

IN THE SUPREME COURT OF THE STATE OF NEVADA

ESTATE OF MARY CURTIS,
DECEASED; LAURA LATRENTA, AS
PERSONAL REPRESENTATIVE OF
THE ESTATE OF MARY CURTIS;
AND LAURA LATRENTA,
INDIVIDUALLY,

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Elizabeth A. Brown
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Appellants,

vs.

Supreme Court Case No. 79396
Appeal from District Court Case No.
A-19-790152-C

SOUTH LAS VEGAS MEDICAL
INVESTORS, LLC, D/B/A LIFE CARE
CENTER OF SOUTH LAS VEGAS,
F/K/A LIFE CARE CENTER OF
PARADISE VALLEY; SOUTH LAS
VEGAS INVESTORS LIMITED
PARTNERSHIP; LIFE CARE
CENTERS OF AMERICA, INC.; AND
CARL WAGNER, ADMINISTRATOR,

Respondents.

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to Nevada Rule of Appellate Procedure 26.1, counsel for Appellants certifies that Appellant Laura Latrenta is a natural person residing in New Jersey and is the Administratrix of the Estate of Mary Curtis. No publicly owned corporation has a financial interest in the prosecution of this appeal.

The following law firms have appeared in the case on behalf of Appellants:

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JURISDICTIONAL STATEMENT

On July 15, 2019, the district court entered an order granting the Motion to Dismiss filed by Appellees South Las Vegas Medical Investors, LLC, South Las Vegas Investors Limited Partnership, Life Care Centers of America, Inc., and Carl Wagner (collectively, “LCC”) to which Appellants, the Estate of Mary Curtis, Laura Latrenta, as Personal Representative of the Estate, and Laura Latrenta, individually (“Laura Latrenta” or “Ms. Latrenta”) filed a Notice of Appeal on August 8, 2019. (Joint Appendix¹ 0210-0212). This Court has jurisdiction to hear this appeal pursuant to NRAP 3A(b)(1) as this is an appeal from a final order entered in an action or proceeding commenced in the court in which the judgment was rendered.

ROUTING STATEMENT

The matter is presumptively retained by the Nevada Supreme Court under NRAP 17(a)(12) as the issue on appeal raises questions of statewide public importance and upon which there is an inconsistency between the decision of the trial court and the published decisions of the Nevada Supreme Court *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048 (2008) and *Marcuse v. Del Webb Communities, Inc.*, 123 Nev. 278 (2007).

In *Five Star*, this Court held that for claim preclusion to apply, there must be a valid final judgment. *Five Star*, 124 Nev. at 1054. The Court clarified that a valid

¹ Joint Appendix, hereinafter “(APP____)”

final judgment does *not* include a case dismissed “for some reason (jurisdiction, venue, failure to join a party) that is not meant to have preclusive effect.” *Id.* at 1054 n.27. During the hearing in the district court below, Ms. Latrenta informed the district court that a previous trial court had dismissed a previous complaint against LCC without prejudice and for lack of jurisdiction, *i.e.*, for reasons not meant to have preclusive effect, and Ms. Latrenta referred the district court to *Five Star*. (APP0186, APP0188, APP0194 – APP0197). However, the court below ignored *Five Star* and dismissed the Complaint. (APP0200 – APP0203). This Court is now asked to decide whether a dismissal without prejudice of a previous complaint for lack of jurisdiction constitutes a basis for claim preclusion.

Additionally, during the hearing in the district court, Ms. Latrenta also referred that court to *Marcuse*. In *Marcuse*, this Court reiterated that the application of judicial estoppel is appropriate when five criteria are met:

- (1) the same party has taken two positions;
- (2) the positions were taken in judicial or quasi-judicial administrative proceedings;
- (3) the party was successful in asserting the first position (*i.e.*, the tribunal adopted the position or accepted it as true);
- (4) the two positions are totally inconsistent; and
- (5) the first position was not taken as a result of ignorance, fraud, or mistake.

Marcuse, 123 Nev. at 286 (citation omitted). Ms. Latrenta informed the trial court that all five elements of *Marcuse* were applicable to this case. (APP0196 – APP0197). However, the trial court ignored *Marcuse* and dismissed the Complaint

without applying judicial estoppel. (APP0200 – APP0203). This Court is now asked to decide whether a party that took, without ignorance, fraud, or mistake, a successful position in a previous judicial proceeding should be judicially estopped from taking a totally inconsistent position in a subsequent judicial proceeding regarding the same matter.

These issues are best resolved by the Nevada Supreme Court as they represent matters of statewide importance and to avoid inconsistent application and interpretation by lower courts.

STATEMENT OF THE ISSUES

1. May a district court rely upon claim preclusion to dismiss a complaint despite the fact that the previous complaint was dismissed without prejudice?
2. May a district court rely upon claim preclusion to dismiss a complaint despite the fact that the previous complaint was dismissed for lack of jurisdiction?
3. Are litigants, the Respondents here, permitted to take two totally inconsistent positions, not just a mere change in position or argument, in separate judicial proceedings to obtain an unfair advantage?

STATEMENT OF THE CASE

This appeal pertains to allegations of abuse and/or neglect of an older person (three-year statute of limitations) and bad faith tort (three-year statute of limitations) filed as a Complaint on February 27, 2019 in the District Court of Clark County, Nevada (“Current Trial Court”) by Ms. Latrenta and against LCC which are entities that are not considered providers of health care under NRS 41A.017. (APP0004 – APP0027).

On May 3, 2019, LCC filed their Motion to Dismiss arguing that the Current Trial Court should apply claim preclusion to dismiss Ms. Latrenta’s Complaint (“Current Complaint”) and case because another district court² (“Previous Trial Court”) dismissed a different complaint filed by Ms. Latrenta against LCC (“Previous Complaint”). (APP0036 – APP0141).

On May 13, 2019, Ms. Latrenta filed her Opposition explaining that claim preclusion was inapplicable because the Previous Trial Court dismissed the Previous Complaint without prejudice and for lack of jurisdiction, *i.e.*, for reasons not meant to have preclusive effect. (APP0142 – APP0172). Ms. Latrenta further explained that, in any event, judicial estoppel should be applicable and preclude dismissal because LCC was attempting to take a totally inconsistent position in the Current

² District Ct. Case No. A-17-750520-C, which is now on appeal before the Nevada Supreme Court as Case No. 77810.

Trial Court than they had in the Previous Trial Court in an attempt to obtain an unfair advantage. (APP0150 – APP152). LCC filed its Reply on May 30, 2019. (APP0173 – APP0179).

The Current Trial Court held a hearing on June 4, 2019, (APP0180 – APP0199), and granted LCC’s Motion to Dismiss on July 15, 2019, (APP0200 – APP0203). LCC filed the Notice of Entry on July 15, 2019, (APP0204 – APP0209), to which Ms. Latrenta timely filed a Notice of Appeal on August 8, 2019. (APP0210 – APP0212). On August 20, 2019, this Court exempted the parties from the settlement program and maintained this case on the appellate docket.

STATEMENT OF FACTS

On March 2, 2016, Mary Curtis was admitted to LCC’s Nevada nursing home, Life Care Center of Paradise Valley (“Facility”). (APP0014). During her residency, Ms. Curtis suffered falls with injuries at the Facility. (APP0015). Then, on March 7, 2016, LCC administered to Mary Curtis morphine not prescribed for her. (APP0015). This fact is uncontested and was so found as a fact by the Previous Trial Court. (APP0063). However, LCC waited until the day after Mary Curtis consumed the morphine to call 911 and have her transported to the hospital. (APP0015). At the hospital, Mary Curtis was diagnosed with anoxic brain encephalopathy and died shortly thereafter on March 11, 2016. (APP0015). Mary Curtis’s death certificate identifies her immediate cause of death as morphine

intoxication. (APP0015).

On February 2, 2017, Ms. Latrenta filed in the Previous Trial Court the Previous Complaint against LCC, the nursing home and its operators, managers, and administrators, alleging abuse/neglect of Ms. Latrenta's mother Mary Curtis under Nevada's older person abuse and neglect statute, wrongful death, and breach of contract. (APP0052 – APP0060). Specifically, Ms. Latrenta's Complaint alleged (1) abuse/neglect of an older person falling under NRS 41.1395, (2) wrongful death, on behalf of the Estate of Mary Curtis under NRS 41.0185, (3) wrongful death on behalf of Laura Latrenta herself under NRS 41.0185, and (4) a bad faith tort. (APP0052 – APP0060). These claims were largely premised on LCC's negligent management and operation of the nursing home that led to, *inter alia*, preventable falls and injuries, the erroneous administration of morphine (prescribed for another resident), and the failure to treat and monitor Mary Curtis as the morphine took her life. (APP0052 – APP0060).

The Previous Trial Court nonetheless dismissed Ms. Latrenta's Previous Complaint almost two years after the filing of the Previous Complaint because Ms. Latrenta did not file an affidavit-of-merit, pursuant to NRS 41A.071, concurrently with the Previous Complaint ("Previous Order") even though Ms. Latrenta did not sue a provider of health care as defined by NRS 41A.017. (APP0062 – APP0070). Ms. Latrenta filed a Notice of Appeal of the Previous Order on December 27, 2018.

(APP0085).

On February 27, 2019, Ms. Latrenta filed her Current Complaint against LCC, the nursing home and its operators, managers, and administrators, none of which are providers of health care under NRS 41A.017, alleging abuse/neglect of Ms. Latrenta's mother Mary Curtis under Nevada's older person abuse and neglect statute (three-year statute of limitations) and bad faith tort (three-year statute of limitations). (APP0004 – APP0027). Ms. Latrenta alleged that, as a result of LCC's conduct, Ms. Curtis suffered injuries including falls with injury, intoxication, unnecessary pain and suffering, and an untimely death. (APP0013). Ms. Latrenta further alleged that "Ms. Curtis's injuries were entirely preventable had Defendants simply provided the Facility with sufficient practices, sufficient supplies, and sufficient staff, in number and training, to provide Ms. Curtis with the amount of supervision and care that the laws and regulations required." (APP0010). Ms. Latrenta alleged that LCC's conduct was motivated by, *inter alia*, "maximizing profits by operating Facility in such a manner that Facility was underfunded and understaffed." (APP0009).

Ms. Latrenta then outlined LCC's duties and responsibilities as a result of their business of providing long-term care as a skilled nursing facility in Nevada, including their obligation to maintain and manage the Facility with adequate staff and sufficient resources to ensure timely care and services and their obligation to

provide adequate supervision, assistance, and intervention to prevent injury or deterioration of the residents' health. (APP0011 – APP0012). Ms. Latrenta then alleged multiple theories of the liability of LCC—not just vicarious liability for one nurse. (APP0008 – APP0009). For example, as to the First Cause of Action for Abuse/Neglect of an Older Person (three-year statute of limitations), Ms. Latrenta alleged that LCC could “be held liable on various theories of liability including direct liability based on their conduct in creating, promotion and maintaining a toxic and unsafe environment for the residents, including Ms. Curtis.” (APP0015). Ms. Latrenta also alleged that LCC could be held liable as a result of their joint venture or enterprise, agency relationship, employment relationship, or under a theory of alter-ego. (APP0015 – APP0016).

On May 3, 2019, LCC filed their Motion to Dismiss pursuant to NRCPC 12(b)(5) for failure to state a claim. (APP0036 – APP0141). LCC argued that the Current Trial Court should apply claim preclusion to dismiss the Current Complaint because the Previous Trial Court purportedly disposed of the Previous Complaint by summary judgment, which LCC claimed was a final judgment for purposes of claim preclusion. (APP0046 – APP0048).

On May 13, 2019, Ms. Latrenta filed her Opposition, explaining that claim preclusion was inapplicable because the Previous Trial Court dismissed the Previous Complaint without prejudice and for lack of jurisdiction. (APP0142 – APP0172).

Ms. Latrenta clarified that although the Previous Trial Court had styled its order as an order granting summary judgment, in reality and true effect, the order was an order dismissing Ms. Latrenta's Previous Complaint as the Previous Trial Court had no discretion to grant summary judgment. (APP0146). Therefore, Ms. Latrenta concluded, the order was a dismissal without prejudice and not subject to preclusive effect for purposes of claim preclusion under *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048 (2008). (APP0145 – APP0146). In any event, Ms. Latrenta explained if the Current Trial Court insisted on maintaining the title of the order by the Previous Trial Court, the same outcome would result as summary judgment may be granted without prejudice. (APP0146 – APP0147).

Ms. Latrenta further explained that claim preclusion was inapplicable because, as LCC had vigorously maintained in the Previous Trial Court, the dismissal of a complaint for failure to attach a required expert affidavit is a dismissal on jurisdictional grounds. (APP0147 – APP0149). Based upon *Five Star's* instruction that a valid final judgment for claim preclusion does not include a jurisdiction-based dismissal, Ms. Latrenta concluded that claim preclusion was inapplicable to the Current Complaint. (APP0149).

Finally, Ms. Latrenta explained that, in any event, judicial estoppel should be applicable and preclude dismissal because LCC was attempting to take a totally inconsistent position in the Current Trial Court than they did in the Previous Trial

Court, thereby obtaining an unfair advantage. (APP0150 – APP0151). Specifically, Ms. Latrenta highlighted the fact that in the Previous Trial Court, LCC claimed Ms. Latrenta’s Previous Complaint failed for lack of jurisdiction (such that dismissal without prejudice had to result) and that the affidavit requirement was jurisdictional (such that dismissal was for lack of jurisdiction); however, LCC now claims that the previous dismissal was a final judgment such that claim preclusion applies. (APP0151). Ms. Latrenta maintained that, because the five elements outlined in *Marcuse v. Del Webb Communities, Inc.*, 123 Nev. 278 (2007) were satisfied, the application of judicial estoppel was warranted such that the Current Trial Court should deny LCC’s Motion to Dismiss. (APP0151). LCC filed its Reply on May 30, 2019. (APP0173 – APP0179).

The Current Trial Court held a hearing on June 4, 2019. (APP0180 – APP0199). During the hearing, Ms. Latrenta referred the district court to *Five Star* and informed the Current Trial Court that the Previous Trial Court dismissed the Previous Complaint against LCC without prejudice and for lack of jurisdiction, *i.e.*, for reasons not meant to have preclusive effect. (APP0186, APP0188, APP0194 – APP0197). Ms. Latrenta also referred the Current Trial Court to *Marcuse* and informed the district court that all five elements were applicable to this case warranting the application of judicial estoppel and denial of LCC’s Motion to Dismiss. (APP0196 – APP0197). Ms. Latrenta also clarified for the Current Trial

Court that the Current Complaint alleged a cause of action under Nevada's older person abuse and neglect statute (three-year statute of limitations), not the medical malpractice statute (one-year statute of limitations), and alleged various theories of liability, not just vicarious liability of one nurse. (APP0189 – APP0191, APP0197 – APP198). Ms. Latrenta pointed out that the Previous Trial Court focused on only the vicarious liability of one nurse and did not address the other theories of liability such as direct, agency, or alter ego. (APP0197 – APP198). In the event the Current Trial Court had any hesitation due to the pending appeal involving the Previous Complaint, Ms. Latrenta referred the Current Trial Court to *Edwards v. Ghandour*, 123 Nev. 105 (2007), which permitted the Current Trial Court to suspend the proceedings without dismissing the case until the completion of the appeal from the Previous Trial Court. (APP0198).

Despite the language of the order of the Previous Trial Court and Ms. Latrenta's presentation of the Current Complaint, *Five Star*, *Marcuse*, and *Ghandour*, the Current Trial Court disagreed with Ms. Latrenta and specifically stated:

I disagree, quite frankly. I think that the -- I think Judge Villani did take all of those into consideration. I think that he did find that these were issues of medical malpractice or professional negligence and that not only was there no affidavit, but that the statute had run.

I do think that it was a final judgment. I think that's why you're able to appeal. I think that's why this is up at the

Supreme Court. So I am granting the defendant's Motion to Dismiss.

(APP0199).

On July 15, 2019, the Current Trial Court entered its Order granting LCC's Motion to Dismiss. (APP0200 – APP0203). However, the Current Trial Court's Order did not state any findings, conclusions of law, or reasons for granting LCC's Motion to Dismiss. (APP0200 – APP0203). Rather, the Current Trial Court's Order merely states that it grants LCC's Motion to Dismiss after "having considered the papers and pleadings in this matter and after hearing oral argument, and good cause appearing." (APP0201).

On July 15, 2019, LCC filed the Notice of Entry, (APP0204 – APP209), to which Ms. Latrenta timely filed a Notice of Appeal on August 8, 2019. (APP0210 – APP0212).

SUMMARY OF THE ARGUMENT

It is Ms. Latrenta's position that the lower court erred in dismissing the Complaint, and this Court must therefore reverse the lower court. Ms. Latrenta's position rests upon three grounds: First, applying claim preclusion despite the fact that the previous complaint was dismissed without prejudice would impermissibly broaden the scope of claim preclusion and contradict the Nevada Supreme Court's prior decisions. Second, applying claim preclusion despite the fact that the previous complaint was dismissed for lack of jurisdiction would impermissibly broaden the

scope of claim preclusion and contradict the Nevada Supreme Court's prior decisions. Third, LCC's totally inconsistent positions in the lower court and the previous trial court in an attempt to obtain an unfair advantage warrants the application of judicial estoppel.

The Current Trial Court erred in not clearly stating its reasoning for granting LCC's Motion to Dismiss. However, the Current Trial Court erred in granting LCC's Motion to Dismiss and in presumably applying claim preclusion because (1) Ms. Latrenta's first action was dismissed without prejudice, which does not translate to claim preclusion as Ms. Latrenta was permitted under the procedural posture to refile her causes of action under Nevada's older person abuse and neglect statute and for bad faith tort within the three-year statute of limitations; (2) Ms. Latrenta's first action was dismissed for lack of jurisdiction, and a dismissal for lack of jurisdiction cannot and does not translate to claim preclusion; and (3) judicial estoppel prevents LCC from successfully asserting claim preclusion in any event. Therefore, this Court should reverse the decision of the Clark County District Court and return this case below for trial by jury.

ARGUMENT

I. As an initial matter, the Current Trial Court erred in failing to state on the record or in its Order the reasons for granting LCC's Motion to Dismiss.

Pursuant to Nevada Rule of Civil Procedure 52(a)(3), in granting or denying a motion to dismiss under NRCP 12, the trial court is required to "state on the record the reasons for granting or denying a motion." NRCP 52(a)(3). Here, while the Current Trial Court stated on the record and in its Order that it granted LCC's Motion to Dismiss, (APP0199, APP0201), the Current Trial Court failed to clearly state its reasoning on the record. Rather, the Current Trial Court merely stated:

Here's the thing. I -- I mean, I've gone over and over, I've gone over all of the minute orders, I've gone over the minute orders that were stricken and the new minute orders. And here, I'm just -- when I look at everything, I disagree, quite frankly. I think that the -- I think Judge Villani did take all of those into consideration. I think that he did find that these were issues of medical malpractice or professional negligence and that not only was there no affidavit, but that the statute had run.

I do think that it was a final judgment. I think that's why you're able to appeal. I think that's why this is up at the Supreme Court. So I am granting the defendant's Motion to Dismiss.

(APP0199).

The Current Trial Court's statements are unclear because the Previous Trial Court did not take into consideration Ms. Latrenta's other theories of liability such as direct, agency, or alter ego and did not address any statute of limitations in its

order. (APP0130 – APP0138). Notably, the statute of limitations for Ms. Latrenta’s claim based on Nevada’s older person abuse and neglect statute is three years. Likewise, the statute of limitations for Ms. Latrenta’s claim based on bad faith tort is three years. Further, in its Motion to Dismiss below, LCC merely argued claim preclusion, not other issues the Current Trial Court may have referenced. (APP0036 – APP0141, APP0173 – APP0179).

Because the Current Trial Court did not afford Ms. Latrenta a clear reasoning for granting LCC’s Motion to Dismiss, Ms. Latrenta assumes the Current Trial Court granted LCC’s Motion to Dismiss based upon LCC’s argument of claim preclusion in their Motion to Dismiss. For the reasons stated herein, this Court should reverse the decision of the Current Trial Court.

II. The Current Trial Court erred in applying claim preclusion and dismissing the Current Complaint because the Previous Trial Court did not enter a valid final judgment meant to have preclusive effect.

“An order granting an NRCP 12(b)(5) motion to dismiss ‘is subject to a rigorous standard of review on appeal.’” *Buzz Stew, LLC v. City of N. Las Vegas*, 181 P.3d 670, 672 (Nev. 2008) (quoting *Seput v. Lacavo*, 134 P.3d 733, 734 (Nev. 2006)). Whether claim preclusion was applicable and warranted dismissal is a question of law reviewed de novo. *G.C. Wallace, Inc. v. Eighth Jud. Dist. Ct, ex rel. Cty. of Clark*, 127 Nev. 701, 705 (2011).

The Nevada Supreme Court has instructed that claim preclusion arises only

when “(1) the parties or their privies are involved in both cases, (2) a valid final judgment has been entered, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case.” *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1056-57 (2008).³ The Nevada Supreme Court clarified that a valid final judgment for purposes of claim preclusion does not include cases dismissed without preclusive effect such as cases dismissed without prejudice or for lack of jurisdiction. *Id.* at 1054 n.27. *See also Trustees of Hotel & Rest. Employees & Bartenders Int’l v. Royco, Inc.*, 101 Nev. 96, 98 (1985) (observing that “[a] dismissal without prejudice is not a final adjudication on the merits,” the court concluded that “res judicata does not preclude [plaintiffs’] present action because a final judgment on the merits was never entered in the former action.”).

Here, the first element of claim preclusion from *Five Star* is satisfied, *i.e.*, the same parties were involved in the previous case as well as this case. However, a review of the second element establishes that claim preclusion is inapplicable as the Previous Trial Court did not enter a valid final judgment meant to have preclusive effect since the dismissal was without prejudice and for lack of jurisdiction. Therefore, the Current Trial Court erred in applying claim preclusion to dismiss the Current Complaint and this Court should reverse the Current Trial Court’s decision.

³ The court has since modified this test to embrace nonmutual claim preclusion, *see Weddell v. Sharp*, 350 P.3d 80, 85 (Nev. 2015), but nonmutuality is not at issue here.

A. The Current Trial Court erred in applying claim preclusion because the Previous Trial Court Dismissed the Previous Complaint without prejudice.

After scrutinizing the Previous Complaint, the Previous Trial Court concluded that the gravamen of Ms. Latrenta's Previous Complaint sounded in professional negligence and therefore required an affidavit of merit pursuant to NRS 41A.071. (APP0064 – APP0065, APP0067 – APP0068). Based upon these conclusions, the Previous Trial Court was required to dismiss the complaint without prejudice, *i.e.*, without preclusive effect, pursuant to NRS 41A.071.

Specifically, the Legislature has mandated that if a plaintiff files a professional negligence action without an affidavit of merit then “the district court shall dismiss the action, without prejudice.” NRS 41A.071. The Legislature's choice of the word “shall” indicates that dismissal without prejudice of a professional negligence action without an affidavit of merit “is mandatory and does not denote judicial discretion.” *Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, 122 Nev. 1298, 1303 (2006). Therefore, “when a plaintiff has failed to meet NRS 41A.071's expert affidavit requirement, the complaint is *void ab initio* and must be dismissed, without prejudice.” *Id.* at 1306.

As such, the Previous Trial Court had no discretion: it had to dismiss Ms. Latrenta's action without prejudice. Indeed, the Previous Trial Court acknowledged in the order the necessity of dismissal, concluding that “[w]ithout such an affidavit [of merit], the case must be dismissed” and that “[s]uch a complaint without an

affidavit must be dismissed since it is void *ab initio*.” (APP0065). Therefore, despite its title, the order by the Previous Trial Court was a dismissal without prejudice.⁴ But, as the Nevada Supreme Court instructed in *Five Star*, a dismissal without prejudice is not a valid final judgment for claim preclusion purposes. Therefore, the Current Trial Court erred in applying claim preclusion to bar Ms. Latrenta’s action below. As such, this Court should reverse the decision of the Current Trial Court.

B. The Current Trial Court erred in applying claim preclusion because the Previous Trial Court Dismissed the Previous Complaint for lack of jurisdiction.

The Nevada Supreme Court has instructed that a professional negligence complaint that does not comply with NRS 41A.071 “is void ab initio, meaning it is of no force and effect” and that “it does not legally exist.” *Washoe Med. Ctr.*, 122 Nev. at 1304. The action seemingly initiated by such a complaint thus in fact never commences. *See, e.g., Wheble v. Eighth Jud. Dist. Ct.*, 128 Nev. 119, 123 (2012) (“because the plaintiffs’ complaint was dismissed for failure to comply with NRS 41A.071, the complaint never legally existed, and because the complaint never existed, the action was never ‘commenced’ as defined by NRCP 3.”). Therefore, a court facing a professional negligence complaint that does not comply with NRS 41A.071 lacks jurisdiction. *See, e.g., Costello v. United States*, 365 U.S. 265, 284

⁴ *See Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 445 (1994) (“This court determines the finality of an order or judgment by looking to what the order or judgment actually *does*, not what it is called.”).

(1961) (“a dismissal for failure to file the affidavit of good cause is a dismissal ‘for lack of jurisdiction,’ within the meaning of the exception under Rule 41(b).”).

Indeed, LCC argued in the Previous Trial Court “given that the expert affidavit requirement is jurisdictional, it cannot be waived,” (APP0167).⁵ The Previous Trial Court accepted LCC’s argument, reproducing it verbatim in the order dismissing the Previous Complaint for lack of jurisdiction. (APP0065). The Previous Trial Court explained that Ms. Latrenta’s complaint sounded in professional negligence and that therefore she had to comply with NRS 41A.071. (APP0064 – APP0065). However, Ms. Latrenta had not complied with NRS 41A.071, meaning that her complaint was void ab initio, that it never legally existed, and that her action under Rule 3 never commenced. The Previous Trial Court therefore lacked jurisdiction over the merits of the action, such that its dismissal was necessarily for lack of jurisdiction.⁶

⁵ See also APP0169 (“Defendants’ Motion concerns a jurisdictional requirement, borne from statute, that if a Plaintiff is going to make professional negligence arguments—be it from a vicarious standpoint or otherwise—they must include an expert affidavit, otherwise their Complaint is *void ab initio*. That is the case here.”).

⁶ For this reason also summary judgment was not a proper means of disposing of the action. See, e.g., *Jones v. Brush*, 143 F.2d 733 (9th Cir. 1944) (observing that a motion for summary judgment “obviously, was not a proper way to raise the question of the court’s jurisdiction” and concluding that instead of granting summary judgment the district court “should have dismissed . . . for want of jurisdiction”); see also 10A Charles Alan Wright et al., *Fed. Prac. & Proc. Civ.* § 2713 (4th ed.) (“[T]he general rule is that it is improper for a district court to enter a judgment under Rule 56 for defendant because of a lack of jurisdiction.”).

But, as the Nevada Supreme Court instructed in *Five Star*, a jurisdiction-based dismissal is not a valid final judgment for claim preclusion purposes. *See* 124 Nev. at 1054 n.27 (explaining that a valid final judgment does not include a case dismissed “for some reason (jurisdiction, venue, failure to join a party) that is not meant to have preclusive effect”).⁷ Therefore, the Current Trial Court erred in applying claim preclusion to bar Ms. Latrenta’s action below. As such, this Court should reverse the decision of the Current Trial Court.

III. The Current Trial Court erred in applying claim preclusion and dismissing the Current Complaint because LCC’s totally inconsistent position in the Current Trial Court mandated the application of judicial estoppel.

One of the purposes of judicial estoppel “is to prevent parties from deliberately shifting their position to suit the requirements of another case concerning the same subject matter.” *In re Frei Irrevocable Tr.*, 390 P.3d 646, 652 (Nev. 2017) (citation omitted). The application of judicial estoppel is a question of law reviewed de novo. *Marcuse*, 123 Nev. at 287.

In *Marcuse*, the Nevada Supreme Court outlined the following five criteria

⁷ *See also* Restatement (Second) of Judgments § 20(1)(a) (1982) (providing that a personal judgment for defendant does not bar another action by plaintiff on the same claim “[w]hen the judgment is one of dismissal for lack of jurisdiction”); *cf.* Nev. R. Civ. P. 41(b) (“Unless the dismissal order or an applicable statute provides otherwise, a dismissal under Rule 41(b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.”).

warranting the application of judicial estoppel:

(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

Id. at 286 (citation omitted).

The Nevada Supreme Court then held the defendant in *Marcuse* judicially estopped from asserting *res judicata*. *Id.* In the first action (a class action), defendant opposed plaintiffs' motion to consolidate (by which plaintiffs attempted to resolve their resultant damages claim within the class action), arguing that there were no common questions of law or fact between plaintiffs' claims and the class's as the class sought recovery for future damages, not resultant damages, and that plaintiffs would suffer no prejudice from denial of consolidation because they could pursue a second action against defendant for resultant damages. *Id.* at 281–82. The district court denied the motion to consolidate. *Id.* at 282. Later, plaintiffs brought a second action, which defendant moved to dismiss, arguing that plaintiffs were class members whose claims had already been litigated in the class action and that *res judicata* and collateral estoppel prevented their re-litigating their claims. *Id.* at 282–83. The district court dismissed the second action based on *res judicata* and collateral estoppel. *Id.* at 283.

The Nevada Supreme Court reversed. *Id.* at 289. Observing that defendant, in opposing the motion to consolidate on grounds that plaintiffs were not class members and in then moving to dismiss on the grounds that plaintiffs were members of the class and so had already litigated their issues in the class action suit, “took totally inconsistent positions in the separate judicial proceedings”; that because the district court denied the motion to consolidate defendant had been successful in asserting its first position; and that there was no evidence that its first position resulted from ignorance, fraud, or mistake, the court considered it “clear that judicial estoppel was the appropriate basis upon which to deny the motion to dismiss.” *Id.* at 288. So “given [defendant’s] conduct, the district court erred by granting [defendant’s] motion to dismiss the second action based upon the doctrines of res judicata and collateral estoppel, because it should have denied the motion based upon the doctrine of judicial estoppel.” *Id.* at 289.

Likewise, the Current Trial Court erred in dismissing the case below because it should have denied LCC’s Motion to Dismiss based upon the doctrine of judicial estoppel as all five elements outlined in *Marcuse* were met. First, LCC took two positions: in the Previous Trial Court LCC argued Ms. Latrenta’s action failed for lack of affidavit (such that dismissal without prejudice had to result) and the affidavit requirement was jurisdictional (such that dismissal was for lack of jurisdiction), (APP0165 – APP0172); in the Current Trial Court LCC argued claim preclusion

applies (which it could not if dismissal was without prejudice or for lack of jurisdiction), (APP0036 – APP0141). Second, LCC’s two positions were taken in judicial or quasi-judicial proceedings as both positions were taken before district courts. Third, LCC was successful in asserting its first position as the Previous Trial Court dismissed the Previous Complaint for failing to comply with the affidavit requirement, which requirement was jurisdictional. (APP0130 – APP0138). Fourth, as explained in the previous sections, LCC’s two positions are totally inconsistent as LCC’s position before the Previous Trial Court necessarily resulted in no claim preclusion yet LCC’s position before the Current Trial Court demands claim preclusion. Finally, LCC’s first position before the Previous Trial Court was not taken as a result of ignorance, fraud, or mistake as the parties thoroughly litigated LCC’s position and LCC is too sophisticated (and its attorneys far too skilled) for their first position to have resulted from ignorance, fraud, or mistake.

Clearly then, all five judicial estoppel elements were present below and the Current Trial Court erred in applying claim preclusion and dismissing the Current Complaint. Indeed, the Nevada Supreme Court’s decision in *Marcuse* supports this conclusion as it shows that judicial estoppel is a valid defense against claim preclusion in a proper case. Further, as did the *Marcuse* defendant, LCC took totally inconsistent positions in separate judicial proceedings, was successful in asserting its first position, and did not take its first position from ignorance, fraud, or mistake,

making judicial estoppel an appropriate basis on which to deny LCC's Motion to Dismiss. Because all five judicial estoppel elements were satisfied below and because LCC's actions accord with those that merited judicial estoppel in *Marcuse*, LCC should have been judicially estopped from asserting claim preclusion below. Therefore, this Court should reverse the decision of the Current Trial Court and return this case below for trial by jury.

Alternatively, this Court should reverse the decision of the Current Trial Court and instruct the Current Trial Court to suspend the proceedings until the completion of the appeal from the Previous Trial Court. *See Edwards v. Ghandour*, 123 Nev. 105, 117 (2007)⁸ (“the trial court in the second action has discretion in proper circumstances to suspend proceedings and wait for the completion of the appeal in the first action.”). *See also* Restatement (Second) of Judgments § 13 cmt. f (“The pendency of . . . an appeal from a judgment, is relevant in deciding whether the question of preclusion should be presently decided in the second action. It may be appropriate to postpone decision of that question until the proceedings addressed to the judgment are concluded.”).

⁸ *overruled on other grounds by Five Star Capital Corp. v. Ruby*, 124 Nev. 1048 (2008).

CONCLUSION

The Current Trial Court erred in applying claim preclusion and dismissing the case below because (1) Ms. Latrenta's first action was dismissed without prejudice, and a dismissal without prejudice cannot cause claim preclusion; (2) Ms. Latrenta's first action was dismissed for lack of jurisdiction, and a dismissal for lack of jurisdiction cannot cause claim preclusion; and (3) judicial estoppel prevents LCC from successfully asserting claim preclusion in any event. Ms. Latrenta therefore prays this Court reverse the decision of the Clark County District Court and return this case below for trial by jury.

RESPECTFULLY SUBMITTED this 17th day of January, 2020.

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RULE 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 5,161 words.

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

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of January 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1)(E), I certify that I am an employee of Kolesar & Leatham and on the 17th day of January, 2020, I submitted the foregoing *Appellants'* *Opening Brief* to the Supreme Court of Nevada's electronic docket for filing and service upon the following:

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