Case No. 79396

In the Supreme Court of Nevada

Estate of MARY CURTIS, deceased; LAURA LATRENTA, as Personal Representative of the Estate of MARY CURTIS; and LAURA LATRENTA, individually,

Appellants,

vs.

SOUTH LAS VEGAS MEDICAL INVESTORS, LLC, dba 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.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JACQUELINE M. BLUTH, District Judge
District Court Case No. A-19-790152-C

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

Respondents South Las Vegas Medical Investors, LLC; South Las Vegas Investors Limited Partnership; and Life Care Centers of America, Inc. have no parent corporations, and no publicly held company owns 10% of any party's stock. Carl Wagner is an individual.

Respondents have been represented in this litigation by S. Brent Vogel and Erin E. Jordan of Lewis Brisbois Bisgaard & Smith, and Daniel F. Polsenberg, Joel D. Henriod, Abraham G. Smith, and Matthew R. Tsai at Lewis Roca Rothgerber Christie, LLP.

Dated this 20th day of April, 2020.

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ROUTING STATEMENT

The Supreme Court should retain this appeal to address whether a plaintiff's claims, which were previously dismissed under NRS 41A.071 for failure to include a medical-expert affidavit, are barred under the doctrine of claim preclusion when the statute of limitations on those claims had run.

The appeal also seeks to preclude courts from dismissing claims under NRS 41A.071 with prejudice, even when the claims are time-barred. The appeal further seeks to utilize NRS 41A.071 to overturn this Court's precedent that dismissals, without prejudice, of time-barred claims are de facto dismissals with prejudice, which in turn are valid, final judgments for purposes of claim preclusion.

These novel arguments are questions of first impression, and in light of the frequency of professional negligence actions, a decision to recognize such an exemption would present an issue of statewide public importance. *See* NRAP 17(a)(11)-(12).

PRINCIPAL ISSUES PRESENTED

1. Does a dismissal of claims under NRS 41A.071 for failure to file a medical expert affidavit constitute a valid, final judgment for purposes of claim preclusion where the statute of limitations on those claims had run?

2. If plaintiffs' second complaint is not barred by claim preclusion, is it barred by the statute of limitations in NRS 41A.097 for professional-negligence claims?

STATEMENT OF THE CASE

This is an appeal from a district court order dismissing plaintiffs' claims of professional negligence on grounds of claim preclusion. Plaintiffs refiled an action for professional negligence that had previously been dismissed for failure to include an expert affidavit. But because NRS 41A.097's one-year statute of limitations governing plaintiffs' claims for professional negligence had run, plaintiffs attempted to style their new complaint as claims for corporate negligence and elder abuse to invoke longer statute-of-limitations periods to the exclusion of NRS 41A.097. The district court held that the previous dismissal of plaintiffs' claims was a valid, final judgment because plaintiffs' claims are subject to NRS 41A.097's one-year statute of limitations, which had expired at the time of dismissal.

STATEMENT OF FACTS

Plaintiffs have filed two actions below—both based on the same claims of professional negligence against respondents—that are separately pending appeal before this Court.

Plaintiffs' first action for professional negligence was subject to summary judgment for failing to file an expert medical affidavit

pursuant to NRS 41A.071, and is currently pending appeal in Docket No. 77180 ("*Curtis I*"). While *Curtis I* is pending appeal, plaintiffs refiled their action for professional negligence, which was dismissed on grounds of claim preclusion and is pending appeal in Docket No. 79396 ("*Curtis II*").

The facts below are taken from plaintiffs' complaint.

A. *Curtis I* Factual Background and Procedural History[1]

Mary Curtis is Admitted to Life Care Center for Memory Care and Other Medical Treatment

According to plaintiffs, Ms. Curtis suffered from dementia, hypertension, chronic obstructive pulmonary disease, and renal insufficiency. (J. App. 56). On March 2, 2016, Mary Curtis was admitted as a patient to Life Care Center of South Las Vegas f/k/a Life Care Center of Paradise Valley ("Life Care Center"), a nursing home, "for continuing subacute and memory care." (*Id.*). Life Care Center was

[1] Under a summary judgment standard, courts look to the "evidence on file" for whether any "genuine issue as to any material fact remains." *Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 742, 405 P.3d 641, 643 (2017) (internal quotation marks omitted) ("The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." (internal quotation marks omitted)).

to render professional "services necessary to maintain [Ms. Curtis's] physical and mental health." (*Id.*). In the course of treatment, Ms. Curtis was to be prescribed and administered medication, and "Ms. Curtis was dependent on [Life Care Center] for proper medication administration." (*Id.*).

Nurse Dawson Administers Wrong Medication to Ms. Curtis During a Course of Treatment

On the morning of March 7, 2017, Ersheila Dawson, a licensed nurse, was assigned to administer medication to Ms. Curtis as part of this course of treatment. (1 R. App. 102). Nurse Dawson instead administered morphine. (1 R. App. 103). Realizing that she had administered the incorrect medication, Nurse Dawson promptly reported her error to her supervisors at Life Care Center, including the assistant director of nursing, nurse practitioner Annabelle Socaoco, and the director of nursing. (1 R. App. 103).

Life Care Center's Nurses Monitor Ms. Curtis

Nurse Dawson's supervisors determined that Ms. Curtis did not automatically need to be sent to a hospital; instead, they would monitor Ms. Curtis and assess her "baseline" because morphine affects each individual differently. (1 R. App. 103). Nurse practitioner Socaoco then

ordered nurses to administer Narcan to Ms. Curtis to counter the effects of the morphine, with her vital signs monitored every four hours, and to report any irregularities. (1 R. App. 103, 105). A licensed nurse administered Narcan to Ms. Curtis at 1:29 p.m. and 1:32 p.m. (1 R. App. 105).

Licensed nurses continue to monitor Ms. Curtis overnight, checking her vital signs "every fifteen minutes for one hour and then every four hours." (1 R. App. 105). Ms. Curtis "was alert and verbally responsive" at 5:00 p.m. that same day, but licensed nurses were to continue monitoring her. (1 R. App. 105–06).

Ms. Curtis Dies

The next morning, Ms. Curtis was found in her room unresponsive. (1 R. App. 106). Emergency medical services transferred Ms. Curtis to Sunrise Hospital for treatment. (1 R. App. 107). Three days later, on March 11, 2016, Ms. Curtis died. (1 R. App. 108).

Plaintiffs Sue for Damages

On February 2, 2017, plaintiffs sued respondents (collectively, "Life Care Center") for injuries arising from Ms. Curtis's death. (J. App. 53-60). They styled their claims as (1) abuse and neglect of an older

person; (2) wrongful death by the estate of Mary Curtis; (3) wrongful death; and (4) tortious breach of the implied covenant of good faith and fair dealing. (J. App. 53-60). Plaintiffs did not file a supporting medical expert affidavit under NRS 41A.071. (*Id.*).

Plaintiffs' Complaint Alleges the Negligence of Licensed Health Care Providers and of their Employer, Life Care Center

Plaintiffs' complaint alleged that Nurse Dawson administered the wrong medication to Ms. Curtis. The nurse allegedly gave the patient morphine, which had been prescribed to another patient. The complaint also alleged that Nurse Dawson and other nurses failed to monitor or treat Ms. Curtis for her administration of morphine, leading to Ms. Curtis's death five days later. (J. App. 56-57).

Plaintiffs alleged that Life Care Center "had a duty to properly train and supervise [its licensed nurses] to act with the level of knowledge, skill, and care" ordinarily used under similar circumstances by similarly trained and experienced licensed nurses. (J. App. 57).

Life Care Center Moves for Summary Judgment for Plaintiffs' Failure to File a Medical-Expert Affidavit under NRS 41A.071

Life Care Center moved for summary judgment against all of plaintiffs' claims, arguing that the gravamen of plaintiffs' complaint,

plaintiffs' discovery efforts, and the theory of the case, all center on professional negligence regarding nursing care. (1 R. App. 4). Because the gravamen of all of plaintiffs' claims is for professional negligence, plaintiffs were required to file a supporting medical expert affidavit pursuant to NRS 41A.071. (*Id.*). Their failure to file the affidavit rendered their complaint void ab initio, requiring dismissal. (*Id.*).

The District Court Grants Summary Judgment

The district court granted summary judgment, concluding that "[t]he administration of morphine by [a licensed nurse] and failure to monitor the effects of the administration of morphine is a claim of professional negligence requiring an affidavit pursuant to NRS 41A.071." (J. App. 160, 161 ("Thus, the gravamen of the Complaint, and all claims therein, sounds in professional negligence, which requires an affidavit.")).

The district court further concluded that Life Care Center's "liability is based on the acts (LPN Dawson's administration of morphine to Mary Curtis) and omissions (failure to monitor Mary Curtis thereafter) of its nursing staff." (J. App. 158-59).

Plaintiffs appealed in Docket No. 77180, which is pending.

B. *Curtis II* Factual Background and Procedural History[2]

Plaintiffs Refile Their Action for Professional Negligence

On February 27, 2019, almost two years after Ms. Curtis's death, plaintiffs refiled their action for professional negligence against Life Care Center. (J. App. 5-18). The new complaint retained only those claims to which plaintiffs believed a longer statute of limitations would apply: (1) abuse and neglect of an older person; and (2) tortious breach of the implied covenant of good faith and fair dealing. (*Id.*). Plaintiffs still avoided styling any claim as one for professional negligence, but they filed a supporting medical expert affidavit pursuant to NRS 41A.071. (J. App. 7).

Plaintiffs' New Complaint Realleges the Negligence of Licensed Health Care Providers and of their Employer, Life Care Center

Plaintiffs' second action is for the same alleged acts of professional negligence in *Curtis I*. (*See, e.g.*, J. App. 10 ("[T]he direct mechanism of Ms. Curtis's death was morphine intoxication . . . ."), 11

[2] "When a court considers a motion to dismiss under NRCP 12(b)(5), all alleged facts in the complaint are presumed true and all inferences are drawn in favor of the complaint." *Neville v. Eighth Judicial Dist. Court*, 133 Nev. 777, 779, 406 P.3d 499, 501-02 (2017).

("Defendants assumed responsibility for Ms. Curtis's total care, including the provisions of activities of . . . skilled nursing . . . . [and] owed a duty to Ms. Curtis provide services and care for her in such a manner and in such an environment as to attain or maintain the highest practicable physical, mental, and psychosocial well-being of Ms. Curtis.")).

Plaintiffs' new complaint again alleges direct and vicarious-liability claims against Nurse Dawson's employers based on the underlying acts of professional negligence that caused Ms. Curtis's death. (*Compare*, J. App. 58 (alleging that Life Care Center "had a duty to properly train and supervise [its licensed nurses] to act with the level of knowledge, skill, and care" ordinarily used under similar circumstances by similarly trained and experienced licensed nurses), *with* J. App. 8 (alleging that Life Care Center "voluntarily and intentionally assumed responsibility for and provided supervisory services for the nursing care" of Ms. Curtis). This time, however, plaintiffs belabored the allegations of direct and vicarious liability against Life Care Center to distance their claims from the underlying

acts of professional negligence that had been dismissed in *Curtis I*. (J. App. 8-9).

Life Care Center Moves to Dismiss Plaintiffs' Refiled Action on Grounds of Claim Preclusion

Life Care Center moved to dismiss all of plaintiffs' claims on grounds of claim preclusion, arguing that—because the district court in *Curtis I* disposed of plaintiffs' claims of professional negligence for failure to file a medical-expert affidavit and the applicable one-year statute of limitations had run when the claims were dismissed—the order in *Curtis I* was a valid, final judgment barring plaintiffs from refiling their action.[3] (J. App. 36-49, 176 ("The statute of limitations has long since passed.")).

In response, plaintiffs disputed only the second element of claim preclusion, arguing that the order granting summary judgment in *Curtis I* was not a valid, final judgment. (J. App. 145-52).

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[3] Life Care Center also argued, and plaintiffs did not dispute, that plaintiffs' action in *Curtis II* is based on the same set of transactions or occurrences, parties, and claims in *Curtis I*. (J. App. 36-49). For example, plaintiffs repeat nearly verbatim their allegations in *Curtis I* to support their claims for elder abuse and breach of the implied covenant in *Curtis II*. (*Compare* J. App. 14-18, *with* J. App. 56-57, 59-60).

The District Court Dismisses Plaintiffs' Refiled Action

The district court granted Life Care Center's motion to dismiss,[4] concluding, in part, that the summary-judgment order in *Curtis I* was a valid, final judgment because the order had determined that: (1) all of plaintiffs' claims were for professional negligence; (2) plaintiffs failed to file a medical expert affidavit in support of their claims for professional negligence, thereby requiring dismissal of their claims; and (3) the one-year statute of limitations for plaintiffs' professional-negligence claims had run. (J. App. 199, 200-03). The order in *Curtis I* thus barred plaintiffs from refiling their claims in the underlying action. (J. App. 199).

Plaintiffs appealed.

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[4] Although the district court's written order did not contain specific findings, this Court may look to the record, including the transcript of the hearing on Life Care Center's motion to dismiss, to determine the district court's findings and conclusions in support of its order. *See, e.g., Okada v. Eighth Judicial Dist. Court*, 131 Nev. 834, 840, 359 P.3d 1106, 1111 (2015) (looking to record where order lacks specific written findings).

SUMMARY OF THE ARGUMENT

Plaintiffs do not get to keep refiling their professional-negligence claims, now time-barred, before successive district judges, in the hopes that one of them will reach a different result.

NRS Chapter 41A governs actions for professional negligence. To combat the insurance crises that Nevada health care providers were facing in 2002, NRS Chapter 41A imposes certain requirements and limitations over professional-negligence claims. This includes requiring a medical-expert affidavit to be filed with a complaint for professional negligence, and limiting the statute of limitations for professional-negligence claims to one year after an injury is discovered. And to effectuate Legislative intent and preclude certain plaintiffs from deceptively pleading their claims to evade NRS Chapter 41A's requirements and limitations, this Court delineated the following rule: a claim is for professional negligence when the gravamen—the substantial point or essence—of its allegations involves medical judgment, diagnosis, or treatment, regardless of how the claim is pleaded.

In *Curtis I*, the district court recognized plaintiffs' deliberate attempt to avoid NRS Chapter 41A's affidavit requirement by styling their claims as those other than for professional negligence. In applying the above rule, the district court in *Curtis I* correctly found that the gravamen of plaintiffs' claims were for professional negligence: that Nurse Dawson administered the wrong medication during a course of treatment, and that Life Care Center's licensed nurses thereafter failed to properly monitor Ms. Curtis. Because plaintiffs did not file an affidavit, summary judgment was proper.

In *Curtis II*, plaintiffs refiled their action for professional negligence and reasserted two of the same claims from *Curtis I*. This time, however, plaintiffs sought to avoid NRS Chapter 41A's applicable one-year statute of limitations by once again styling their claims for elder abuse and breach of the implied covenant of good faith and fair dealing. The district court in *Curtis II* dismissed plaintiffs' claims on grounds of claim preclusion, finding in part that the order in *Curtis I* was a final, valid judgment. Specifically, the order in *Curtis I* had already determined that plaintiffs' claims are for professional negligence and required dismissal for failure to file an affidavit. And

because the one-year statute of limitations governing plaintiffs' claims for professional negligence had run, the *Curtis I*'s dismissal of the claims was preclusive and final.

This Court should affirm.

ARGUMENT

Standard of review: Whether claim preclusion operates to bar this action for professional negligence (*Curtis II*) based on the final judgment that Life Care Center obtained in plaintiffs' prior action for professional negligence (*Curtis I*) presents a question of law that this Court reviews de novo. *Boca Park Marketplace Syndications Grp., LLC v. Higco, Inc.*, 133 Nev. 923, 925, 407 P.3d 761, 763 (2017). Also, when the facts are uncontroverted, the application of the statute of limitations is a question of law that this Court reviews de novo. *Holcomb Condo. Homeowners' Assoc., Inc. v. Stewart Venture, LLC*, 129 Nev. 181, 186-87, 300 P.3d 124, 128 (2013).

I.

PLAINTIFFS' CLAIMS ARE BARRED UNDER THE DOCTRINE OF CLAIM PRECLUSION

This Court has established a three-part test for determining whether claim preclusion applies: "whether (1) the parties or their privies are the same, (2) the final judgment is valid, 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." *Mendenhall v. Tassinari*, 133 Nev. 614, 618, 403 P.3d 364, 368 (2017) (internal quotation marks omitted).

Under this test, plaintiffs' complaint in *Curtis II* is barred. Plaintiffs concede that the parties are the same and that the claims were or could have been brought in *Curits I*. And the judgment in *Curtis I* became final because the court there held that the complaint was for professional negligence, and the statute of limitations had expired.

A. The Parties are the Same in *Curtis I* and *Curtis II*

Plaintiffs concede, below and on appeal, that the parties are the same in *Curtis I* and *Curtis II*. (AOB at 13; J. App. 142-52. *Compare* J. App. 5, *with* J. App. 53.)

B. *Curtis II* is Based on Any and All Claims that Were or Could Have Been Brought in *Curtis I*

Plaintiffs have waived any arguments that *Curtis II* is based on the same claims or any part of them that were or could have been brought in *Curtis I*. This is because plaintiffs are unable to argue otherwise.

1. Claims are Barred in a Subsequent Action if They are Based on the Same Set of Facts and Circumstances as the Initial Action

Claim preclusion applies "where 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." *Mendenhall v. Tassinari*, 133 Nev. 614, 620, 403 P.3d 364, 370 (2017) (internal quotation marks omitted). "The test for determining whether the claims, or any part of them, are barred in a subsequent action is if they are based on the same set of facts and circumstances as the initial action." *Id.* (internal quotation marks omitted).

This Court in *Mendenhall* explained that this test for determining the commonality between initial and subsequent claims is a departure from the previous "overly rigid" test for applying claim preclusion. *Id.* The previous test required that "the first and second complaint needed

to be based on the same set of common facts and had to seek the same relief," and an "identity of causes of action" needed to exist between the two complaints. *Id.* (internal quotation marks omitted). However, these requirements were disposed of by this Court. *Id.* at 620 n.2, 403 P.3d at 370 n.2 (rejecting appellant's limited interpretation of claim preclusion "that for claim preclusion to apply in Nevada, the two sets of claims must be based on the same 'cause of action' and that the test for identical causes of action is whether the sets of facts essential to maintain the two suits are the same").

2. Claim Preclusion Embraces the Rule Against Claim/Action Splitting

This Court has held that "[i]t would be contrary to fundamental judicial procedure to permit two actions to remain pending between the same parties upon identical cause." *Fitzharris v. Phillips*, 74 Nev. 371, 376-77, 333 P.2d 721, 724 (1958), *disapproved on other grounds by Lee v. GNLV Corp.*, 116 Nev. 424, 996 P.2d 416 (2000). Indeed, "a single cause of action may not be split and separate actions maintained." *Smith v. Hutchins*, 93 Nev. 431, 432, 566 P.2d 1136, 1137 (1977).

This rule against claim/action splitting is a concept underlying the doctrine of claim preclusion. *See Boca Park Marketplace Syndications*

Grp., LLC v. Higco, Inc., 133 Nev. 923, 925, 407 P.3d 761, 763 (2017); *Katz v. Gerardi*, 655 F.3d 1212, 1218 (10th Cir. 2011) ("A plaintiff's obligation to bring all related claims together in the same action arises under the common law rule of claim preclusion prohibiting the splitting of actions." (internal quotation marks omitted)); *Curtis v. Citibank, N.A.*, 226 F.3d 133, 139 (2d Cir. 2000) ("[P]laintiffs have no right to maintain two actions on the same subject in the same court, against the same defendant at the same time.").

3. Plaintiffs Waived this Issue

Before the district court below, plaintiffs did not oppose Life Care Center's argument that *Curtis II* "is based on the same claims or any part of them that were or could have been brought in the first action." (J. App. 47, 142-152.) Plaintiffs did not even attempt to present any authority or counterarguments to that point. (J. App. 142-152.) Plaintiffs thus waived this issue. *See Dolores v. State, Emp't Security Div.*, 134 Nev. 258, 261, 416 P.3d 259, 262 (2018) ("Issues not argued below are deemed to have been waived and will not be considered on appeal.").

4. Plaintiffs do not Dispute that Their Claims are the Same as, or Could have Been Brought in, Curtis I

On appeal, plaintiffs still do not dispute that *Curtis II* is based on the same claims or any part of them that were or could have been brought in *Curtis I*. (AOB at 13-17.); *Lewis v. Renown Regional Med. Ctr.*, No. 74300, 2018 WL 6721372, at *1 n.2 (*Order of Affirmance*, Dec. 18, 2018) ("Issues not raised in an appellant's opening brief are deemed waived." (quoting *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011)); *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

Plaintiffs unquestionably waived this issue.

5. Plaintiffs' Claims are Based on the Same Set of Facts and Circumstances as Curtis I

Plaintiffs' silence on this issue below and on appeal is because their claims in *Curtis II* are undisputedly based on the same set of facts and circumstances as *Curtis I*.

First, plaintiffs' claims are identical in both proceedings. (*Compare,* J. App. 14-18 (asserting claims for elder abuse and breach of

the implied covenant of good faith and fair dealing in *Curtis II*), *with* J. App. 56-57, 59-60 (asserting claims for elder abuse and breach of the implied covenant of good faith and fair dealing in *Curtis I*). Indeed, Plaintiffs repeat nearly verbatim their allegations in *Curtis I* to support their claims in *Curtis II* for elder abuse and bad faith. (*Id.*)

And to the extent any part of the claims in *Curtis II* can even be construed as being different from those in *Curtis I*, it could have been brought in the first case. Both set of claims are based on the same set of alleged facts and circumstances: that Nurse Dawson administered the wrong medication during a course of treatment and that Life Care Center's licensed nurses thereafter failed to properly monitor Ms. Curtis.

Plaintiffs' claims in *Curtis II* are thus the same as *Curtis I*, and any part of the claims that is different in *Curtis II* may not be split into two different actions when it could have been brought in *Curtis I*.

C. The Order in *Curtis I* is a Valid, Final Judgment

Regardless of how the district court in *Curtis I* disposed of plaintiffs' claims (i.e., whether through summary judgment or a motion to dismiss), the effect of the order was preclusive because the statute of

limitations on plaintiffs' claims had run. Thus, the district court's order in *Curtis I* is a valid, final judgment.

1. Plaintiffs Waived Any Objection to Curtis I's *Resolution on Summary Judgment*

It is indisputable that a summary judgment order, even pending appeal, is a valid, final judgment. *Tumacacori Mission Land Dev., Ltd. v. Union Pac. R. Co.*, 297 P.3d 923, 925 (Ariz. Ct. App. 2013) ("An order granting summary judgment is a final judgment on the merits notwithstanding the possibility it will be appealed."); *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (summary judgment is a valid, final judgment when it "disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court"); *Edwards v. Ghandour*, 123 Nev. 105, 116, 159 P.3d 1086, 1093 (2007) ("[W]e conclude that the better reasoned approach, adopted by a majority of courts, is to give a judgment preclusive effect even when it is on appeal or the appeal period is running."), *abrogated on other grounds by Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008).

Plaintiffs now argue, however, that the district court in *Curtis I* should have dismissed their claims without prejudice in lieu of entering summary judgment under NRS 41A.071 ("[T]he district court shall

dismiss the action, without prejudice, if the action is filed without an affidavit . . . ."). (AOB at 14). But in *Curtis I*, plaintiffs never raised this issue or an objection before the district court, let alone instruct or direct the district to style its order as one for dismissal as opposed to summary judgment.[5] *See Dolores v. State, Emp't Security Div.*, 134 Nev. 258, 261, 416 P.3d 259, 262 (2018) ("Issues not argued below are deemed to have been waived and will not be considered on appeal.").

For example, in *Curtis I*, plaintiffs never raised this issue in their opposition to Life Care Center's motion for summary judgment or during oral argument on the motion. (1 R. App. 176 –96; 1 R. App. 131–73). Nor did plaintiffs raise this in a post-judgment motion after the district court entered summary judgment. Instead, Plaintiffs appealed the order and represented to this Court that the order was a valid, final judgment under NRAP 3A(b)(1) (1 R. App. 212; AOB at 1). Thus, plaintiffs waived this issue and cannot now fault the district court for failing to grant a relief that it never requested.

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[5] Regardless, as discussed further below, how the district court styled its order does not bear on the effects of the order in *Curtis I*, which is the dismissal of plaintiffs' claims with prejudice. *See infra* Section I.C.2 & 4.

2. A Dismissal of a Time-Barred Claim is a Valid, Final Judgment

An order dismissing a claim that is time-barred is in effect a dismissal with prejudice, and thus, is a valid, final judgment for purposes of claim preclusion.

a. WHETHER AN ORDER IS A VALID, FINAL JUDGMENT IS DETERMINED BY ITS EFFECT

It is the effect of an order that determines whether it is a valid, final judgment, regardless of how it is styled. *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440 (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."); (AOB at 15 n.4 (plaintiffs agreeing)). Specifically, whether the dismissal of a case has "preclusive effect" is the primary consideration for the dismissal being a valid, final judgment. *Cf. Five Star Cap. Corp. v.* Ruby, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008) (noting that a valid final judgment does not include a dismissal "that is not meant to have preclusive effect"); (AOB at 15 (plaintiffs agreeing)).

b. A Dismissal is De Facto with Prejudice if it has Preclusive Effect, and thus, is a Valid, Final Judgment for Claim Preclusion

A dismissal is de facto with prejudice if it has preclusive effect, which in turn renders the dismissal a valid, final judgment. *See Azzarello v. Humboldt River Ranch Assoc.*, Docket No. 68147, 2016 WL 6072420, at *1 n.1 (*Order of Affirmance*, Oct. 14, 2016) ("recognizing that dismissal with prejudice has preclusive effect"); *Stewart v. U.S. Bancorp.,* 297 F.3d 953, 956 (9th Cir. 2002) (noting that a final judgment "is often used interchangeably with 'dismissal with prejudice.'"). In contrast, a dismissal is truly without prejudice only if it does not bar a plaintiff "from returning later, to the same court, with the same underlying claim." *Semtek Intern. Inc. v. Lockheed Martin Corp.,* 531 U.S. 497, 505 (2001).

c. A Dismissal of a Time-Barred Claim, Even if it were Styled as Without Prejudice, is De Facto Dismissal with Prejudice

A dismissal without prejudice of claims that are time-barred will have a preclusive effect, and thus, is de facto dismissal with prejudice.[6]

[6] Other courts are seemingly unanimous on this position. *See, e.g., Weasel v. St. Alexius Med. Ctr.*, 230 F.3d 348, 353 n.4 (8th Cir. 2000) (recognizing that a dismissal without prejudice will have a preclusive effect where the statute of limitations expires during the pendency of

Scrimer v. Eighth Judicial Dist. Court, 116 Nev. 507, 514, 998 P.2d 1190, 1195 (2000) ("Although the dismissal was without prejudice, it was effectively with prejudice, since the statute of limitations had run."); *Dougan v. Gustaveson*, 108 Nev. 517, 519, 835 P.2d 795, 796 (1992), *abrogated on other grounds by Arnold v. Kip*, 123 Nev. 410, 168 P.3d 1050 (2007) ("Although [plaintiff's] complaint was dismissed without prejudice, the effect of the dismissal was final because the statute of limitations had run. After the district court certified the

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the case); *Gallardo v. PS Chicken Inc.*, 285 F. Supp. 3d 549, 552 (E.D.N.Y. 2018) ("[E]ven where a dismissal without prejudice does not explicitly preclude a plaintiff from reviving his or her claims, the potential preclusive effect of a dismissal without prejudice when coupled with the statute of limitations could render it a de facto dismissal with prejudice." (internal quotation marks omitted)); *Pearson v. City of Big Lake, Minn.*, No. CIV. 10-1745 JRT/FLN, 2011 WL 1136443, at *4 (D. Minn. Mar. 25, 2011) ("A dismissal without prejudice in this case will have the same preclusive effect as a dismissal with prejudice because the complaint was filed shortly before the expiration of the statute of limitations. Thus, if the case is dismissed without prejudice, the limitations period will have run and [plaintiff] will not be able to re-file."); *Thomas v. Bear, Stearns & Co., Inc.*, No. CIV.A. 3:93-CV-1970D, 1996 WL 706871, at *1 (N.D. Tex. Dec. 4, 1996) ("Because a dismissal without prejudice in the present case would still result in barring a second suit based on the preclusive effect of the statute of limitations, the court must treat [the] dismissal as being one with prejudice."); *Power Constructors, Inc. v. Acres Am.*, 811 P.2d 1052, 1054 n.5 (Ala. 1991) ("Dismissal without prejudice will only have a preclusive effect if the statute of limitations has run while the case was pending.").

judgment as final, this appeal followed."); *Domino v. Gaughan*, 103 Nev. 582, 583, 747 P.2d 236, 237 (1987) ("Although the dismissal was without prejudice, it was, in effect, a dismissal with prejudice because the applicable statute of limitations had run.").

3. The Order in Curtis I Became Final Because the One-Year Statute of Limitations Governing Plaintiffs' Claims Had Expired

The district court in *Curtis I* concluded that the gravamen of plaintiffs' claims are for professional negligence, and despite their efforts, they cannot escape NRS Chapter 41A's limitations, including NRS 41A.097(2)'s one-year statute of limitations.[7] (J. App. 67 ("This means that a plaintiff cannot escape the [professional negligence] statutes' damages or timeliness limitations by pleading an intentional tort—battery, say—instead of negligence.")). And in reaching its decision to grant summary judgment, the district court heard and considered arguments regarding whether the statute of limitations of plaintiffs' claims had run. (1 R. App. 176–96) During oral argument on

[7] NRS 41A.097(2) provides that the statute of limitations governing a claim for professional negligence is one year after the plaintiff discovers the injury. This is discussed more fully below. *See infra* Section II.B.

Life Care Center's summary-judgment motion, plaintiffs even conceded that the statute of limitations on their claims had run. (1 R. App. 183) ("They wait till the statute of limitations pass in order to try to get this entire case thrown out.").

Thus, the effect of the district court's order in *Curtis I* was dismissal with prejudice because it determined that plaintiffs' claims are for professional negligence, plaintiffs' claims must be dismissed for failure to file a medical-expert affidavit, and the one-year statute of limitations had run. Plaintiffs even conceded as such during oral argument below:

> THE COURT: . . . But my understanding . . . is that [the district court in *Curtis I*] ultimately did not agree with you that this was abuse of an elder person, that they felt this should have been, you know, a med mal professional negligence, and then thus the affidavit should have been attached, and therefore, that's why it got dismissed, because this wasn't an elder abuse case, this is a med mal case, and there was no affidavit.
>
> *Since there was no affidavit, the statute had ran, so—are we—am I there? Right? I mean—*
>
> MS. BOSSIE: *Correct.*

(J. App. 189) (emphases added).

Accordingly, the district court in *Curtis II* did not err in concluding that the order in *Curtis I* was a valid, final judgment with preclusive effect.

4. Any Error in the Title of the Order in Curtis I *was Only One of Form, and not Substance*

While plaintiffs take issue with the district court styling its order in *Curtis I* as one for summary judgment instead of dismissal without prejudice, any error there "was simply one of form" because the effect is the same: the claims are time-barred. *McClellan v. Haddock*, 166 A.3d 579, 589 n.10 (Vt. 2017). The Supreme Court of Vermont in *McClellan* is instructive:

> We note that the trial court's judgment of dismissal "with prejudice" was technically not authorized under the statute providing that failure to file the requisite certificate of merit "shall be grounds for dismissal of the action without prejudice." Any error, however, was simply one of form; the statute of limitations had already expired, so even if the trial court had dismissed without prejudice and plaintiff had refiled the complaint, it would have been subsequently dismissed with prejudice as time-barred.

Id. (citation omitted); *see also White v. Tariq*, 299 S.W.3d 1, 5 (Mo. Ct. App. 2009) (acknowledging that, although a medical malpractice action is dismissed "without prejudice" for failure to timely file a health care

affidavit in support of their medical malpractice action, the dismissal may still present claim preclusion when the claims are "otherwise barred" under the statute of limitations).

Indeed, a rigid and overly-simplified application of the rule that dismissals without prejudice are generally not valid, final judgments is incorrect and defies common sense where the dismissed claims are time-barred:

> As a general matter, if a court lack subject matter jurisdiction over a claim, it should dismiss that claim without prejudice. . . . However, the court should not ignore common sense. A court may dismiss a complaint with prejudice if the running of the statute of limitations would bar a plaintiff from [bringing a subsequent action] . . . .

Forsgren v. United States, 74 Fed. Cl. 422, 425 (2006); *Kesterson v. State Farm Fire & Cas. Co.*, 242 S.W.3d 712, 717 (Mo. 2008) ("Notwithstanding a dismissal 'without prejudice,' the common law doctrine of claim preclusion may present an instance where the civil action is 'otherwise barred.'").

5. Adopting Plaintiffs' Position that Dismissal of Time-Barred Claims is Never a Valid, Final Judgment Would Create Absurd Results

Adopting plaintiffs' incorrect interpretation of NRS 41A.071—that dismissals of claims for professional negligence for failure to include a medical expert affidavit can never have preclusive effect—would create absurd, far-reaching results. *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716-17 (2007) ("Statutory interpretation should not render any part of a statute meaningless, and a statute's language should not be read to produce absurd or unreasonable results." (internal quotation marks omitted)).

Plaintiffs' interpretation would misapply NRS 41A.071's purpose of triaging and dismissing meritless professional negligence claims, to instead preclude courts from dismissing, with prejudice, time-barred claims for professional negligence. It would also permit a plaintiff, whose claims for professional negligence were dismissed under NRS 41A.071, to bring the same claims in a new action beyond their statute of limitations. *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 2014) ("The fact that dismissal of earlier suit was without prejudice does not authorize subsequent suit brought outside of otherwise binding

statute of limitations."). Plaintiffs would keep on refiling their claims, begging each successive district judge not to defer to the previous determination that their claims were for professional negligence—just as plaintiffs have done here.

This was not, and cannot be, what the Legislature intended under NRS 41A.071's affidavit requirement.

II.

PLAINTIFFS' SECOND COMPLAINT IS TIME-BARRED

The district court correctly applied claim preclusion to dismiss plaintiff's complaint. But even without preclusion doctrines, the complaint fails.

That is because, at this preliminary stage, we analyze the complaint for statute of limitations the same way we do for the NRS 41.071A affidavit requirement: "we must look to the gravamen or 'substantial point or essence' of each claim rather than its form to see whether each individual claim is for medical malpractice"—and thus subject to the one-year limitation of NRS 41A.097. *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 642–43, 403 P.3d 1280, 1285 (2017).

Here, just as the district court in *Curtis I* determined that plaintiffs' complaint there stated professional-negligence claims for the medical-expert affidavit requirement, plaintiffs' refiled complaint in *Curtis II* states profession-negligence claims for the one-year statute of limitations. So even though this time they attached the required affidavit, those claims are still time-barred.

A. Chapter 41A's Statute of Limitations and Affidavit Requirement Call for the Same Preliminary Analysis of the Complaint

NRS Chapter 41A contemplates certain gatekeeping measures at the beginning of a case where the gravamen is the exercise of poor medical judgment by a health-care provider. Regardless of how a case may be developed in litigation and trial to encompass other types of claims, at the outset the district court may treat the claim as one for professional negligence. So if the complaint does not attach a medical-expert affidavit under NRS 41A.071, or is filed more than a year after the injury's discovery under NRS 41A.097(2), the court may dismiss the claim.

1. The Gravamen of the Claim Preliminarily Determines Whether the One-Year Limitation Period in NRS 41A.097 Applies

A preliminary determination that a complaint states claims for professional negligence triggers both the affidavit requirement of NRS 41A.071 and the one-year statute of limitations under NRS 41A.097(2). *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 642–43, 403 P.3d 1280, 1285 (2017) (citing *Benz–Elliott v. Barrett Enters., LP*, 456 S.W.3d 140, 148–49 (Tenn. 2015)). So if the complaint alleges an injury discovered more than a year before filing, and the gravamen of the claim is professional negligence, the court must dismiss that claim.[8]

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[8] *See, e.g.*, *Lewis v. Renown Reg'l Med. Ctr.*, Docket No. 74300, 2018 WL 6721372, at *2 (*Order of Affirmance*, Dec. 18, 2018) ("Thus, we affirm the district court's dismissal of [plaintiffs'] claims against [defendant employer] because his claim for abuse and neglect sounds in professional negligence and is *time barred pursuant to NRS 41A.097(2)*." (emphasis added)); *Zhang v. Barnes*, Docket No. 67219, 2016 WL 4926325, at *7 (2016) ("Negligent hiring, training, and supervision claims cannot be used as a channel to allege professional negligence against a provider of health care *to avoid the statutory caps on such actions*." (Emphasis added.)); *Blackwell v. Goodwin*, 513 S.E.2d 542, 545-46 (Ga. Ct. App. 1999) (determining that the statute of repose for medical malpractice claims applies to plaintiffs' claims against the nurse's employer for negligent hiring, retention, supervision, and entrustment because the claims arose out of the nurse's administration of an injection, which involved the exercise of her professional skill and judgment), *cited with approval by Zhang*, Docket No. 67219, 2016 WL 4926325.

That is why this Court has held that a plaintiff whose complaint is dismissed under NRS 41A.071 cannot simply amend or refile the complaint to avoid the statute of limitations. *See Wheble v. Eighth Judicial Dist. Court*, 128 Nev. 119, 123, 272 P.3d 134, 137 (2012) (holding that, "[w]here [professional negligence] claims have been dismissed for failure to comply with the affidavit requirement of NRS 41A.071," a plaintiff cannot "refile the same claims beyond [NRS 41A.097's] statute of limitations"); *Washoe Med. Ctr. v. Second Judicial Dist. Court,* 122 Nev. 1298, 1306, 148 P.3d 790, 795 (2006) (holding that a plaintiff cannot file an amended pleading to remedy a failure to include a medical expert affidavit in the original pleading after NRS 41A.097's statute of limitations had run). The rule prevents a plaintiff from restyling their claims for professional negligence as something else to avoid statute of limitations and the affidavit requirements of NRS Chapter 41A.

The key for both questions is the "set of duties" that form the basis of the claim. *Szymborski*, 133 Nev. at 645-46, 403 P.3d at 1286-87. If the claim as alleged in the complaint turns on duties grounded in a health provider's exercise of "medical judgment," that is professional

negligence. *Id.* If, instead, the relevant set of duties is one of administration or other nonmedical judgment—such as a hospital's administrative policies that interfere with its providers' medical judgment, or a social worker's exercise of nonmedical judgment in serving a member of the community—the gravamen is ordinary negligence. *Id.*

2. The Preliminary Determination Does Not Preclude the Development of a Case

The critical role that the affidavit requirement and statute of limitations play is just that of a gatekeeper—to clear the system of claims and complaints that on their face and in substance allege the breach of a health care provider's professional judgment. For claims that survive these initial steps, the case may develop as any case would, through discovery and at trial, including to develop claims and theories that do not rest on professional negligence. *See* NRCP 54(c) (directing the district court to "grant[s] the relief to which each party is entitled, even if the party has not demanded such relief in its pleadings"); NRCP 15(b); *Ivory Ranch v. Quinn River Ranch*, 101 Nev. 471, 473, 705 P.2d 673, 675 (1985); *see also Pinkley, Inc. v. City of Frederick*, 191 F.3d 394, 400 (4th Cir. 1999) (applying Rule 54(c) where "the allegations properly

pled *and proven* support a theory and type of relief not specified in [the] demand for judgment" (emphasis added)).

B. Plaintiffs' Claims are Subject to NRS Chapter 41A's Statute of Limitations, and thus, are Time-Barred

Plaintiffs posit, without any explanation or supporting authority, that their claims are subject to a three-year statute of limitations. (AOB at 4). But just as those claims were dismissed in *Curtis I* for failure to attach the NRS 41A.071 affidavit, the gravamen of their claims as pleaded here is still professional negligence: the claims are subject to a one-year statute of limitations, and thus, are time-barred.

1. Plaintiffs Cannot Refile Their Claims from Curtis I *Beyond the One-Year Statute of Limitations*

By refiling their action and reasserting the same claims for professional negligence from *Curtis I*, plaintiffs run afoul of NRS 41A.097(2)'s one-year statute of limitations.

In *Curtis I*, the district court exercised its reasonable judgment in determining that the gravamen of plaintiffs' claims—Nurse Dawson's administering the incorrect medication to Ms. Curtis during a course of treatment, and licensed nurses' inadequately monitoring Ms. Curtis thereafter, leading to her death—is professional negligence. (J. App.

62-68). Thus, although plaintiffs despite styled their claims as corporate negligence and elder abuse, they were subject to the medical-expert affidavit requirement. Because they did not include such an affidavit, the district court correctly entered summary judgment.

Yet, plaintiffs refiled their action and reasserted two of the same claims (elder abuse and breach of the implied covenant of good faith and fair dealing) from *Curtis I*. Indeed, plaintiffs do not dispute that their claims in *Curtis II* are the same claims from *Curtis I*. *See supra* Section I.B.

And because these claims were already held to be for professional negligence in *Curtis I*, plaintiffs could not "refile[ ] the same claims beyond [NRS 41A.097(2)'s one-year] statute of limitations." *See Wheble*, 128 Nev. at 123, 272 P.3d at 137. But that is exactly what the new complaint did.[9] It is time-barred.

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[9] Ms. Curtis died on March 11, 2016, meaning that the last day for plaintiffs to file an action against Life Care Center was March 11, 2017. (J. App. 15). And although plaintiffs complaint in *Curtis I* was filed on February 2, 2017, their failure to include a medical-expert affidavit means that the action never commenced and that the statute of limitations was not tolled. *Wheble*, 128 Nev. at 123, 272 P.3d at 137 ("Here, 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

2. The Gravamen of Plaintiffs' Claims Are for Professional Negligence of Health-Care Personnel Exercising Medical Judgment

The district court's determination in *Curtis I* was substantively correct.

Plaintiffs allege that Ms. Curtis's "past medical history included dementia, hypertension, COPD, and renal insufficiency," and that she was transferred to Life Care Center "*for continuing subacute and memory care*." (J. App. 14) (emphasis added). And, in rendering services relating to Ms. Curtis's course of treatment for subacute and memory care, Life Care Center's licensed nurses were to monitor Ms. Curtis and provide medical services to her, including administer medication. (J. App. 9-10, 15). However, on March 7, 2016, Nurse Dawson allegedly administered the incorrect medication, morphine, to Ms. Curtis during her course of treatment—an error in professional judgment. (J. App. 10).

Then, according to plaintiffs, Nurse Dawson and the other licensed nurses neglected the nursing protocol or inadequately

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'commenced.'"). Plaintiffs filed the new complaint on February 27, 2019. (J. App. 5).

monitored Ms. Curtis's reaction to the morphine, which could have prevented her death. (J. App. 10 ("Despite [Nurse Dawson's] notice and knowledge that [she] had wrongly administered morphine to Ms. Curtis, [she] failed to act timely upon that discovery, instead retaining Ms. Curtis as a resident until 8 March 2016."), 15 ("Defendants eventually called 911 and emergency personnel transported Ms. Curtis to Sunrise Hospital, where she was diagnosed with anoxic brain encephalopathy."), 13 (Life Care Center's licensed nurses "fail[ed] to manage, care, monitor, document, chart, prevent and/or treat the injuries suffered by Ms. Curtis").

These collective acts and omissions by health care providers exercising medical judgment demonstrate to a district court, as part of its gatekeeping function during the inception of the case, that the gravamina of plaintiffs' claims are quintessentially matters of professional negligence. *Cruz v. Centro Medico de P.R.*, 13 Offic. Trans. 931, 955-56 (P.R. 1983) (holding that professional negligence is "more than an initial error of judgment," but includes "the sum total of [the health care provider's] concomitant and subsequent acts and omissions [that] point out to a conclusion of professional negligence").

3. Plaintiffs' Allegations Against Life Care Centers Are Still About the Failure of the Nurses' Medical Judgment, Not True Corporate Negligence

Plaintiffs wrongly suggest that the gravamen of their claims in *Curtis II* are not for professional negligence because they couched their allegations in terms of Life Care Center's direct and vicarious liability for negligent hiring, training and supervision. (*See, e.g.,* AOB at 4 ("[Plaintiffs then alleged multiple theories of the liability of [Life Care Center]—not just vicarious liability for one nurse.") But this is mere deceptive pleading, a tactic that this Court has repeatedly rejected. *Szymborski*, 133 Nev. at 647-48, 403 P.3d at 1288 (citing *Blackwell v. Goodwin*, 513 S.E.2d 542, 545-46 (Ga. 1999), which "determin[ed] that the statute of repose for [professional negligence] applies to plaintiff's claims against the nurse's employer for negligent hiring, retention, supervision, and entrustment because the claims *arose out of the nurse's administration of an injection*" (emphasis added)).

And in any case, the allegations against Life Care Center arise from, and are coextensive with, plaintiffs' allegations of professional negligence. Plaintiffs' broad and amorphous allegations that Life Care Center was in charge of staffing, budgeting, and operation of the facility

when the underlying acts of professional negligence occurred are not the type of allegations that would entitle them to an independent claim of ordinary negligence against Life Care Center. For example, plaintiffs do not allege that any specific corporate policy interfered with Nurse Dawson's or the other licensed nurses' exercise of medical judgment in administering morphine to Ms. Curtis and treating her thereafter. Nor do they allege that Ms. Curtis died because of a decision to reduce access to medical services. Instead, each of these allegations rests on the notion the set of professional medical duties that Nurse Dawson allegedly violated can be attributed to Life Care Center. *See Lewis*, 2018 WL 6721372, at *2 (claim pleaded as abuse and neglect under NRS 41.1395 was professional negligence subject to one-year limitations period when based on the underlying substandard medical care provided by healthcare professionals).

In its gatekeeping role, the district court could properly have determined the gravamen of plaintiffs' claims are preliminarily for professional negligence and thus barred by the one-year statute of limitations.

CONCLUSION

This Court should affirm the district court's decision.

Dated this 20th day of April, 2020.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(ii) because, except as exempted by NRAP 32(a)(7)(C), it contains 7,904 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 20th day of April, 2020.

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