATH: I'm asking her.

MR. CALL: Well, I think my objection --

MR. RATH: You made your objection.

MR. CALL: Yes. I don't -- think we can be a little emotional here, Mr. Rath. Okay.

BY MR. RATH:

Q. You can answer the question.

MR. CALL: Go ahead, and you can answer the question.

MR. RATH: If you need it read back, we'll read it back.

THE WITNESS: Please read it back.

(The requested portion of the record was read by the court reporter.)

MR. CALL: Objection, misstates testimony.

THE WITNESS: I think at that time, I was emotional and -- and I don't recall the details.

BY MR. RATH:

Q. Okay. But as far as whether a stent could have been used prior to that, that's something you learned at Desert Springs Hospital while your husband was there. That's the only question.

MR. CALL: Objection, misstates testimony.

THE WITNESS: I may have learned it. I don't know. I may not have learned anything while I was there. I was emotional.

BY MR. RATH:

Q. At some point, you learned about this issue of the stent?

A. At some point.

Q. Do you remember when?

A. No.

Q. Do you remember who said something about that?

A. Who exactly, no.

Q. Who in general?

A. I don't remember.

Q. Doctor, nurse, friend?

A. I don't remember.

Q. Well, it was learned prior to the time you requested the records on August 28th; correct?

A. That's fair, yes.

Q. Okay.

MR. RATH: I want to attach this petition as Exhibit A to the deposition.

(Exhibit A was marked for identification.)

BY MR. RATH:

Q. On August 28th, you also made a request to Southwest Medical Associates to obtain Barry's records; correct?

A. Yes.

Q. And that's your signature on the form?

A. Yes.

Q. And you requested the entire record; correct?

A. Yes.

Q. And you also requested MRI films and CAT scans; correct?

A. Yes.

Q. Okay. Why were you requesting the films at that point?

A. For the same reason I was requesting them from the first, for interest.

Q. Same reasons you gave me for the petition?

A. Correct.

Q. Okay. All right. I have another request form for Southwest where you're requesting all CT and CXR; correct?

A. Yes.

Q. And the date on that which you signed was August 28th, 2008; correct?

A. Yes.

Q. Do you know what CXR is?

A. No.

Q. And you will see in the center of that page, it says "Date Needed: 8-29-08."

Do you see that?

A. Yes.

Q. Why did you need this stuff, these records and films by August 29 of 2008?

A. I don't know. What day was that on?

Q. I don't know what day of the week it is.

I'm just asking -- I'm just asking you why you put down that you needed it by August 29 of '08.

A. I don't know. Because I wanted it. I was trying to get all the records collected.

Q. Okay.

MR. RATH: We'll attach the -- this one as Exhibit B, and the second one as Exhibit C.

(Exhibits B and C were marked for identification.)

BY MR. RATH:

Q. On August 29th you filed an affidavit with the Court requesting some additional records.

Do you see that?

A. Yes.

Q. Is that your signature on that document?

A. Yes.

Q. And that was done on August 29th; correct?

A. Yes.

Q. And why were you seeking those additional record the next day?

A. For the same reason, to have all of his records together.

MR. RATH: Okay. Let's attach that as Exhibit D.

(Exhibit was marked for identification.)

BY MR. RATH:

Q. What else did you do prior to retaining an attorney to investigate the cause of Barry's death?

A. Prior to collecting records?

Q. Prior to retaining an attorney.

A. I don't remember.

Q. Did you do anything else other than what we've discussed prior to retaining an attorney to further inquire into whether medical malpractice was involved in your husband's death?

A. I don't know.

Q. Did you have any -- strike that.

You told me about one discussion you had with Barry Becker, Sr.

Was there more than one discussion with him regarding filing a lawsuit for malpractice?

A. Possibly. Yes.

Q. Do you know approximately how many discussions you had with Barry Becker, Jr., on that topic?

A. Senior, you mean?

Q. Senior. I'm sorry.

A. I don't recall how many conversations, no.

Q. But you recall it was more than one?

A. Yes.

Q. Do you know whether it was more than three?

A. I don't know. I don't know how many.

Q. Okay. Aside from Ed Bernstein's office -- and, again, I don't want to know what you told your attorneys. Aside from Ed Bernstein's office, did you see any other attorneys regarding your lawsuit or potential lawsuit?

A. Not to my knowledge.

Q. Okay. When did you first decide to file a lawsuit in this case?

A. I don't remember the exact date.

Q. Do you know approximately when?

A. No.

Q. In your discussion with Barry Becker, Sr., in August of 2008 that we've previously discussed, did you tell him you were thinking about filing a lawsuit?

A. I think we were interested in looking into it.

Q. The both of you were interested in

looking into filing a lawsuit.

A. Looking into what had actually happened to him, yes.

Q. And were you both interested in looking into filing a lawsuit at that point?

A. Did you say a specific date? Because I don't know a specific date. I couldn't tell you when exactly.

MR. CALL: No. Listen to his question. Okay?

BY MR. RATH:

Q. When you spoke to Barry Becker, Sr., the conversation we've been talking about, when you went to get these records from the court, did the two of you discuss an interest in filing a malpractice lawsuit or at least looking into it?

A. Looking into it.

Q. Okay. You told me that you had looked at Dr. Barry Ludwig's report prior to your deposition.

A. Yes.

Q. Had you ever spoken with Dr. Ludwig at any time?

A. No.

MR. RATH: Let's go off the record for a minute.

(A brief off-the-record discussion was held.)

MR. RATH: Let's go back on. I still have a number of questions to keep going on the deposition, so plaintiffs' counsel and I have agreed that we will conclude tonight, and what we will do is reschedule Shannon's depo for a mutually agreeable date and time.

MR. CALL: Okay. Sounds good. Do we have coming up deadlines? I don't know off the top of my head.

MR. RATH: Want to go off the record?

MR. CALL: Yeah, let's go off the record.

MR. RATH: We're off record.

THE COURT REPORTER: Do you want a copy?

MR. CALL: Yes, I do.

And we're going to have to, of course, notice Dr. Ehrenfeld's depo.

MR. RATH: Absolutely.

(Thereupon, the taking of the deposition was continued sine die.)

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DISTRICT COURT

CLARK COUNTY, NEVADA

*****

BLAIR BECKER, by and through her mother and natural guardian, SHANNON BECKER, individually and as heir of BARRY BECKER, JR., deceased, Plaintiff, HOWARD EHRENFELD, M.D., an individual; SOUTHWEST MEDICAL ASSOCIATES, INC., DOES 1 to 75, inclusive; and ROE CORPORATIONS Defendants.	CASE NO.: A612134 DEPT NO.: XVI **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Exhibit 5

Condensed Transcript

DISTRICT COURT
CLARK COUNTY, NEVADA

SHANNON BECKER, et al.

Plaintiff(s),

vs.

HOWARD EHRENFELD, M.D., et al.

Defendant(s).

~~~~~~~~~~~~~~~~~~~~~~~~~~~~

CASE NO. A-10-612134-C
DEPT. NO. XVI

DEPOSITION OF

BARRY BECKER, SR.

January 12, 2012
10:19 a.m.

10080 West Alta Drive
Las Vegas, Nevada

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Q. Do you know the results of that screening?
A. Well, he passed it. I don't know, is that positive or negative? I don't understand. I'm not sure what the term is.
Q. He passed them?
A. He passed them.
Q. Aside from Dr. Clark, do you know the names of the physicians that Barry treated with prior to 2008?
A. No.
Q. Are there any other medical or mental health conditions or hospitalizations of Barry's prior to January of 2008 that you haven't told me about that you know about?
A. I don't know of anything other than a drinking problem.
Q. Okay. All right. Let's talk about --
A. Let me backtrack.
Q. Sure. Go ahead.
A. He broke his leg out at Tully Springs riding his motorcycle when he was fifteen maybe, so he did spend the night in the hospital and had his leg set.
Q. Okay. Anything else you recollect?
A. And I think he did something to his shoulder mountain biking, and had to have his shoulder, this one

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little knob here, pushed back down. I'm not sure if he was in the hospital for that. And he was in a car accident in the nineties and had a broken shoulder and pretty severe laceration to his foot.
Q. Any other medical conditions or hospitalizations that you recall?
A. No.
Q. All right. Let's turn to 1998. Did Barry, to your knowledge start exhibiting any symptoms in 2008 that he had not had before?
A. Well, I would think that occasionally he would drink a little bit too much in 1998.
Q. I'm sorry, 2008.
A. 2008.
Q. The year he passed away.
A. There was an episode at the Capital Grille. We were having dinner and my wife and her sister and Shannon and myself and my son Randy were there, and all of a sudden he just -- he -- he somewhat couldn't function. I don't think he knew where he was and I don't think he would have been able to walk.
Q. Do you know about when that was?
A. March.
Q. March of 2008?
A. Yes.

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Q. I'm sorry, you said you were having dinner at the Capital Grille?
A. Yes.
Q. And Shannon was there too?
A. Yes.
Q. And you say he became nonfunctional. Can you describe that a little bit more for me? What did you observe?
A. He didn't know where he was, he couldn't put a sentence together.
Q. Was he not speaking or speaking gibberish or slurring his speech?
A. Well, he wasn't making any sense.
Q. So he was speaking gibberish?
A. Well, I don't know what gibberish is. I only know two languages, pig Latin and English, I'm not very good at either one.
Q. I'll just ask you, he couldn't talk or he could talk and it didn't make any sense?
A. Yes, he wasn't making any sense.
Q. Okay. What other symptoms did you observe at that time?
A. I think he just didn't really kind of know where he was.
Q. He seemed out of it?

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A. Yes.
Q. How long did that episode last?
A. Until -- well, it was gone by the time he got home.
Q. Approximately how long did it last?
A. I don't know, probably takes -- probably took ten or fifteen minutes to find a way to get him up and walk out of there, get our cars, and a half an hour to drive home, hour, hour and a half.
Q. During that entire time period, was he unable to talk properly or was that only for part of the duration?
A. I believe Shannon drove him home in her car or his car, so you know, once we got in the cars we met at his house, but that was no longer with him.
Q. Okay. So how long was your observation of this event then? Was it fifteen, ten minutes?
A. Fifteen, twenty minutes.
Q. And during that entire time was he unable to speak properly?
A. Yes.
Q. Apart of being out of it and being unable to speak properly, did you observe any other symptoms at that time?
A. No.

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Q. Did you observe any of these other episodes in 2008?
A. I did not observe them personally, I don't believe.
Q. Okay. So that's the only episode of altered mental state that you observed in 2008 was that time in March?
A. Yes.
Q. All right. Did Shannon tell you about any other episodes?
A. Yes.
Q. What did she tell you about that?
A. Well, he had a similar situation when they had some friends that lived in the neighborhood over for dinner.
Q. And that was after March?
A. Yes.
Q. Did she tell you about any other episodes?
A. Well, she mentioned that he had some -- one day in Europe where -- on their trip in Europe, I believe.
Q. Did she tell you about any others?
A. Shannon hadn't, but others had.
Q. Okay. Who else told you about it?
A. Nicole Compton.

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Q. And who is that?
A. She's a girl that worked on some of the real estate deals on our group.
Q. Was she a co-worker of Barry's?
A. Yes.
Q. Anybody else tell you about one of these incidents?
A. I believe Bunny, our executive assistant there in our office.
Q. I'm sorry, I didn't hear the name.
A. Bunny.
Q. Bunny?
A. Bunny.
Q. What's her last name? I assume it's a she.
A. It's Reiman (phonetic), Runyon (phonetic), I don't know, I never use her last name. Leave a blank and I'll fill it in.
Q. All right.
(Please supply information on Certificate of Deponent located on the second to the last page hereof.)
Q. Okay. Anyone else?
A. I don't really -- my brother Randy may have, but I don't know.
Q. Okay. So Shannon told you about two

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episodes. Did she describe to you what had happened during those episodes or did she just tell you they happened?
A. She just said they were similar to what happened at the Capital Grille.
Q. Did she tell you whether there were any differences between what happened at the Capital Grille and those two other occasions?
A. I don't know, I don't recall.
Q. And Nicole and Bunny -- strike that.
Nicole and Bunny, they each observed one separate incident?
A. I believe so.
Q. What did they tell you about those two separate incidences? Let's go with Nicole first.
A. Nicole was at a meeting at the New Horizons Academy, and it was a meeting of the Parent Teacher Association or the foundation, I don't know, and he was going to become president of one of those organizations. And he had one of those episodes where all of a sudden he couldn't communicate, and I believe that Nicole drove him back to the office.
Q. And that's all she told you?
A. Correct.
Q. And how about the incident that Bunny related

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to you?
A. Well, she mentioned that she had observed him in a similar situation.
Q. Did Nicole or Bunny tell you how long these incidences had lasted?
A. No.
Q. How about Shannon, when she told you about these two episodes, did she tell you how long they lasted?
A. No.
Q. Do you know whether Barry was still having headaches in 2008?
A. Well, I believe he was.
Q. Do you know how frequently he was getting the headaches?
A. No.
Q. Do you know whether the episodes you described for me were accompanied by headache?
A. I don't.
Q. Do you know whether Barry experienced any neck pain during 2008?
A. I do not know.
Q. Do you know whether the incidences that you've discussed with me were accompanied by any neck pain?

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CLARK COUNTY, NEVADA

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BLAIR BECKER, by and through her mother and natural guardian, SHANNON BECKER, individually and as heir of BARRY BECKER, JR., deceased, Plaintiff, HOWARD EHRENFELD, M.D., an individual; SOUTHWEST MEDICAL ASSOCIATES, INC., DOES 1 to 75, inclusive; and ROE CORPORATIONS Defendants.	CASE NO.: A612134 DEPT NO.: XVI **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Exhibit 6

IN CAMERA REVIEW

OPPS

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DISTRICT COURT

CLARK COUNTY, NEVADA

*****

BLAIR BECKER, by and through her mother and natural guardian, SHANNON BECKER, individually and as heir of BARRY BECKER, JR., deceased, Plaintiff, HOWARD EHRENFELD, M.D., an individual; SOUTHWEST MEDICAL ASSOCIATES, INC., DOES 1 to 75, inclusive; and ROE CORPORATIONS Defendants.	CASE NO.: A612134 DEPT NO.: XVI **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Affidavits of Shannon and Barry Becker, Sr., to be supplemented as

Exhibit 7

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HUTCHISON & STEFFEN

A PROFESSIONAL LLC

EXHIBIT 4

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Howard Ehrenfeld, M.D. and
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DISTRICT COURT

CLARK COUNTY, NEVADA

SHANNON BECKER, individually an as heir of BARRY BECKER, JR., deceased; BLAIR BECKER, by and through her mother and natural guardian; Plaintiffs, vs. HOWARD EHRENFELD, M.D., an individual; EDWARD CLARK, M.D., an individual; SOUTHWEST MEDICAL ASSOCIATES, INC., DOES 1 to 75, inclusive; and ROE CORPORATIONS 1 to 10, Defendants.	CASE NO.: A-10-612134-C DEPT. NO: XXXI **DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** Date of Hearing: **February 24, 2012** Time of Hearing: **9:30 A.M.**

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendants, HOWARD EHRENFELD, M.D. and SOUTHWEST MEDICAL ASSOCIATES, INC., (hereinafter collectively referred to as "Defendants"), by and through their counsel of record, HUTCHISON & STEFFEN, LLC, hereby file their Reply to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment.

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This Reply is made and based upon the papers and pleadings on file herein, the attached Memorandum of Points and Authorities and any oral argument which the Court may entertain at the hearing on this Motion.

DATED this 15th day of February, 2012.

HUTCHISON & STEFFEN, LLC

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Peccole Professional Park
10080 West Alta Drive, Suite 200
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Attorneys for Defendants
Howard Ehrenfeld, M.D. and
Southwest Medical Associates, Inc.

Memorandum of Points and Authorities

1. Introduction

There can be no doubt based on Plaintiff Shannon Becker's sworn deposition testimony that she was on inquiry notice of a potential claim for medical malpractice against Defendants by September 12, 2008, at the latest, but most probably by August 28, 2008. In fact, not only was Mrs. Becker on inquiry notice at that time, she testified that she actually inquired into a potential claim for medical malpractice on August 28, 2008, as she specifically testified that she requested the records on that date to look into whether there was a potential claim for medical malpractice. Furthermore, she even testified to her knowledge of specific facts on or before August 28, 2008, which led her to pursue this inquiry. The undisputed facts in Defendants' Motion for Summary Judgment are taken virtually word for word from Plaintiff's deposition testimony and Plaintiff has not disputed her own deposition testimony.

Furthermore, the date of the running of the statute of limitations applies equally to the minor Plaintiff, Blair Becker. While Plaintiffs wish to argue that Blair's time in utero tolled the statute of limitations for her, that is contrary to Nevada law. NRS 41A.071 unambiguously states that it is the parent or guardian who is responsible for brining the claim of a minor within the

statute of limitations for medical malpractice. Furthermore, Nevada case law and statutory law deems that a posthumous child is living at the time of death of his or her parent. NRS 132.290 (stating, "A posthumous child is deemed living at the death of his or her parent"); *Weaks v. Mounter*, 493 P.2d 1307, 1309 n.5 (Nev. 1972).

Given the unequivocal evidence in this case and pertinent Nevada case law, it is fully appropriate to grant Defendants' Motion for Summary Judgment.

2. Legal Arguments

A. Plaintiff Shannon Becker was on inquiry notice of a potential claim for medical malpractice by September 12, 2008 at the latest.

According to *Massey v. Litton*, a case cited both by Defendants in their motion and Plaintiffs in their opposition, the discovery rule in medical malpractice, "has been clarified to mean that the statute of limitations begins to run when the patient has before him facts which would put a reasonable person on inquiry notice of his possible causes of action, whether or not it is occurred to that particular patient to seek further medical advice. *Massey v. Litton*, 669 P.2d 248, 251 (Nev. 1983). In Plaintiffs' opposition, Plaintiff Shannon Becker acknowledges that she thought Dr. Ehrenfeld may have done something wrong based on the medical tests that he ordered and acknowledges that she believed that, if a stent had been placed, her husband's death may have been prevented. *See* Plaintiffs' opposition at pages 5 to 6. After she made these admissions, Plaintiff then argues that she could not have been placed on inquiry notice until after she consulted with an attorney and had all medical records reviewed by a medical expert. However, there is no support for that proposition in Nevada case law or from other states examining similar issues which have similar statutes.

Plaintiffs cite two cases from the State of Oregon, *Gaston v. Parsons*, 968 P.2d 1319 (Or. 1994) and *Greene v. Legacy Emanuel Hospital Care Center*, 60 P.3d 535 (Or. 2002), to attempt to support their overly broad readings of Nevada statutes. However, rather than supporting the Plaintiffs' legal position, these cases actually support the Defendants.

...

...

Both of the aforementioned Oregon cases construe an Oregon statute that is similar to the Nevada medical malpractice[1] statute and reads as follows:

> An action to recover damages for injuries to the person arising from any medical, surgical or dental treatment, omission or operation shall be commenced within two years from the date any injury is first discovered or in the exercise of reasonable care should have been discovered.

ORS 12.110(4) (as cited in *Greene v. Legacy Emanuel*, 60 P.3d 535, 538.

The *Gaston* case is factually dissimilar from the case at bar here. In that case, the Oregon Supreme Court found there was a question of fact as to when the plaintiff was on inquiry notice because the patient's symptoms appeared to be related to the procedure performed and his physician specifically told the patient that his symptoms of left arm dysfunction were temporary and would resolve in six months to two years. *Gaston*, 864 P.2d at 1321. Based on this statement, there was a question of fact as to whether the plaintiff reasonably could have waited the six months to two years before discovering the injury and medical malpractice.

That is not the case in the instant lawsuit. As set forth in Defendants' moving papers, Mrs. Becker was aware of the actual injury, her husband's death, on August 12, 2008. Furthermore, she was aware of specific facts behind her legal theories on medical malpractice against these Defendants: specifically, that they had not ordered the correct tests and that a stent could potentially have saved her husband's life. Furthermore, Mrs. Becker was fully aware when she requested the court to order her husband's medical records on August 28, 2008, that her husband's death had been caused by a ruptured brain aneurysm.

The case facts in the *Becker* lawsuit are more akin to those facts in the second Oregon case of *Greene v. Legacy Emanuel*, which Plaintiffs cite.[2] In the *Greene* case, the plaintiff entered

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[1] Notably, one difference is that the statute of limitations in Oregon is two years, while in Nevada it is one year.

[2] Plaintiffs reference a citation to the *Greene v. Legacy Emanuel* case at 165 Or. App. 543 (Or. App. 2000). However, that case citation is from the Oregon Appellate Court, which initially heard the appeal. That decision was then appealed to the Oregon Supreme Court, which is reported at 60 P.3d 535. The *Greene* case discussed in this Reply refers to that Oregon Supreme Court case, 60 P.3d 535, which is the decision of the Oregon Supreme Court and the controlling authority.

Legacy Emanuel Hospital on July 26, 1995 for an outpatient surgical abortion procedure. During the course of the procedure, the defendant physician perforated the plaintiff's uterine wall and colon with forceps. *Greene,* 60 P.3d at 537. Shortly thereafter, the plaintiff retained a lawyer and on August 22, 1995, her lawyer sent the hospital a request for a copy of the plaintiff's medical records. *Id.* The plaintiff in *Greene* later retained a second lawyer and ultimately filed her complaint for medical malpractice against the defendant on July 24, 1997. *Id.* The complaint was served on November 14, 1997, and, under Oregon law, November 14, 1997 was the date that the action commenced. *Id.* The Oregon Supreme Court affirmed the grant of summary judgment in favor of the defendant due to the plaintiff's failure to commence her action within the two year Oregon statute of limitations. *Id.* at 542.

In reaching its decision, the Oregon Supreme Court in *Greene* specifically stated that it was clarifying and updating the Oregon law on the discovery rule as set forth in *Gaston* and other prior cases. *Greene*, 60 P.3d at 538-539.

In examining the particular facts at issue in that case, the Oregon Supreme Court in *Greene* found that, "When plaintiff left the hospital in August 1995, including from the time that plaintiff's lawyer received a copy of her medical records on November 10, 1995, plaintiff had discovered or reasonably should have discovered that, during the abortion procedure on July 26, 1995, Nesler [the defendant physician] had perforated her uterine wall and colon with forceps." *Id.* at 542. The court in *Greene* specifically rejected the plaintiff's contention that she had not discovered her injury for purposes of the discovery rule until after she had retained an attorney, the medical records had been sent to a medical expert, and that medical expert then reached the conclusion that her injury was caused by medical negligence. *Id.* at 537; 542. The court stated that the medical opinion that plaintiff received from her expert in March 1997 served only to confirm the discovery of tortuous conduct that plaintiff reasonably should have made when she learned what had occurred shortly after surgery. *Id.* at 542. The plaintiff patient was aware of specific facts which put her on notice of a potential medical malpractice claim and the court stated that it rejected plaintiff's contention

that nothing short of a positive diagnosis by a physician would commence the period of limitations. *Id.* at 542.

In sum, Shannon Becker's contentions that she could not be on inquiry notice until after her medical expert had done a full analysis of her case is unsupported by the Oregon law which she cites. Furthermore, Plaintiffs have cited no Nevada law stating that inquiry notice is triggered only after the plaintiff has had a complete case analysis performed by a medical expert and that medical expert has reached his or her conclusions.

Likewise, Plaintiffs' citation to the Nevada case *Pope v. Gray*, 760 P.2d 763 (Nev. 1998) is equally unavailing. First, Plaintiffs reference the *Pope* case and state, "merely because an individual is alerted to the 'fact of death' i.e. the death itself, does not impute knowledge of the 'legal injury' to start the running of the statute of limitations." *See* Plaintiffs' Opposition at page 7. Even assuming that is a correct reading of the *Pope* case, the factual situation in the case at bar is markedly different. Not only was Mrs. Becker aware of the fact of death, i.e., that Mr. Becker died on August 12, 2008, she was also fully aware of the facts suggesting negligence under her negligence theories. According to the *Pope* case, the statute of limitations runs not only when the victim discovers an injury, but also the facts suggesting negligence. *Pope*, 760 P.2d at 765. As Mrs. Becker testified at her deposition, prior to her requesting her husband's medical records on August 28, 2008, she was aware (and concerned with the fact) that the physicians she sued did not order different tests from what her husband had received before. She also testified that she was aware, prior to ordering the records on August 28, 2008, and had information that a stent could have saved her husband's life. In fact, it was these facts which led her to request the medical records on August 28, 2008. On these two issues, it bears repeating Mrs. Becker's deposition testimony. She testified as follows:

> Q: So do you believe it was before or about the time that you filed this petition that you spoke - - had this discussion with Mr. Becker?
>
> A: I think we decided prior to me signing this petition, yes, that's - - yes.
>
> Q: Okay. And what had you decided?

A: That we wanted to look into his records.

Q: And you wanted to look into whether there was a potential claim for medical malpractice at that point?

A: Yes. Or a mistake made or something missed, yes.

Q: You testified that when you made this request for the Court to get the records on August 28, 2008, you were doing it to look into whether there was medical malpractice. And I'm asking you what facts did you have at the time that you thought there might be a potential for medical malpractice in your husband's treatment?

A: What facts - -

Q: Other than what you told me.

A. My interests. The fact that the only tests that had been ordered were the same tests, and the fact that I received a phone call from Dr. Ehrenfeld's office after he had passed away for follow-up. And that's all I can remember.

* * *

Q: What made you think that his death could have been prevented?

A: From when he was in the hospital at Desert Springs.

Q: Did somebody tell you his death could have been prevented?

A: If he would have had a stent, I believe.

Q: Okay. Somebody told you that?

A: Uh-huh. I don't remember if they told me that specifically, no.

Q: At some point, you learned about this issue of the stent?

A: At some point.

Q: Do you remember when?

A. No.

Q: Do you remember who said something about that?

A: Who exactly, no.

Q: Who in general?

A: I don't remember.

Q: Doctor, nurse, friend?

A: I don't remember.

Q: Well, it was learned prior to the time you requested the records on August 28th; correct?

A: That's fair, yes.

See Exhibit B to Defendants' Motion for Summary Judgment on file herein at pages 125 and 127-132.

Thus, by August 28, 2008, Mrs. Becker not only had a mere suspicion of medical malpractice, she had specific facts and theories on which she based this belief: namely, the tests which were or were not performed and the fact that a stent had not been placed. Based on these facts and theories, she testified unequivocally that, when she requested the records on August 28, 2008, she wanted to look into whether there was a potential claim for medical malpractice at that point.[3]

In sum, the factual analysis in this case on the statute of limitations is relatively straightforward. According to *Massey v. Litton*, the discovery rule triggers the statute of limitations, which begins to run, "when the patient has before him facts which would put a reasonable person on inquiry notice of his possible cause of action." The two facts that Mrs. Becker had were the testing issue and the stent issue, which she had on August 28, 2008, when she **actually inquired** about her case by requesting medical records to specifically investigate a claim of potential medical malpractice.

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[3] The *Pope* case references a California case with approval, *Larcher v. Wanless*, 557 P.2d 507 (Cal. 1976), which found that a plaintiff did have a year to bring her wrongful death action where she was aware, before death, of the possible negligence that caused the decedent's death. *Pope*, 760 P.2d at 767 n.8. As referenced in Defendants' moving papers, Mrs. Becker was aware that Dr. Ehrenfeld may have done something wrong within a month of her husband's death.

B. **The claims for medical malpractice brought by Minor Plaintiff Blair Becker are likewise barred by the statute of limitations.**

As set forth in Defendants' moving papers, NRS 41A.097(4) unambiguously states that the parent, guardian or legal custodian of any minor child is responsible for exercising reasonable judgment in determining whether to prosecute any cause of action for medical malpractice within the statute of limitations. NRS 41A.097(4). The statute is not ambiguous, as Plaintiffs claim. The statute clearly references "any minor child" and does not exempt a posthumous minor child. According to the plain language of the statute, any minor child, including a posthumous minor child, is bound by the action of his or her parent or guardian in filing a malpractice lawsuit within the statute of limitations. Furthermore, there is no language in NRS 41A.097(4) that the statute of limitations is tolled while a posthumous child remains in utero.

Contrary to Plaintiffs' assertions, there is no need to engage in a philosophical analysis as to "when life begin." In fact, the key case cited by Plaintiffs on this issue, *Weaks v. Mounter*, 493 P.2d 1307 (Nev. 1972), supports the conclusion that NRS 41A.097(4) holds no exceptions for posthumous children.[4] In the *Weaks* case, the Nevada Supreme Court considered the issue of whether a posthumous illegitimate child could sue for the wrongful death of her father, even though the father had not acknowledged paternity. *Weaks*, 493 P.2d at 1308. In analyzing this issue, the Nevada Supreme Court found that a posthumous child (that is a child born after a parent dies) is an heir for purposes of the wrongful death statute. *Id.* at 1309. In reaching this conclusion, the court determined that Nevada statutory law considered a posthumous child as legally living at the time the parent died. Via this legal construction, a posthumous child was legally alive at the time the parent died and therefore entitled to sue for wrongful death as an heir of that parent. Without reaching this conclusion, the posthumous child would not be able to recover in a wrongful death suit, because the child would not be considered an heir of the decedent.

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[4] The only other case that the Plaintiffs cite on this proposition is *Hogle v. Hall* 912 P.2d 814 (Nev. 1996). That case had absolutely nothing to do with the statute of limitations. It merely cites the *Weaks* case for the proposition that an unborn child who sustains injury prior to birth may bring an action for those injuries after being born. It says nothing about when the cause of action accrues for statute of limitations purposes and makes no mention of the statute of limitations at all.

The *Weaks* case specifically stated that the Nevada Legislature found, "that posthumous children are considered as living at the death of their parents." *Id.* at 1309, n.5. The statute cited in the *Weaks* case was NRS 134.140. Although that particular statute was repealed, it is still good Nevada law and has been recodified at NRS 132.290, which states, "A posthumous child is deemed living at the death of his or her parent." NRS 132.290.

Thus, under Nevada law, to be considered an heir of Barry Becker, Jr., Blair Becker is legally deemed to have been living at the time Barry Becker, Jr. died. *Weaks*, supra; NRS 132.290. Thus, the discovery rule began to run at the same time for Blair Becker as it did for Shannon Becker, which was no later than September 12, 2008, when Shannon Becker (the party responsible for bringing Blair Becker's malpractice claims) was on inquiry notice of the malpractice causes of action. There was no tolling or delay for Blair Becker's actual birth and this is fully in accord with NRS 41A.097(4), which states it is applicable to "any minor." In their opposition, Plaintiffs have cited no Nevada case or statutory law to the contrary.

C. **There is no issue of material fact precluding summary judgment.**

In Defendants' Motion for Summary Judgment, the Statement of Undisputed Facts contained dates from the medical and court records and lengthy quotations from Plaintiff Shannon Becker's deposition, with nothing further. In fact, the bulk of the undisputed facts set forth were from Shannon Becker's sworn deposition testimony. *See* Defendants' Motion for Summary Judgment at pages 6-9. Despite the foregoing, in their opposition, Plaintiffs state that many facts remain in dispute and that several genuine issues of fact regarding inquiry notice remain an issue. *See* Plaintiffs' Opposition at pages 9-10.

However, Plaintiffs never state exactly what facts they dispute or what specific genuine issues of material fact are present to preclude summary judgment. As the Nevada Supreme Court stated in *Wood v. Safeway, Inc.*, 121 P.3d 1026 (Nev. 2005):

> While the pleadings and other proof must be construed in a light most favorable to the non-moving party, that 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 parties favor. The nonmoving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against

> him." The nonmoving party "is not entitled to build a case on gossamer's threads of whimsy, speculation, and conjectures."

Wood v. Safeway, Inc., 121 P.3d at 1031.

In their Opposition, Plaintiffs set forth no such specific facts demonstrating to the existence of a genuine issue for trial.

Plaintiffs' Opposition states that it includes affidavits from Shannon Becker and Barry Becker, Sr. stating that they did not know the death of Barry Becker, Jr. was caused by negligence until they received their expert report; however, no affidavits were attached as Exhibit 7. An affidavit was later received for Barry Becker Sr., but as discussed below, that is completely irrelevant because Barry Becker, Sr., is not a party to this case.

Even if Mrs. Becker has or does submit such an affidavit as stated in footnote 1 of page 8 of Plaintiffs' Opposition, such an affidavit would not create a genuine issue of material fact. First, it would simply be a legal conclusion on her part as to what inquiry notice is. Second, it would likely directly contradict Mrs. Becker's deposition testimony that she knew of facts leading her to inquire about a potential medical malpractice claim, as set forth in her deposition. A nonmoving party cannot create an issue of fact for summary judgment purposes simply by means of an affidavit contradicting that party's prior deposition testimony. *Addisu v. Meyer*, 198 F.3d 1130, 1138 n.6 (9th Cir. 2000) (citing *Kennedy v. Allied Mutual Insurance Co.*, 952 F.2d 262, 266 (9th Cir. 1991)); *Deck v. American Hawaii Cruise, Inc.*, 121 F.Supp.2d 1292 (D. Hawaii 2000).

The same is true for Barry Becker, Sr. His affidavit merely states that he did not know of alleged negligence until Plaintiffs' expert rendered his final opinions. This again is a simple conclusory legal statement on inquiry notice. It also contradicts Mr. Becker's deposition testimony.[5] However, most importantly, Barry Becker, Sr., is not a party to this action and therefor his state of mind or beliefs are completely irrelevant to this motion for summary judgment.

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[5] Mr. Barry Becker, Sr., testified in his deposition that, even before Barry Becker, Jr. was admitted to the hospital in August 2008, he had concerns about the care Barry Becker, Jr., was receiving from his physicians. *See* Barry Becker, Sr.'s deposition testimony at pages 37-38, attached hereto as Exhibit A.

Lastly, it must be noted that Plaintiffs' opposition cites two cases on the summary judgment standard: *Butler v. Bogdanovich*, 705 P.2d 662 (Nev. 1985) and *Wiltsie v,. Baby Grand Corp.*, 774 P.2d 432 (Nev. 1989). Both of these cases were decided well before the key case of *Wood v. Safeway*, supra, which eliminated the metaphysical doubt standard for summary judgment. Therefore, these two cases cited are irrelevant and the court should consider only the summary judgement standard set forth in *Wood v. Safeway*.

3. Conclusion

Plaintiff Shannon Becker testified under oath at her deposition that she requested the court issue an order on August 28, 2008 to obtain her husband's medical records. She testified that she requested these medical records to look into whether she had a potential claim for medical malpractice against her husband's treating providers. She further testified that the reason she did this was based on at least two facts of which she had knowledge at the time: (1) that the testing performed by the treating physicians was or may have been inappropriate; and (2) that using a stent could have potentially saved her husband's life. Therefore, Mrs. Becker was undisputably on notice of a potential claim for medical malpractice because she knew her husband had died (the actual injury) and was on notice of facts that he died as a result of medical malpractice. She was on inquiry notice because she specifically used the request for medical records to inquire as to whether she had a potential claim of medical malpractice. There is no dispute over the facts as set forth in Mrs. Becker's deposition, so it fully appropriate to grant summary judgment to Defendants.

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Furthermore, Mrs. Becker had a duty under NRS 41A.097 to timely file a complaint for medical malpractice on behalf of her daughter, Blair Becker. Nevada law makes no exception to the statute of limitations for posthumous children. Therefore, summary judgment is also appropriate as to Blair Becker's claims.

DATED this 15th day of February, 2012.

HUTCHISON & STEFFEN, LLC

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Las Vegas, Nevada 89145

Attorneys for Defendants
Howard Eherenfeld, M.D. and
Southwest Medical Associates, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this 15th day of February, 2012, I caused the above and foregoing document entitled **DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to be served as follows:

[X] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

[ ] Pursuant to EDCR 7.26, to be sent **via facsimile;** and/or

[X] Pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

[ ] to be hand-delivered to the attorneys listed below at the addresses indicated:

Gary W. Call, Esq.
Edward M. Bernstein & Associates
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-AND-
Gerald I. Gillock, Esq.
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Attorneys for Plaintiffs

Renee Hoban
An employee of Hutchison & Steffen, LLC

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EXHIBIT A

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

SHANNON BECKER, individually, and as heir of BARRY BECKER, JR., deceased; BLAIR BECKER, by and through her mother and natural guardian,

Plaintiffs,

vs.

CASE NO. A-10-612134-C
DEPT. NO. XVI

HOWARD EHRENFELD, M.D., an individual; EDWARD CLARK, M.D., an individual; SOUTHWEST MEDICAL ASSOCIATES, INC., DOES 1 to 75, inclusive; and ROE CORPORATIONS 1 to 10,

Defendants.

THE DEPOSITION OF

BARRY BECKER, SR.

Thursday, January 12, 2012

10:19 a.m.

10080 West Alta Drive

Las Vegas, Nevada

June W. Seid, CCR NO. 485

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put them in your office, right?

MR. GILLOCK: He didn't say that. He said he didn't know.

A. I don't know. We went through that.

BY MR. RATH:

Q. All right. Within a month of Shannon getting the records, did you have a discussion with her about the records or what had happened to Barry?

A. I don't recall.

Q. Do you recall having a conversation with Shannon about the records or what had happened to Barry prior to the end of 2008?

A. Well, I'm sure that I had a discussion from time to time that Shannon was not very happy with some of the medical treatment, but what was on our mind was kind of getting over the catastrophic event that had happened, and we had a high-risk pregnancy that we were trying to make sure the baby went to its term, and so we didn't -- we tried not to engage in a lot of frustrating conversations.

Going through Christmas and New Year's and Thanksgiving was pretty horrific that first year. We had a few other things on our minds.

Q. When did Shannon tell you she had issues with the medical care that Barry had received?

MR. GILLOCK: Object as vague and ambiguous.
A. I believe probably during the time prior to Barry going in the hospital she was a little frustrated with Dr. Clark and some of these folks that he had gone to see.
BY MR. RATH:
Q. Okay. What did she --
A. He had a problem and nobody was doing anything about it.
Q. And she told you that before he got admitted in August of '08?
A. Yes.
Q. What specifically did she tell you she was having an issue with, with Dr. Clark?
A. She was going to a doctor and he was going to a doctor and he went getting any better.
Q. All right. Did she mention the neurologist, Dr. Ehrenfeld, whether she had some issues with him or concerns?
A. Well, you know, we have had a discussion since he passed, but I have no clue when that would be.
Q. Sure.
A. I don't know who Dr. Ehrenfeld is.
Q. Was she speaking about specific doctors or just the doctors he was seeing in general?

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HUTCHISON & STEFFEN

A PROFESSIONAL LLC

EXHIBIT 5

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CLERK OF THE COURT

SUPP
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DISTRICT COURT

CLARK COUNTY, NEVADA

*****

BLAIR BECKER, by and through her mother and natural guardian, SHANNON BECKER, individually and as heir of BARRY BECKER, JR., deceased, Plaintiff, HOWARD EHRENFELD, M.D., an individual; SOUTHWEST MEDICAL ASSOCIATES, INC., DOES 1 to 75, inclusive; and ROE CORPORATIONS Defendants.	CASE NO.: A612134 DEPT NO.: XVI **PLAINTIFFS' SUPPLEMENT TO OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

PLAINTIFFS, SHANNON BECKER, individually and as heir of BARRY BECKER, JR., deceased; BLAIR BECKER, by and through her mother and natural guardian, SHANNON BECKER, individually and as heir of BARRY BECKER, JR., deceased by and through their attorney, GARY W. CALL, ESQ., of the law firm of EDWARD M. BERNSTEIN & ASSOCIATES, hereby submit the 1) Affidavit of Shannon Becker; and 2) Affidavit of Barry Becker, Sr., in supplement to their OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

EDWARD M. BERNSTEIN & ASSOCIATES
ATTORNEYS AT LAW
500 SO. FOURTH ST.
LAS VEGAS,
NEVADA 89101
(702) 240-0000

Said affidavits are noted in the Opposition as Exhibit 7.

DATED this 15 day of February, 2012.

EDWARD M. BERNSTEIN &ASSOCIATES

By: _____
GARY W. CALL
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 15 day of February, 2012, service of the foregoing PLAINTIFFS' SUPPLEMENT TO OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT, was e-filed through the Eighth Judicial District Court EFP system and by causing a copy of the same to be deposited in the United States mail, postage prepaid, addressed as follows:

L. Kristopher Rath, Esq.
HUTCHISON & STEFFEN, LLC
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Las Vegas, NV 89145
Attorneys for Defendants

GERALD I. GILLOCK
GILLOCK MARKELY & KILLEBREW
428 S. Fourth Street
Las Vegas, NV 89101
Co-Counsel for Plaintiff

_____
An Employee of Edward M. Bernstein & Associates

EDWARD M. BERNSTEIN & ASSOCIATES
ATTORNEYS AT LAW
500 SO. FOURTH ST.
LAS VEGAS,
NEVADA 89101
(702) 240-0000

AFFIDAVIT OF SHANNON BECKER

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

SHANNON BECKER, being first duly sworn, deposes and states as follows:

1. That your affiant is over the age of majority, has personal knowledge of the facts herein, is a Plaintiff hereto, and is competent to testify to the same.

2. Affiant did not become aware of or suspect that the death of her husband, Barry Becker, Jr., was caused by the errors, acts, omissions, or failure to act of Defendant, Howard Ehrenfeld, M.D. and/or Southwest Medical Associates.

3, The Affidavit of expert Barry Ludwig, M.D., dated March 16, 2010, was attached to the initial Complaint filed on March 17, 2010.

4. It was only after she knew of Dr. Ludwig's opinions did she know that the death of her husband, Barry Becker, Jr., was caused by the errors, acts, omissions, or failure to act of Defendant, Howard Ehrenfeld, M.D. and/or Southwest Medical Associates.

Further Affiant sayeth naught.

DATED this 14 day of February, 2012.

Shannon Becker
SHANNON BECKER

SUBCRIBED and SWORN to before me
this 14 day of February, 2012.

NOTARY PUBLIC
BUNNY J. REIMAN
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. APRIL 25, 2012
No: 08-6529-1

Bunny J. Reiman
NOTARY PUBLIC in and for said
County and State

AFFIDAVIT OF BARRY BECKER, SR.

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

BARRY BECKER, SR., being first duly sworn, deposes and states as follows:

1. That your affiant is over the age of majority, has personal knowledge of the facts herein, is a Plaintiff hereto, and is competent to testify to the same.

2. Affiant did not become aware of or suspect that the death of his son, Barry Becker, Jr., was caused by the errors, acts, omissions, or failure to act of Defendant, Howard Ehrenfeld, M.D. and/or Southwest Medical Associates.

3, The Affidavit of expert Barry Ludwig, M.D., dated March 16, 2010, was attached to the initial Complaint filed on March 17, 2010.

4. It was only after he knew of Dr. Ludwig's opinions did he know that the death of his son, Barry Becker, Jr., was caused by the errors, acts, omissions, or failure to act of Defendant, Howard Ehrenfeld, M.D. and/or Southwest Medical Associates.

Further Affiant sayeth naught.

DATED this 3 day of February, 2012

BARRY BECKER, SR.

SUBCRIBED and SWORN to before me

this 3 day of February, 2012.

NOTARY PUBLIC in and for said
County and State

NOTARY PUBLIC
KIM L. HAWKINS
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. MARCH 02, 2012
No: 96-0908-1

EDWARD M. BERNSTEIN & ASSOCIATES
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HUTCHISON & STEFFEN

A PROFESSIONAL LLC

EXHIBIT 6

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CLERK OF THE COURT

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Attorneys for Defendants Howard Ehrenfeld, M.D. and Southwest Medical Associates, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

SHANNON BECKER, individually an as heir of BARRY BECKER, JR., deceased; BLAIR BECKER, by and through her mother and natural guardian; Plaintiffs, vs. HOWARD EHRENFELD, M.D., an individual; EDWARD CLARK, M.D., an individual; SOUTHWEST MEDICAL ASSOCIATES, INC., DOES 1 to 75, inclusive; and ROE CORPORATIONS 1 to 10, Defendants.	CASE NO.: A-10-612134-C DEPT. NO: XXXI **DEFENDANTS' REPLY TO PLAINTIFFS' SUPPLEMENTAL OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Date of Hearing: **February 24, 2012** Time of Hearing: **9:30 A.M.**

DEFENDANTS' REPLY TO PLAINTIFFS' SUPPLEMENTAL OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, HOWARD EHRENFELD, M.D. and SOUTHWEST MEDICAL ASSOCIATES, INC., (hereinafter collectively referred to as "Defendants"), by and through their counsel of record, HUTCHISON & STEFFEN, LLC, hereby file their Reply to Plaintiffs' Supplemental Opposition to Defendants' Motion for Summary Judgment.

. . .

. . .

This Reply is made and based upon the papers and pleadings on file herein, the attached Memorandum of Points and Authorities and any oral argument which the Court may entertain at the hearing on this Motion.

DATED this 16th day of February, 2012.

HUTCHISON & STEFFEN, LLC

L. Kristopher Rath (5749)
Jessica S. Taylor (11193)
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145

Attorneys for Defendants
Howard Ehrenfeld, M.D. and
Southwest Medical Associates, Inc.

Memorandum of Points and Authorities

1. Introduction

As an initial matter, Plaintiffs' Supplemental Opposition is untimely and is not permitted by the rules. EDCR 2.20(i). For that reason alone, it should be stricken.

Second, even if the Court were to consider the supplement, in her affidavit, Mrs. Becker never recants the deposition testimony that she gave, which clearly demonstrates that she was on inquiry notice of a potential claim for medical malpractice by September 12, 2008 at the latest. To the extent Mrs. Becker's new affidavit contradicts any of her deposition testimony, it is ineffective to create a material issue of fact. *Addisu v. Meyer*, 198 F.3d 1130, 1138 n.6 (9th Cir. 2000); *Deck v. American Hawaii Cruise, Inc.*, 121 F. Supp.2d 1292 (D. Hawaii 2000). Finally, Mrs. Becker's affidavit states the incorrect standard for inquiry notice.

2. Legal Arguments

A. Plaintiffs' Supplemental Opposition must be stricken.

EDCR 2.20 governs the filing of motions, oppositions, and replies in the Eighth Judicial District Court. Under this court rule, Plaintiffs' opposition to Defendants' motion was due on January 31, 2012. At the request of Plaintiffs' counsel, defense counsel granted Plaintiffs an extension to file their opposition up to and including February 3, 2012, when it was filed. Plaintiffs' counsel did not request any further extensions and Defendants then filed their Reply Brief timely.

Plaintiffs filed their Supplemental Opposition on February 15, 2012.[1] According to EDCR 2.20(i), supplemental briefs on motions are only permitted, if filed within the original time limitations, or by order of the court. There is no indication that Plaintiffs obtained permission to file the supplemental opposition and it is untimely.

. . .

[1] At the time this Reply was prepared, Plaintiffs had not even served their Supplemental Opposition on Defendants. Defendants' counsel happened to notice that the Supplemental Opposition had been filed when checking the Court Docket for other reasons.

Notably, Plaintiffs provide no explanation as to why the supplemental opposition was filed so late. It includes only brief, conclusory affidavits (most likely prepared by counsel) signed by a witness and Plaintiff Shannon Becker. With regard to Shannon Becker, there is no explanation as to why it took nearly a month after the filing of the original Motion for Summary Judgment for her to sign a brief affidavit prepared by her counsel.

As the supplemental opposition is both untimely and impermissible under the court rules, Defendants respectively request that the Court strike it and/or refrain from considering the new exhibits put forth in reaching any decision on this matter.

B. **Even if the Court considers the Supplemental Opposition, it is still fully appropriate to grant summary judgment to Defendants.**

The two brief affidavits attached to Plaintiffs' Supplemental Opposition do not change any of the key facts or arguments as set forth in Defendants' Motion and Reply Brief. They do not create any issues of material fact which would preclude the granting of summary judgment in favor of Defendants.

With regard to Plaintiff Shannon Becker's affidavit, the key paragraphs are paragraphs 2 and 4. In paragraph 2 of her affidavit, Shannon Becker states, "Affiant did not become aware of or suspect the death of her husband, Barry Becker, Jr., was caused by the errors, acts, omissions, or failure to act of Defendant, Howard Ehrenfeld, M.D. and/or Southwest Medical Associates." However, Shannon Becker never states when she became aware or suspected the matters noted (although, in her deposition, she did testify as to when she was made aware of facts which put her on inquiry notice of a potential claim for medical malpractice). Furthermore, and more importantly, she never recants the deposition testimony that she gave.

As set forth in Defendants' Motion and Reply, Mrs. Becker unequivocally testified that she was on notice of at least two facts which lead her to believe medical malpractice was committed under her legal theories[2] and based on these facts, she actively inquired into a potential claim for medical malpractice by seeking a court order to allow the release of her husband's medical records

[2] (1) The fact that improper testing may have been ordered and (2) that a stent may have saved her husband's life.

to her on August 28, 2008. She testified further that she came to believe that Dr. Ehrenfeld may have done something wrong in his treatment of her husband within a month of her husband's death, which would have been September 12, 2008. *See* Defendants' Motion and Reply Brief, on file herein.

Nothing Mrs. Becker states in her affidavit retracts, recants, or alters the sworn deposition testimony she gave on the aforementioned issues. Furthermore, to the extent that the affidavit could be potentially construed as contradictory to the testimony Mrs. Becker gave, that cannot create an issue of material fact to defeat summary judgement. *Addisu v. Meyer*, 198 F.3d 1130, 1138 n.6 (9th Cir. 2000) (citing *Kennedy v. Allied Mutual Insurance Co.*, 952 F.2d 262, 266 (9th Cir. 1991)); *Deck v. American Hawaii Cruise, Inc.*, 121 F. Supp.2d 1292 (D. Hawaii 2000).

In paragraph 4 of her untimely affidavit, Mrs. Becker states that it was only after she **knew** of her expert's opinions that she then **knew** that the death of her husband was caused by medical malpractice. However, this paragraph misstates the definition and standard of "inquiry notice." According to *Massey v. Litton*, 669 P.2d 248 (Nev. 1983), the discovery rule, which triggers the statutory of limitations in medical malpractice cases, begins to run, "When the patient has before him facts which would put a reasonable person on inquiry notice of his possible cause of action, whether or not it has occurred to the particular patient to seek further medical advice." *Id.* at 251. The *Massey* case further stated, "The focus is on the patient's knowledge of or access to facts rather than on her discovery of legal theories." *Id.* at 252. Notably, Mrs. Becker actually had her legal theories in line when she requested her husband's medical records on August 28, 2008. By that time, she already believed that the proper testing had not been ordered and that a stent should have been placed. In any event, the *Pope v. Gray* case acknowledges that the statute of limitations begins to run when the victim discovers both the injury and the facts suggesting negligence. *Pope v. Gray*, 760 P.2d 763, 765 (Nev. 1988). Mrs. Becker clearly had the facts suggesting negligence under her legal theories (i.e., the testing done by the physicians and the stent issue) and because they suggested negligence in her mind, she actively inquired into a potential malpractice case by requesting her husband's medical records on August 28, 2008.

. . .

In sum, neither the *Pope* case nor the *Massey* case, both of which were cited by Plaintiffs, state that the statute of limitations does not run until after the plaintiff has absolute knowledge of medical malpractice by consulting a lawyer, sending medical records to an expert, having the expert review those records, and receiving the final opinion of that expert. Nevada case law does not support any such interpretation of NRS 41A.097. In fact, the Oregon case of *Greene v. Emanuel Hospital*, which Plaintiffs also cite, specifically rejected that approach. Thus, the affidavit that Mrs. Becker submitted does not create an issue of material fact and does not contain anything which would defeat Defendants' Motion for Summary Judgment.

3. Conclusion

Plaintiffs' Supplemental Opposition should be stricken as untimely and impermissible under court rules. Even if the Court considers Plaintiffs' Supplemental Opposition, it does nothing to change the facts and the law in this case. Mrs. Becker never recants her deposition testimony which amply demonstrated that she was on inquiry notice of a potential claim for medical malpractice against Defendants by September 12, 2008 at the latest. Accordingly, the Court should grant Defendants' Motion for Summary Judgment.

DATED this 16th day of February, 2012.

HUTCHISON & STEFFEN, LLC

L. Kristopher Rath (5749)
Jessica S. Taylor (11193)
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145

Attorneys for Defendants
Howard Eherenfeld, M.D. and
Southwest Medical Associates, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this 16th day of February, 2012, I caused the above and foregoing document entitled **DEFENDANTS' REPLY TO PLAINTIFFS' SUPPLEMENTAL OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** to be served as follows:

[X] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

[ ] Pursuant to EDCR 7.26, to be sent **via facsimile;** and/or

[X] Pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or

[ ] to be hand-delivered to the attorneys listed below at the addresses indicated:

Gary W. Call, Esq.
Edward M. Bernstein & Associates
500 South Fourth Street
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-AND-
Gerald I. Gillock, Esq.
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Attorneys for Plaintiffs

An employee of Hutchison & Steffen, LLC

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HUTCHISON & STEFFEN

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DISTRICT COURT

CLARK COUNTY, NEVADA

SHANNON BECKER, et al

Plaintiffs,

vs.

HOWARD EHRENFELD MD, et al,

Defendants.

CASE #A612134

DEPT. XXXI

BEFORE THE HONORABLE JOANNA S. KISHNER, DISTRICT COURT JUDGE
FRIDAY, MARCH 2, 2012

***TRANSCRIPT OF PROCEEDINGS*:**
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

For the Plaintiffs: GARY W. CALL, ESQ.
GERALD I. GILLOCK, ESQ.

For the Defendants: LUKE KRISTOPHER S. RATH, ESQ.

RECORDED BY: RACHELLE HAMILTON, Court Recorder

FRIDAY, MARCH 2, 2012, AT 9:33 A.M.

THE COURT: This is page two, Becker vs. Ehrenfeld , A612134. Counsel, can I briefly have your appearances please?

MR. GILLOCK: Gerald Gillock, bar number 51 for the plaintiff.

MR. CALL: Gary Call, bar number 6922 for the plaintiff.

MR. RATH: Good morning, Your Honor, Kristopher Rath, bar number 5749 for defendants.

THE COURT: It's your motion. I have read everything that we have received so feel free to proceed.

MR. RATH: Thank you, Your Honor. As you've read everything I'll try to be fairly brief.

As you're aware it's a medical malpractice case. The question here is when the Plaintiffs were on inquiry notice of a potential claim for medical malpractice under the discovery rule in NRS 48.097.

You've read the deposition testimony. Mrs. Becker first of all testified she thought Dr. Ehrenfeld had done something wrong within a month of her husband's death. She requested her medical -- her husband's medical records from the court via petition on August 28, 2008, and specifically testified that that was to look into whether there was a potential claim of medical malpractice. She also testified that she knew of two facts prior to requesting those records on that date that led her to believe there was medical malpractice that included her belief improper testing had been done and her belief that a stent should have been inserted. Her deposition testimony on when she knew these facts I think is very clear, Your Honor, and we provided you with that deposition testimony.

Despite those undisputed facts Plaintiff's claim that they were on inquire notice later than this. And I would point out that neither Nevada or any other state that's looked inquiry notice has found that absolute knowledge is necessary. Absolute knowledge really only occurs after trial or appeal.

Inquiry notice does not require a plaintiff to hire an attorney, hire an expert, get medical records to the expert, have the expert review those medical records and reach a final conclusion.

The *Greene* case which is out of Oregon which considered a similar statute specifically said that was not the case. If we look at Nevada law, the *Massey* case says that, quote, the focus is on the patient's knowledge of or access to facts rather than her discovery of legal theories, which indicates the patient doesn't even need to go to a lawyer.

Inquiry notice means you have the facts available to investigate a claim of medical malpractice. Not only was Mrs. Becker on inquiry notice, she actively inquired into the potential claim by requesting the court release her records and getting those records. She also testified about the facts that she was aware of which led her to the inquiry. She's inquiring about a claim by requesting those records, Your Honor, and so it's our position that if that's not inquiry notice then nothing really is.

There was some -- there were some affidavits submitted in the supplemental opposition and it's our position that it should be stricken first of all because it's late. Supplemental oppositions are not permitted. Even if you are to consider that affidavit it really doesn't change anything. Mrs. Becker didn't recant or reverse her testimony at her deposition. She gave some conclusory statements about having absolute knowledge which is really not the standard.

If she had said anything in that affidavit which was contradictory to her deposition, and I don't think she did, then that is not to create an issue of material fact per the case law that we cited to you.

Then I think the final issue is on the minor. Plaintiffs don't dispute that 41A.097(4) charges the parent, or guardian of the minor, from filing within the statute of limitations. I don't think that's in dispute. They argue there's a question as to whether the statute accrues prior to the minor being born. Under Nevada case law that's not the case.

In the *Weaks* case which the Plaintiff cited the court found that a posthumous child wasn't heir entitled to sue for damages in wrongful death, and in reaching that conclusion the *Weaks* case cited a wills and trust statute that stated a posthumous child is deemed to be legally alive at the time the parent passes away. And that is codified in NRS 132.290. According to that statute the posthumous child is deemed to be living when the parent dies so there is no tolling for the child being in utero.

Furthermore 41A.097 states that it's any minor child and that there's no tolling for a posthumous child. So the statute of limitations began running for both Plaintiffs in this case when Ms. Becker was on inquiry notice and actually acquired by requesting the records from the court. And those are basically our points, Your Honor, if you have any further questions.

THE COURT: I don't at this point. I'll tell you 41A.097 has been brought up a lot in the Nevada Supreme Court and we don't have hard guidance yet. But please, I'll let Plaintiff's counsel.

MR. GILLOCK: Thank you, Your Honor. Let me begin by saying that the statute of limitations is, in medical malpractice, is probably the harshest statute that

exists and places such an unreasonable burden on plaintiffs that it's almost virtually a question of fact in every single case.

I find that the defense position intellectually dishonest. The term inquiry notice is something they have coined that is totally inconsistent with the statute and the provision to the statute. If inquiry notice was the standard then inquiry notice would bar almost every single case that there is involving medical malpractice because at the time of a medical malpractice injury there's generally grief and sorry, and especially in a death case, where the person is going through and have very strong feelings about their case.

I can't tell this Court how many cases come into the office where they think something was wrong. They want to find out if something was wrong. They want to inquire if something was wrong, but they're lay people, they have absolutely no idea whatsoever whether or not there was a legal standard. They have no idea whatsoever about a, quote, statute of limitations. They have no idea about the standard of care required of a doctor. They don't know if a mere mistake or a mistake of judgment is negligence. They don't have the necessary knowledge to do anything more than inquire. And I challenge counsel to look at the statute 41.097 and find the term inquiry notice in that statute. It is not there. It says when a plaintiff discovers or with use of reasonable diligent should have discovered. Now that does not mean inquire, that means -- discover means actual knowledge when a person discovers there was malpractice.

In this case we have the affidavits which I agree they were submitted a bit late but we have to look at justice and we have to look at the need to prove these cases on their merits.

In this particular case the family was of course upset and she so

testified in her deposition. And they wanted to know if anything was done wrong. And they began -- they gathered the records and then they went through this grieving period and period of loss, and now we -- they don't know until they talk to an attorney and the attorney then has a doctor evaluate this to see if they can discover that there was negligence, and if so what that negligence was. If the breach of the standard of care was a cause, and clearly the Nevada Supreme Court has always maintained one principle in the statute of limitations and that is that it's a question of fact as to whether -- as to when the statute of limitation runs. And I am very upset with them trying to come before this Court and impose a new standard of, quote, inquiry notice on this Court when the statute is extremely clear when they discover or should have discovered, and they made efforts and they discovered, or should have discovered when the affidavit of the doctor was signed and filed. And that's when the Plaintiffs discovered that there was medical malpractice in this case. And I think that that given -- that is the status of this case, and that is the status of -- and it complies with the law, and there was no -- there's no assertion by the defense that they, quote, should have discovered it sooner. They're relying totally on this phantom theory of theirs of inquiry notice, and I challenge them to find that in the statute.

THE COURT: Can we address the issue with regards to Blair Becker and the posthumous.

MR. GILLOCK: Yes, I think that once again is a question of fact. But the issue with Blair is Blair was not alive at the time that the father died. I think it would be unreasonable to impose a duty upon Blair to have the statute start running at the time she's in utero and impose upon the guardian the duty to start inquiring before the child is even born, nor does the guardian know whether or not there's legal --

whether or not there's medical malpractice, nor do they know whether or not the child has a claim or not. There would -- since the child wasn't born we can't impose a duty on the parent to know that they -- if there's a claim or not.

Gary, did you have something more that you wanted to address on Blair?

MR. CALL: On Blair, if we go ahead and go by what the statute -- the way the defense wants to interpret it, if Blair was conceived immediately nine months prior, and then Blair would have had to go ahead and file, or her mother would have had to go ahead and file prior to her even being born whether she would have been viable or not we didn't -- she wouldn't have known. And then we would have -- if that's the standard that every child that is conceived and not born before one of the parent's death would all -- everybody would have to file and -- to protect the statute. That just doesn't make reasonable sense here. And if she was -- it had to be -- it had to be filed after she was born if she was conceived at nine months she would have only had three months to go ahead and file to preserver her claim.

The statute is ambiguous in this instance. It doesn't even address children that are in utero. The cases that I cited for the Court shows that the child doesn't have a claim until it is born, and that's in other instances. Here the statute doesn't even address that. So to be fair I think that it would be -- Blair's claim still remains viable in this instance as far as the statute of limitations is concerned.

Just let me address a little bit as far as Shannon is concerned. The cases I cited, the *Gaston v. Parsons* case, it says you have to have a legal claim similar to what we have here in Nevada; a reasonable person that experiences symptoms that are incidental, particular medical procedures, may not be aware that he or she has been a victim of a tortuous conduct.

Here Barry Junior had severe headaches that had been going on for about a year. He had an aneurism which led to his passing. This is pretty much incidental to what was going on. It is dissimilar to the one in the *Greene vs. Legacy Emanuel* which I know Mr. Rath cites for his client as support for his position. Unlike the *Greene* case there was a definite problem that occurred with an abortion, that it was a perforation of the uterus. That is something that is not incidental to the procedure. Perforation of the uterus during that procedure was clearly a malpractice and that gave rise to them going ahead and looking further into the case. Unlike what we have in this instance where we have an aneurism that looked to be a continuation of the symptoms that were going on and not what anything that Dr. Ehrenfeld or Southwest Medical Association had done at the time.

So the notice or the -- Shannon going ahead and looking at this case further she didn't know she had a legal cause of action until a doctor told her about all the complex issues that were involved here and said that we had malpractice at the time.

THE COURT: Counsel?

MR. RATH: Thank you, Your Honor. First of all the inquiry notice standard is not something that I made up, it's from the Nevada Supreme Court, it's in the cases of both *Massey v. Litton* and the *Pope* case, and those are the Nevada Supreme Court's interpretation of NRS 41A.097.

Again *Massey* states the focus is on the patient's knowledge of or access to facts rather than discovery of legal theories. Inquiry notice is the standard set up by the Nevada Supreme Court in two cases, okay. They have not cited any case law that says that you need to go to an attorney, have an expert review records and have that expert's conclusions before you're on inquiry notice.

Case law doesn't say that. 41A was instituted by the legislature especially after the 2002 medical malpractice issues to protect physicians. That's why the statute at that time was reduced from two years to one year. It was meant to protect physicians, so if it's unduly harsh then that's something to take up with the legislature, but that's the law.

The discovery rule is often a factual issue but I've cited you case law that says if there are undisputed material facts it can be decided as a matter of law and that's the *Siragusa vs. Brown* case.

There are no factual issues here, Your Honor. The Plaintiff's testimony at deposition is her testimony and that's what there is to work with. She said that she requested the records for two reasons; she thought other testing should have been done. She thought that a stent could have been placed. Those are the facts she knew that put her on inquiry notice and actually led her to inquire by getting the records.

The case law and the statute applies to lay people. It doesn't matter that you're a lay person or you're an expert, that's how it applies. None of the plaintiff patients in the *Massey* case or *Pope* case were physicians who knew about medicine. The simple issue is do you have enough facts to make you inquire and we do in this case. And as far as Blair I think the statute clearly puts the duty on the parent to file for the minor. That's never going to make you blow a statute because the minor is in utero for nine months.

THE COURT: Counsel, that was what I was asking a couple questions on.

MR. RATH: Well --

THE COURT: Any time -- you're kind of asking this Court to interpret *Roe vs. Wade* in a way that, you know --

MR. RATH: I don't think you need to get there.

THE COURT: But isn't the ruling you're seeking from this Court really does get there? It makes the determination that the Court would have to say, not maybe in this specific case, but if this case were to go up and that were to be the law of the land

MR. RATH: Uh-huh.

THE COURT: -- it truly -- at what point does the in utero child have a claim? You've truly been kind of saying that. I mean --

MR. RATH: Well let me --

THE COURT: -- the day before birth maybe.

MR. RATH: Let me address it this way.

THE COURT: The first month, second month the child passes away, disappearing twins syndrome, fifteen different examples -- you know what I mean? Unfortunately things happen --

MR. RATH: And I think that's why --

THE COURT: Hopefully it will never happen to anybody, but -- knock on wood. But isn't that really -- if you're -- is you're proposing? In the definition of a minor truly in almost every other statute doesn't include somebody who's unborn, but that's the one I really have challenges with shall we say.

MR. RATH: Let me make two points on that.

THE COURT: Please do.

MR. RATH: First of all there's nothing preventing a plaintiff from getting the ball rolling and starting to look at her case while she's pregnant. In fact in this case it happened. Mrs. Becker --

THE COURT: But the -- sorry, I interrupted you. Sorry go ahead. My

apologies.

MR. RATH: I'm sorry. Let me make a couple quick points.

THE COURT: No please do.

MR. RATH: Mrs. Becker actually inquired in this issue before her child was born, about six months before the child was born. She inquired by asking for the records and obviously she was pregnant at that time. But Your Honor this is why we have statutory constructs. The wrongful death statute was not there at common law. It's a statutory construct, all right. When the Nevada Legislature made the wrongful death statutes, wrongful death statutes had to define who the plaintiff blamed for wrongful death. Wrongful death statutes therefore had to define who an heir was. An heir was defined in reference to the wills and trust statutes as a person who would have taken from the decedent had he died intestate. And you've got to look to chapter 132 to determine who an heir is.

In the *Weaks* case they had this issue with a posthumous child who wasn't technically an heir. So what did they do? The looked to the statute I cited to you, which is a legal construct, which says the posthumous child is deemed to be living at the time the parent died. So for the wrongful death statute the court said that legal construct allows the posthumous child to bring a wrongful death claim. Consequently that statutory construct must also come in here where we are looking to see the posthumous child can -- when the statute of limitations runs for a posthumous child.

If a posthumous child is deemed to be legally living at the time the parent died so that he can bring the wrongful death claim then also he's got to be deemed legally living at the time the parent died under the statute and that legal construct for purposes of running the statute of limitations. That's not going to

prevent a minor child from bringing a claim but the parents are going to bring the claim anyway and is working it up and the minor child, they still have at least three months or more depending on when inquiry notice ran. So I think legally according to Nevada law and statutes it's run for the minor child as well. 41A does not give exceptions for posthumous children, and 132.290 says when they are deemed to be born.

Conversely, and let me address this issue, if you've got a minor child who is three years old they can't follow the discovery rule, they have to rely on their parent or guardian and that's why 41A.097 requires and charges the parent or guardian with the duty to bring it within the statute of limitations.

MR. CALL: Your Honor, can I --

MR. RATH: You're getting another shot? I mean --

THE COURT: I'd say I'm really -- this was well briefed, it was well argued. I'm ready to rule.

MR. CALL: I just wanted to direct the Court to one aspect of my opposition.

THE COURT: Counsel, and I have very politely said I'm ready to rule.

MR. CALL: Thank you, Your Honor.

THE COURT: I appreciate that because if not we've got other people that have been going back and forth for the last -- if this was something that I felt that there needed some other -- it was very well briefed, very well argued, okay?

I was very intrigued by the times to the wills and trust but it just doesn't meet it under the medical malpractice statute. And the role of the wills and trust to allow somebody to have something, I mean it just doesn't apply to the medical malpractice concept because you basically would have -- if somebody knows they're pregnant their child's claim starts to run, but then a person says that they

don't know they're pregnant -- I mean it just wouldn't -- with so many, so many concerns that there is really not a direct Nevada Supreme Court case on point. There is not, from looking at the clear statutory language that there was an intention by the legislature to -- in the medical malpractice realize I'm making this very narrow, I'm not extending it outside, but in 41A.097 there was an intention obviously to make a statute of limitations what it is, but the legislature had tons of, shall we say, view points from numerous interested groups and if they had wished to include in utero children in the definition of the statute of limitation we all know that standard, you know.

I don't create the law, I follow the law. If the legislature did intend something to be in there it would have put it in there. So this Court is not going to create an extension, although, like I said, I appreciated a very creative argument but I -- it's an extension of the current law.

So the Court is going to deny summary judgment. It finds that there are issues of facts. It finds that the statute does not clearly state that a child's claim starts in utero and therefore since there's ambiguity when the statute of limitations asserts that is a question of fact.

With regards to Shannon Becker; Shannon Becker is a closer call but I think the Court feels that there is still some conflicting evidence exactly what Shannon Baker, as a lay person, knew at any particular time. Let me be clear, the Court is not saying that, as proposed by one side, that you have to have an attorney and it has to be at the time of the doctor's affidavit. The Court's not saying that, that's not what the law is, but the Court is saying in these case on these facts, this is an issue that goes up to the Supreme Court all the time and it's usually -- every single one comes down is it's a question in fact unless you have something

more than we have in this case. And in this case we don't have enough that summary judgment would be appropriate. There are disputed issues of facts as to material issues of facts in dispute with regards to both Shannon Becker and Blair Becker, and therefore the Court does deny summary judgment without prejudice.

Plaintiff's counsel will you prepare the order and submit it to Defendant, please?

MR. GILLOCK: Yes we will, Your Honor

MR. CALL: Yes, Your Honor.

MR. GILLOCK: Thank you, Your Honor.

THE COURT: Thank you so very much. I appreciate it.

MR. RATH: Your Honor, you're just saying it's a question of fact for the jury to decide on the statute of limitations?

THE COURT: It doesn't meet the summary judgment standard so therefore the summary judgment is denied based on everything that's been presented to the Court.

MR. RATH: Okay.

THE COURT: And the Court did, if anyone did take into consideration the supplementary affidavits for the reason that there's a clear directive from the Supreme Court to rule on things, and I didn't see that it was anything willful or any reason that the Court shouldn't consider it, and both firms have hit me with things at the last moment so in fairness I end up reading everything.

MR. RATH: Okay.

MR. GILLOCK: Thank you, Your Honor.

MR. RATH: Thank you.

MR. CALL: Thank you, Your Honor.

MR. GILLOCK: I appreciate it.

THE COURT: Okay, thank you so very much, I appreciate it.

[Proceeding concluded at 9:59 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.



RACHELLE HAMILTON
Recorder/Transcriber

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EXHIBIT PAGE ONLY

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

EXHIBIT 8

NOEJ

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

******

SHANNON BECKER, individually and as heir of BARRY BECKER, JR., deceased; BLAIR BECKER, by and through her mother and natural guardian, SHANNON BECKER, individually and as heir of BARRY BECKER, JR., deceased, Plaintiffs, HOWARD EHRENFELD, M.D., an individual; EDWARD CLARK, M.D., an individual; SOUTHWEST MEDICAL ASSOCIATES, INC., DOES 1 to 75, inclusive; and ROE CORPORATIONS 1 to 10, Defendants.	CASE NO.: A-10-612134-C DEPT NO.: XXXI NOTICE OF ENTRY OF ORDER DENYING WITHOUT PREJUDICE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Hearing Date: 3/2/12 Hearing Time: 9:30 a.m.

TO: ALL DEFENDANTS ABOVE NAMED; and

TO: THEIR COUNSEL OF RECORD.

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an ***Order Denying Without Prejudice Defendants' Motion for Summary Judgment*** was entered on the 23rd day

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....

of March, 2012, a copy of which is attached hereto.

DATED this 28th day of March, 2012.

EDWARD M. BERNSTEIN & ASSOCIATES

BY: _____
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Attorneys for Plaintiffs

GERALD I. GILLOCK, ESQ.
GILLOCK MARKELY & KILLEBREW
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428 S. Fourth Street
Las Vegas, NV 89101
Co-Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of March, 2012, service of the foregoing ***Notice Of Entry Of Order Denying Without Prejudice Defendants' Motion For Summary Judgment***, was served by causing a copy of the same to be deposited in the United States mail, first class postage fully pre-paid, addressed as follows:

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

******

SHANNON BECKER, individually and as heir of BARRY BECKER, JR., deceased; BLAIR BECKER, by and through her mother and natural guardian, SHANNON BECKER, individually and as heir of BARRY BECKER, JR., deceased, Plaintiffs, HOWARD EHRENFELD, M.D., an individual; EDWARD CLARK, M.D., an individual; SOUTHWEST MEDICAL ASSOCIATES, INC., DOES 1 to 75, inclusive; and ROE CORPORATIONS 1 to 10, Defendants.	CASE NO.: A-10-612134-C DEPT NO.: XXXI ORDER DENYING WITHOUT PREJUDICE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Hearing Date: 3/2/12 Hearing Time: 9:30 a.m.

Defendants, HOWARD EHRENFELD, M.D. and SOUTHWEST MEDICAL ASSOCIATES, appearing by and through their counsel of record, L. KRISTOPHER RATH, ESQ. and JESSICA S. TAYLOR, ESQ. of the law firm of HUTCHISON & STEFFEN, LLC, having filed a Motion for Summary Judgment, and the same having come on regularly for hearing on the 2nd day of March, 2012; Plaintiffs, SHANNON BECKER, individually and as heir of BARRY BECKER, JR., deceased; BLAIR BECKER, by and through her mother and natural guardian, SHANNON

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BECKER, individually and as heir of BARRY BECKER, JR., deceased, appearing through their counsel of record, GARY W. CALL, ESQ., of the law firm of EDWARD M. BERNSTEIN & ASSOCIATES and GERALD I. GILLOCK, ESQ., of the law firm of GALATZ & GILLOCK; the HONORABLE JOANNA S. KISHNER presiding, the Court having reviewed all pertinent papers and pleadings on file herein and having heard oral arguments of counsel, and good cause appearing therefor

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment to dismiss the instant action due to untimely filing within the statute of limitations for medical malpractice action by Plaintiff, SHANNON BECKER, individually and as heir of BARRY BECKER, JR., deceased, is denied without prejudice.

IT IS HEREBY FURTHER ORDERED that Defendants' Motion for Summary Judgment to dismiss the instant action due to untimely filing within the statute of limitations for medical malpractice action by Plaintiff, BLAIR BECKER, by and through her mother and natural guardian,

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SHANNON BECKER, individually and as heir of BARRY BECKER, JR., deceased, is denied without prejudice.

DATED this 22 day of March, 2012.

DISTRICT COURT JUDGE

Respectfully submitted by:
EDWARD M. BERNSTEIN & ASSOCIATES

BY: _____
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Approved as to form and content:

HUTCHISON & STEFFEN, LLC

BY: _____ 3/16/2012
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