

1 *Attorney Info*

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DISTRICT COURT
ANY COUNTY, NEVADA

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CAPTION

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Case No. A 123456
Dept. No. X
Docket No. Z

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**MOTION FOR PARTIAL SUMMARY JUDGEMENT REGARDING ATTORNEY-
CLIENT RELATIONSHIP, DUTY, BREACH OF DUTY AND CAUSATION**

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Date of hearing: _____

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Time of hearing: _____

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COME NOW Plaintiffs, DAUGHTER #1, DAUGHTER #2, DAUGHTER #3, individually and as heirs of the ESTATE OF MOTHER, deceased; and DAUGHTER #1 as SPECIAL ADMINISTRIX OF THE ESTATE OF MOTHER, deceased, by and through their counsel, LEGAL LAW FIRM, P.C., and hereby move this court for partial summary judgment as a matter of law on the issue of attorney-client relationship, duty, breach of duty and causation.

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This motion is based on all the pleadings and documents on file with the court herein, the motion, notice of motion, memorandum of points and authorities, including exhibits, attached

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1 herewith and in support thereof, and upon such further and other oral and documented evidence as
2 the court may allow at the hearing on said motion.

3 DATED this 26th day of June, 1997.

4 LEGAL LAW FIRM, P.C.

5
6
7 By: ARTHUR M. ATTORNEY, ESQ.
8 Nevada Bar No. 000000
9 [Address]
10 Searchlight, Nevada 89000
11 ATTORNEYS FOR PLAINTIFFS

12 **STANDARD NOTICE OF MOTION**

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I.**

15 **STATEMENT OF RELEVANT FACTS**

16 This litigation arises out of a claim for medical malpractice that occurred on or about May,
17 1991, entitled Daughter #1 v. Physician #1 et al., case no. A654321, (hereinafter “the underlying
18 action”). Plaintiffs in the underlying action are the ESTATE OF MOTHER and her daughters,
19 DAUGHTER #1, DAUGHTER #2, and DAUGHTER #3, individually and as heirs of the ESTATE
20 OF MOTHER, deceased; DAUGHTER #1 represents ESTATE OF MOTHER.

21 Defendants in the underlying action were Physician #1, Physician #2, Physician #3 and
22 Cardiology Associates of Stateline d/b/a as Broken Heart Clinic of the West. The district court
23 complaint in the underlying actions alleges professional negligence against the defendant doctors in
24 their care and treatment of decedent MOTHER during hospitalization at the College of Medical Arts
25 in May-June 1991. See, complaint attached hereto and incorporated by reference as Exhibit “1”.
26 [Omitted.] This complaint was filed by the plaintiffs’ former counsel, LAWYER #1, LAWYER #2
27 and OVERSIGHT LAW, P.C. No trial date has been set.

28 Prior to institution of the district court complaint in the underlying action and pursuant to

1 NRS 41A.039, et. seq., a complaint for medical malpractice was filed before the Medical-Legal
2 Screening Panel. On June 6, 1994, the Medical-Legal Screening Panel found reasonable probability
3 of medical malpractice against two of the respondents, Physician #1 and Physician #2. See, Medical-
4 Legal Screening Panel finding attached hereto and incorporated by reference as Exhibit "2".
5 [Omitted.]

6 On December 15, 1994, Physician #2 died. He was dismissed from the underlying action with
7 prejudice by LAWYER #1 and LAWYER #2 when they failed to file a Substitution of Parties
8 naming Physician #2's executrix in his stead within ninety days after the filing of the Suggestion of
9 Death in compliance with NRCPC 25(a)(1). See, Stipulation for Dismissal with Prejudice of Physician
10 #2 attached hereto and incorporated by reference as Exhibit "3". [Omitted.]

11 Thereafter, Plaintiffs hired LEGAL LAW FIRM, P.C., to replace LAWYER #1 and
12 LAWYER #2 in the underlying action and also to represent their interests in a separate lawsuit
13 against their former attorneys. Accordingly, on or about July 10, 1996, a second district court
14 complaint was filed and subsequently assigned to this court, case no. A123456, Dept X. See,
15 complaint attached hereto and incorporated by reference as Exhibit "4". [Omitted.] Therein Plaintiffs
16 seek damages for legal malpractice of Defendants LAWYER #1, LAWYER #2 and the law firm of
17 OVERSIGHT LAW, P.C., for failing to adequately protect claims against the estate of respondent
18 Physician #2.

19 I.

20 LAW AND ARGUMENT

21 A. LEGAL STANDARD

22 In Perez v. Las Vegas Medical Center, 107 Nev. 2 (1991), the Nevada Supreme Court
23 reiterated the standard district courts must consider in deciding motions for summary judgment:

24 Summary judgment is appropriate only when the moving party is entitled to judgment
25 as a matter of law, and no genuine issue of material fact remains for trial; properly
26 supported factual allegations of the party opposing summary judgment must be
27 accepted as true. [Citation omitted.] Additionally, the pleadings and documentary
evidence must be construed in the light most favorable to the party against whom the
motion for summary judgment is directed, [Citation omitted.] Litigants are not to be
deprived of a trial on the merits if there is the slightest doubt as to the operative facts.

28 Id. At 4.

1 **B. SUMMARY JUDGMENT ON THE ELEMENT OF ATTORNEY-CLIENT**
2 **RELATIONSHIP, DUTY, BREACH OF DUTY, AND CAUSATION IS PROPER**
3 **BECAUSE NO GENUINE ISSUE OF MATERIAL FACT REMAINS**

4 To prove legal malpractice, the Plaintiffs' must establish that there was "the existence of an
5 attorney-client relationship, failure to perform the duty, and the negligence of the lawyer as a
6 proximate cause of damage to the client". Warmbrodt v. Blanchard, 100 Nev. 703, 706-707, 692
7 P.2d 1282, 1285 (1985) (citing Hansen v. Wrightman, 538 P.2d 1238 (1975)); accord, Semenza v.
8 Nevada Medical Liability Insurance, 104 Nev. 666, 667-668, 765 P.2d 184, 185 (1988); Allyn v.
9 McDonald, 112 Nev. 68, 71, 910 P.2d 263, 266 (1996). Based on the filing of the Complaint by
10 LAWYER #1 and LAWYER #2 and the serving of the Notice of Lien for Attorneys' Fees and Costs
11 by LAWYER #1 on behalf of OVERSIGHT LAW, P.C., the finding of the Medical-Legal Screening
12 Panel against Physician #2, and the Stipulation for Dismissal with Prejudice of Physician #2.
13 Plaintiffs maintain that no genuine issue of material fact exists on the attorney-client relationship,
14 duty, breach of duty and causation.

14 **1. Attorney-Client Relationship**

15 It is the "contractual relationship creating a duty of care upon an attorney [which is] the
16 primary essence to a recovery for legal malpractice". Warmbrodt at 707, 692 P.2d at 1285 (citing
17 Ronnigen v. Hertogs, 199 N.W.2d 420, 421 (Minn. 1972).) See, Williams v. Bashman, F.Supp. 322
18 (E.D. Pa. 1978); John B. Gunn Law Corp. v. Maynard, 235 Cal.Rptr. 180 (1987). The existence of
19 a contract is a question of law. Warmbrodt at 707, 692 P.2d at 1285.

20 In the instant case there can be no question of a contractual relationship and, therefore, an
21 attorney-client relationship between Defendants and Plaintiffs. Defendants LAWYER #1 and
22 LAWYER #2 filed a complaint on behalf of Plaintiffs and their decedent, represented Plaintiffs at
23 the Medical-Legal Screening Panel hearing, and served a Notice of Lien for Attorneys' Fees and
24 Costs.¹ See, Exhibits "1" through "3" and "5". [Omitted.] Simply put, no genuine issue remains that
25 Defendants were Plaintiffs' counsel and summary judgment on the issue of attorney-client
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27 ¹ Present counsel for Plaintiffs received Plaintiffs' file from Defendant OVERSIGHT LAW, P.C., without the
28 Letter of Engagement. Plaintiffs' counsel submits the complaint in the underlying action and the Notice of Lien for
Attorneys' Fees and Costs serve as proof that a contract existed.

1 relationship is appropriate.

2 **2. Duty and Breach of Duty**

3 The existence of a duty is a question of law. See, Merluzzi v. Larsen, 96 Nev. 409, 610 P.2d
4 739 (1980); Turner v. Sullivan, 89 Nev. 554, 516 P.2d 728 (1973) The duty of an attorney is
5 mandated by the Nevada Supreme Court: “[a] lawyer shall provide competent representation to a
6 client. Competent representation requires the legal knowledge, skill, thoroughness and preparation
7 necessary for the representation”. SCR 151.

8 In a legal malpractice action, expert evidence is generally required in order to establish the
9 attorney’s breach of care. Allyn at 71, 910 P.2d at 266. However, “an exception exists in cases where
10 the breach of care or lack thereof is so obvious that it may be determined by the court as a matter of
11 law”. Id.

12 Here, Defendants LAWYER #1 and LAWYER #2 failed to file a Substitution of Parties
13 naming Physician #2's executrix in his stead within ninety days from the filing of the Suggestion of
14 Death as required by statute.² The statute is clear and unambiguous. More importantly, Defendants
15 stipulated to dismiss with prejudice Physician #2 without any ruling of the court. Defendants
16 LAWYER #1 and LAWYER #2 could not possibly offer any evidence to contradict that they
17 breached the standard of care of competent representation.

18 In sum, no genuine issue remains that Defendants LAWYER #1 and LAWYER #2 had a duty
19 to file the Substitution of Parties naming Physician #2's executrix, and that duty was breach because
20 Defendants LAWYER #1 and LAWYER #2 failed to file the substitution within ninety days from
21

23 ²NRCPT 25(a)(1) states:

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25 If a party dies and the claim is not hereby extinguished, the court may order substitution of the proper
26 parties. The motion for substitution may be made by any party or by the successors of representatives
27 of the deceased party and, together with the notice of hearing, shall be served on the parties as
28 provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for service of
summons. Unless the motion for substitution is not made later than 90 days after the death is suggested
upon record of service of a statement of the fact of the death as provided herein for the service of the
motion, the action shall be dismissed as to the deceased party.

1 the Suggestion of Death as required by statute.³ Summary judgment on duty and breach of duty is
2 appropriate.

3 **3. Causation**

4 In order establish causation, Plaintiffs must show that Defendants' breach of the standard of
5 care was the legal cause of their injuries. Fernandez v. Admirand, 843 P.2d 354, 358 (Nev. 1992).
6 A legal cause of injury, damages, loss or harm is a cause which is a substantial factor in bringing
7 about the injury, damage, loss or harm. See, Nev. J.I. 4.04A. As this court knows, the element of
8 "causation" must be proved by a preponderance of the evidence.

9 Defendants' stipulation to dismiss Physician #2 with prejudice was the legal event which
10 ended Plaintiffs' rights against him. By so doing, Plaintiffs forever lost all rights of recovery against
11 Physician #2. Moreover, once it is established that Defendants were negligent, it is axiomatic that
12 such negligence was the proximate cause of any damages to Plaintiffs. See, Gonzales v. Stewart title
13 of Northern Nevada, 111 Nev. 1350, 905 P.2d 176 (1995) ("[A plaintiff] 'sustains damage' by
14 assuming the expense, inconvenience and risk of having to maintain litigation even if he wins it").
15 The only event that caused Plaintiffs to file a legal malpractice suit against Defendants was their
16 failure to timely file a Substitution of Parties within the required 90-day period. Such failure was also
17 the direct cause of the damages sustained by Plaintiffs when they lost all rights of recovery against
18 Physician #1 and his estate.

19 **III.**

20 **CONCLUSION**

21 Construing the evidence in the light most favorable to Defendants LAWYER #1 and
22 LAWYER #2, no genuine issue of material fact remains on whether (1) a duty was owed to Plaintiffs
23 by Defendants as their attorneys of record in the underlying action; (2) Defendants, by failing to
24 timely file the Substitution of Parties after receiving the Suggestion of Death breached the standard
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26
27 ³ Defendants LAWYER #1 and LAWYER #2 admit in their own Motion to Dismiss, which was not granted by
28 this court, filed on August 19, 1996, that the Substitution of Parties was filed due to "a calendaring error". See, page 3,
line 17 of Defendants' Motion to Dismiss attached hereto and incorporated by reference as Exhibit "6". [Omitted.] This
admission merely adds weight to Plaintiffs argument that no issues remain.

1 of care; and, (3) that the breach was the legal cause of injury suffered by Plaintiffs.

2 Although Plaintiffs realize that Defendants LAWYER #1 and LAWYER #2 are “not to be
3 deprived of a trial on the merits if there is the slightest doubt as to the operative facts”, in this case
4 no such doubt exists on these four elements, attorney-client relationship, duty, breach of duty, and
5 causation. Based on the foregoing, Defendants LAWYER #1 and LAWYER #2 cannot even meet
6 the threshold showing to withstand summary judgment.

7 Wherefore, Plaintiffs respectfully request this Honorable Court grant their MOTION FOR
8 PARTIAL SUMMARY JUDGMENT REGARDING ATTORNEY-CLIENT RELATIONSHIP,
9 DUTY, BREACH OF DUTY AND CAUSATION.

10 DATED this 26 day of June, 1997.

11 LEGAL LAW FIRM, P.C.

12
13
14 By: _____
15 ARTHUR M. ATTORNEY, ESQ.
16 Nevada Bar No. 000000
17 [Address]
18 Searchlight, Nevada 89000
19 ATTORNEYS FOR PLAINTIFFS

20 **STANDARD CERTIFICATE OF SERVICE**