

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' REPLY 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.

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ARGUMENT

Ms. Latrenta argued in her Opening Brief that the trial court below erred in applying claim preclusion and dismissing *Curtis II*¹ because the previous trial court in *Curtis I*² did not enter a valid final judgment for purposes of claim preclusion, as the court in *Curtis I*, without discretion to proceed otherwise, dismissed *Curtis I* for lack of jurisdiction and without prejudice. *See* NRS 41A.071 (“If an action for professional negligence is filed in the district court, the district court ***shall dismiss the action, without prejudice***, if the action is filed without an affidavit”) (emphasis added); NRCP 41(b) (stating a dismissal for lack of jurisdiction does not operate as an adjudication on the merits). *See also Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054 n.27 (2008) (noting that a judgment is not considered valid and final for purposes of claim preclusion if the case was dismissed without prejudice, lack of jurisdiction, improper venue, or failure to join a party). Ms. Latrenta further argued that, in any event, LCC was judicially estopped from successfully asserting claim preclusion because LCC deliberately, and without ignorance, fraud, or mistake, shifted its position in *Curtis II* from its successful position in *Curtis I* (of jurisdictional flaw) in an attempt to suit the requirements of claim preclusion.

¹ For convenience, Ms. Latrenta will use LCC’s reference to *Curtis II* to refer to the current trial court below and the pending appeal in Docket No. 79396.

² For convenience, Ms. Latrenta will use LCC’s reference to *Curtis I* to refer to the previous trial court and the pending appeal in Docket No. 77180.

In response, LCC never addressed Ms. Latrenta's argument that LCC was judicially estopped from successfully asserting claim preclusion. Rather, LCC waived a response to Ms. Latrenta's judicial estoppel argument and spent an excessive amount of time making circular and distracting arguments based on a misinterpretation of the procedural facts in *Curtis I* and of Ms. Latrenta's allegations in *Curtis II*. Notably, LCC misconstrues the procedural facts in *Curtis I* by attempting to designate the order in *Curtis I* as a dismissal based on the expiration of the statute of limitations (a valid final judgment for purposes of claim preclusion) when, in reality, the order in *Curtis I* was a dismissal, without prejudice, for lack of jurisdiction (**not** a valid final judgment for purposes of claim preclusion and determination of the running of time).

If the Court was to entertain LCC's misinterpretation of the procedural facts in *Curtis I* and look at the overall effect of the order in *Curtis I*, the order would have a preclusive effect only as to professional negligence claims based on LCC's vicarious liability, not on claims for elder abuse and bad faith tort based on LCC's direct liability because *Curtis I* concluded only that professional negligence claims based on LCC's **vicarious** liability were subject to the professional negligence statutes and *Curtis II* is for elder abuse and bad faith tort claims based on LCC's direct liability. Therefore, the viability of direct allegations against LCC for elder abuse and bad faith tort are still open and not precluded by *Curtis I*.

Further, LCC misconstrues and ignores a substantial portion of Ms. Latrenta's allegations in *Curtis II* in an attempt to argue that the statute of limitations for professional negligence would nevertheless bar the complaint below. However, a simple review of the complaint reveals that LCC's argument is without merit as Ms. Latrenta's claims in *Curtis II* are not grounded in professional negligence. Therefore, *Curtis II* should proceed below before the trial court.

I. LCC's Totally Inconsistent Position from *Curtis I* Mandates the Application of Judicial Estoppel

Even though LCC spends a great deal of time attempting to persuade this Court that the trial court properly applied claim preclusion to dismiss the complaint in *Curtis II*, LCC completely fails to address Ms. Latrenta's argument that LCC was judicially estopped from asserting claim preclusion. Based upon the arguments made in Ms. Latrenta's Opening Brief regarding judicial estoppel,³ this Court should disregard LCC's Answering Brief, reverse the decision of the Clark County District Court and return this case below for trial by jury.

II. LCC's Improper Characterization or Interpretation of the Order in *Curtis I* Does Not Transform the Order into a Valid Final Judgment for Purposes of Claim Preclusion

Throughout LCC's Answering Brief, LCC attempts to characterize the order in *Curtis I* as a dismissal with prejudice based on the expiration of the statute of

³ See Appellant's Opening Brief ("AOB") at 17-22.

limitations (a valid final judgment for purposes of claim preclusion) when, in reality, the order in *Curtis I* was a dismissal, without prejudice, for lack of jurisdiction (*not* a valid final judgment for purposes of claim preclusion).

A. Despite LCC’s Characterization, the Order in *Curtis I* was a Dismissal, Without Prejudice, for Lack of Jurisdiction which is Not a Valid Final Judgment for Purposes of Claim Preclusion

Notably, the court in *Curtis I* had no discretion: it had to dismiss Ms. Latrenta’s action *without prejudice* pursuant to NRS 41A.071 because the court found that Ms. Latrenta did not file an affidavit of merit for the claims the court considered were grounded in professional negligence – specifically, the claims based upon LCC’s vicarious liability for the acts and omissions of its nursing staff in the administration of morphine and the failure to monitor. (J. App. 0065 – 0068). *See* NRS 41A.071 (“If an action for professional negligence is filed in the district court, the district court *shall dismiss the action, without prejudice*, if the action is filed without an affidavit”) (emphasis added).

The court in *Curtis I*, citing to NRS 41A.071’s affidavit requirement as a jurisdictional requirement and acknowledging its lack of discretion, concluded that “[w]ithout such an affidavit, the case must be dismissed” and that “[s]uch a complaint without an affidavit must be dismissed since it is void *ab initio*.” (J. APP. 0065). Therefore, because the case in *Curtis I* was dismissed without prejudice, the order in *Curtis I* was not a valid final judgment *for purposes of claim preclusion*

even though the statute of limitations may have run for some of the claims.

Likewise, the fact that the court in *Curtis I* dismissed the case for lack of jurisdiction, pursuant to Nevada Rule of Civil Procedure 41(b) and *Five Star*, the dismissal neither operated as an adjudication on the merits nor operated as a valid final judgment *for purposes of claim preclusion* even though the statute of limitations may have run for some of the claims. *See Five Star*, 124 Nev. at 1057 (stating that a court can look to NRCP 41(b) to resolve the question of whether the dismissal is a valid final judgment); NRCP 41(b) (“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”) (emphasis added). LCC’s attempt to characterize the order otherwise is improper and should not be entertained.

B. Even if the Court Were to Analyze the Subsequent Overall Effect of the Order in *Curtis I*, Ms. Latrenta’s Claims in *Curtis II* Are Not Subject to Claim Preclusion Because the Order in *Curtis I* Focused Solely on Negligence Claims Based on LCC’s *Vicarious Liability* and *Curtis II* is for Elder Abuse and Bad Faith Tort Claims based on LCC’s *Direct Liability*

Should this Court entertain LCC’s disregard of Nevada’s rules, statutes, and case law to instead analyze the subsequent overall effect of the order in *Curtis I* and characterize it as a dismissal based on the expiration of the statute of limitations (a valid final judgment for purposes of claim preclusion), such a characterization would nevertheless preclude only professional negligence claims (assuming the statute of

limitations had run) based on LCC's vicarious liability, not on Ms. Latrenta's claims for elder abuse and bad faith tort based on LCC's direct liability.

In *Curtis I*, the trial court focused solely on Ms. Latrenta's theories of vicarious liability, without ever referencing Ms. Latrenta's theories of direct liability, to dismiss the entire case for lack of jurisdiction pursuant to NRS 41A.071. In fact, the court pointed out in its order that LCC "contend[s] that they are entitled to the protections of Chapter 41A because their liability is *derivative* of its nursing staff" (J. App. 0065) (emphasis added). The court narrowed its focus to only Ms. Latrenta's allegations based on LCC's vicarious liability. The court found that Ms. Latrenta's claims based upon a theory of LCC's *vicarious* liability were grounded in professional negligence and required an affidavit of merit pursuant to NRS 41A.071 because LCC'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. 0065 – 0066).

The court dismissed the entire case for lack of an affidavit of merit – not for expiration of the statute of limitations or failure to state a claim. (J. App. 0067 – 0070). In fact, the court never even mentioned the statute of limitations in regard to Ms. Latrenta's claims. (J. App. 0062 – 0070). Further, at no point did the court conclude (or even address) that the allegations based on LCC's *direct* liability were for professional negligence. (J. App. 0062 – 0070, 0197 – 0198).

Despite the limited ruling of the court in *Curtis I* and the instructions of NRS 41A.071, NRCP 41(b), and *Five Star*, LCC would like this Court to improperly analyze the overall effect of the order in *Curtis I* to invoke claim preclusion as to Ms. Latrenta's complaint in *Curtis II* below. Specifically, LCC argues that *Curtis I* precludes Ms. Latrenta's current claims because the statute of limitations has run for professional negligence claims based on LCC's vicarious liability. However, even if this Court were to entertain LCC's improper suggestion to analyze the overall effect of the order in *Curtis I*, LCC's argument establishes that the order would in effect only preclude claims based on LCC's *vicarious* liability for its nurses' professional negligence since the order was limited to only these claims and the statute of limitations has purportedly run for any professional negligence claims.

LCC's argument however completely overlooks the fact that Ms. Latrenta's current claims are not solely for negligence based on LCC's vicarious liability. Rather, as explained in detail in the next section, *Curtis II* is for elder abuse and bad faith tort based on LCC's direct liability which are not subject to the same statute of limitation as a professional negligence claim. (J. App. 0004 – 0027). Because Ms. Latrenta's claims are not based solely on LCC's vicarious liability for negligence and were in fact filed within the statute of limitations, the viability of Ms. Latrenta's allegations against LCC for elder abuse and bad faith tort are still open and not precluded by *Curtis I*. Therefore, this Court should reverse the decision of the Clark

County District Court and return this case below for trial by jury.

III. Ms. Latrenta's Complaint in *Curtis II* is Not Based on Professional Negligence and is Not Time-Barred

LCC argues that this Court should nevertheless affirm the lower court because LCC interprets Ms. Latrenta's complaint below to allege claims for professional negligence beyond the statute of limitations. However, Ms. Latrenta's claims for elder abuse and bad faith tort, neither of which are professional negligence claims⁴, are against LCC, the nursing home and its operators, managers, and administrators. LCC, the nursing home and its operators, managers, and administrators, are not providers of health care under NRS 41A.017.⁵ The new complaint is based largely

⁴ NRS 41A.015 defines a "professional negligence" as:

the failure of a *provider of health care*, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care.

NRS 41A.015 (emphasis added).

⁵ NRS 41A.017 defines a "provider of health care" as:

a physician licensed pursuant to chapter 630 or 633 of NRS, physician assistant, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, holder of a license or a limited license issued under the provisions of chapter 653 of NRS, medical laboratory director or technician, licensed dietitian or a licensed hospital, clinic, surgery center, physicians' professional corporation or group practice that employs any such person and its employees.

on their *direct* liability, (APP0004 – APP0027), and conduct motivated by, *inter alia*, “maximizing profits by operating Facility in such a manner that Facility was underfunded and understaffed.” (APP0009).⁶

For example, Ms. Latrenta alleged:

At all times mentioned herein, Defendants had an obligation to establish practices that addressed the needs of the residents of the Facility, including Ms. Curtis, with respect to the care and services which were necessary to maintain the physical and mental health of residents.

At all times mentioned herein, Defendants had a duty to employ sufficient staff to provide services to attain or maintain the highest practicable physical and mental well-being of Ms. Curtis.

At all times mentioned herein, Defendants had an obligation to maintain and manage the Facility with

NRS 41A.017. In 2015, the legislature deliberately chose to not include nursing homes in the definition of provider of health care. *See* Hearing on S.B. 292 Before the Assembly Comm. on Judiciary, 78th Leg. (Nev., March 26, 2015)

⁶ A nursing home, and its operators, managers, and administrators, may be subject to vicarious liability for the actions of their employees while *also* being subject to direct corporate liability due to, *inter alia*, the level of control they exercise over the management of the nursing home facility. *See, e.g., Scampone v. Grane Healthcare Co.*, 2017 PA Super 257, 169 A.3d 600, 607 (2017). The *Scampone* court explained:

direct corporate liability and vicarious liability are distinct bases for recovering against a corporate defendant and that liability for one did not obviate liability for the other. Indeed, direct corporate liability was designed to expand a plaintiff’s ability to recover against a corporation and does not supplant vicarious liability imposed on a corporation for the acts and omissions of its employees.

Id. at 621.

adequate staff and sufficient resources to ensure timely care and services which were necessary to maintain the physical and mental health of residents, such Ms. Curtis.

...

Despite their obligations and duties, Defendants made a conscious decision to operate and/or manage the Facility so as to maximize profits at the expense of the care required to be provided to their residents, including Ms. Curtis.

In their efforts to maximize profits, Defendants negligently, intentionally and/or recklessly mismanaged and/or reduced staffing levels below the level necessary to provide adequate care to the residents and implemented practices in disregard to the safety of the residents.

Despite their knowledge of the likelihood of harm due to insufficient staffing levels, and despite complaints from staff members about insufficient staffing levels, Defendants intentionally, recklessly and/or negligently disregarded the consequences of their actions, and caused staffing levels at the Facility to be set at a level such that the personnel on duty could not and did not meet the needs of the Facility's residents, including Ms. Curtis.

Despite their knowledge of the likelihood of harm due to inadequate practices, Defendants intentionally, recklessly and/or negligently disregarded the consequences of their actions, and prevented personnel on duty to meet the needs of the Facility's residents, including Ms. Curtis.

...

However, in an effort to increase profits and at the direction of the Management Defendants, Defendants failed to provide the resources necessary, including sufficient staff, to meet the needs of the residents, including Ms. Curtis.

Defendants knowingly disregarded patient acuity levels while making staffing decisions, and also knowingly disregarded the minimum time required by the staff to

perform essential day-to-day functions and services.

The acts and omissions of Defendants were motivated by a desire to increase the profits of the nursing homes they own, including the Facility, by knowingly, recklessly, and with total disregard for the health and safety of the residents, reducing expenditures for needed staffing, training, supervision, and care to levels that would inevitably lead to severe injuries, such as those suffered by Ms. Curtis.

...

Although the direct mechanism of Ms. Curtis's death was morphine intoxication, Defendants created, promoted and maintained a toxic and unsafe environment that predictably and inevitably led to and ultimately caused Ms. Curtis's death.

Defendants may be held liable on various theories of liability including direct liability based on their conduct in creating, promoting and maintaining a toxic and unsafe environment for the residents, including Ms. Curtis.

Defendants may also be held liable as participants in the joint venture or enterprise. Specifically, Defendants, by their acts and omissions as alleged above, operated pursuant to an agreement, with a common purpose and community of interest, with an equal right of control, and subject to participation in profits and losses, as further alleged above, such that they operated a joint enterprise or joint venture, subjecting each of them to liability for the acts and omissions of each other.

Defendants may also be held vicariously liable for the acts that occurred during the agency relationship. Specifically, Defendants were the knowing agents of one another, inclusive, and Defendants' officers, directors, and managing agents, directed, approved, and/or ratified the conduct of each of the other Defendants' officers, agents and employees, and are therefore vicariously liable for the acts and/or omissions of their co-defendants and their

agents, as is more fully alleged above.

(J. App. 0011 – 0016).

Remarkably, LCC ignores the additional specificity in the complaint below regarding Ms. Latrenta’s direct theories of liability for the elder abuse and bad faith tort claims in an improper attempt to mischaracterize the claims as ones for professional negligence beyond the statute of limitations. LCC improperly suggests that Ms. Latrenta’s complaint is merely a deceptive pleading to evade NRS Chapter 41A’s requirements and limitations.⁷ However, Ms. Latrenta’s complaint is neither deceptive nor artful as Ms. Latrenta is not attempting to take away any statutory protections provided by NRS Chapter 41A from any statutory provider of health care as defined in NRS Chapter 41A. *See, e.g., Betts v. Royal Springs Healthcare & Rehab., Inc.*, No. 77323-COA, 2019 WL 5681088, at *3 (Nev. App. Oct. 31, 2019) (“Because a ‘provider of health care’ does not include a ‘facility for skilled nursing,’ a suit brought against a facility for skilled nursing cannot allege ‘professional negligence.’”).⁸ Rather, LCC is artfully attempting to provide statutory protection to parties which are not entitled to such statutory protection. Indeed, the cases LCC cites to for support all involve entities that are included in NRS 41A.017’s list of statutory providers of health care.

⁷ LCC’s Answering Brief at 11 and 39.

⁸ Pursuant to NRAP 36(c), this case is being cited for illustrative purposes only, and not for any precedential or persuasive weight.

Because Ms. Latrenta's claims are not based solely on LCC's vicarious liability for professional negligence and were in fact filed within the statute of limitations,⁹ Ms. Latrenta's complaint is not time-barred. Therefore, this Court should reverse the decision of the Clark County District Court and return this case below for trial by jury.

CONCLUSION

In short, judicial estoppel prevents LCC from ever successfully asserting claim preclusion. In any event, claim preclusion is inapplicable because the order in *Curtis I* was not a valid final judgment for purposes of claim preclusion. Lastly, Ms. Latrenta's complaint below is not time-barred as Ms. Latrenta filed the complaint within the applicable statutes of limitations. Ms. Latrenta therefore prays this Court reverse the decision of the Clark County District Court and return this case below for trial by jury.

⁹ Ms. Latrenta's claim for elder abuse has a three-year statute of limitation pursuant to NRS 11.190(2)(c) while Ms. Latrenta's claim for bad faith tort had a four-year statute of limitation pursuant to NRS 11.190(3)(a). The Opening Brief mistakenly states that both claims have a three-year statute of limitation. AOB at 1, 4, 10, 12.

RESPECTFULLY SUBMITTED this 20th day of May, 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 3,370 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable

Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of May 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1)(E), I certify that I am an employee of Saltzman Mugan Dushoff and on the 20th day of May, 2020, I submitted the foregoing *Appellants' Reply Brief* to the Supreme Court of Nevada's electronic docket for filing and service upon the following:

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