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, Plaintiffs/Appellants,

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 inclusive,

Respondents.

Supreme Court No. 77810
District Court Case No. A750520

PLAINTIFFS/APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to Nevada Rule 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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JURISDICTIONAL STATEMENT

Summary judgment was entered in this matter by the District Court dismissing Appellant Ms. Latrenta's negligence claims on December 3, 2018. The Notice of Appeal was filed on December 27, 2018. APP310-312.[1] This Court has jurisdiction to hear this appeal pursuant to NRAP 3A(b)(1).

ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court because the question presented is an issue of first impression. *See* NRAP 17(a)(11) and NRAP 17(a)(12). This Court is asked to decide whether negligence in the operation and management of a nursing home to include negligent decisions regarding staffing levels and staff schedules—decisions that led directly to a foreseeable fatal mistake made by one of the staff members—generates direct liability in the decision-maker. This Court is further asked whether there exists a legal difference under Nevada law between the mistaken administration of a drug arising out of an error in professional discretion, and the mistaken administration of a drug in the circumstance of its ***administration to the admittedly wrong person***. These issues are best resolved by the Supreme Court because they represent matters of statewide importance; to avoid inconsistent application and interpretation by lower courts; and to afford certainty to

[1] Appellants Appendix, hereinafter "APP___".

those who are typically involved with drafting and bringing claims for injuries caused by professional negligence, and claims for injuries caused by the abuse, neglect or exploitation suffered by an older or vulnerable person pursuant to Nev. Rev. Stat. 41.1395.

STATEMENT OF ISSUES

1. Do allegations that a nursing home conglomerate under budgeted, understaffed, and otherwise mismanaged resources and staff at a nursing home, such that medical errors were bound to occur, constitute a direct cause of action, thereby providing a theory of recovery independent of the affidavit-of-merit requirement of NRS 41A.071?

2. Is giving prescribed medication to the wrong nursing home resident an instance of professional negligence simply because the care-giver at the nursing home happens to be a provider of health care as defined in NRS 41A.071?

3. Are nursing homes entitled to the protections of the affidavit-of-merit requirement, notwithstanding the fact that the legislature has specifically declined to extend NRS 41A.071 to nursing homes, and despite the existence of a separate statute (NRS 41.1395) enacted to provide greater protections to the older and vulnerable populations of Nevada?

4. Is giving a patient un-prescribed medication an instance of *res ipsa loquitur*?

STATEMENT OF THE CASE

This appeal pertains to allegations of nursing home abuse and neglect filed as a Complaint in the District Court of Clark County, Nevada. Appellant Laura Latrenta ("Laura Latrenta" or "Ms. Latrenta") appeals an Order entered on December 7, 2018 (APP289-297), granting summary judgment to 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 a timely Notice of Appeal was filed. The initial complaint was filed on February 2, 2017.[2] APP001-8. Answer was filed on March 3, 2017. APP012-19. On September 10, 2017, the case was consolidated with a related case before the district court, Case No. A-17-754013-C, against Defendant Samir Saxena, M.D. On May 1, 2018, Annabelle Socaoco, N.P.; IPC Healthcare, Inc. aka The Hospitalist Company, Inc., Inpatient Consultants of Nevada, Inc.; IPC Healthcare Services of Nevada, Inc.; and Hospitalists Of Nevada, Inc. were added as defendants with Defendant Samir Saxena, M.D. (collectively referred to as "IPC parties").[3] On January 7, 2019, this

[2] Appellant stipulated to the dismissal of nursing home administrator Bina Hribik Portello on July 6, 2017.

[3] The IPC parties are not parties to this appeal because the final judgment was entered against only the LCC defendants. However, Appellant Laura Latrenta anticipates filing a notice of appeal of a recent decision in favor of, and dismissing, the IPC parties.

appeal was assigned to the NRAP 16 Settlement Program; but the parties were unable to reach settlement, and this appeal was returned to the appellate docket.

STATEMENT OF FACTS

On March 7, 2016, Nevada nursing home, Life Care Center of Paradise Valley, administered to nursing home resident Mary Curtis, morphine not prescribed for her. This fact is uncontested, and was so found as a fact by the lower court. APP290. More specifically, on that day, after a shift at the facility had already begun, Licensed Practical Nurse Esheila Dawson, was called into work to add a nurse to the shift. She did not have familiarity with the residents of the wing for which she was *ad hoc* assigned, and her supervisors pressured her to move quickly with passing medication in a "chaotic" situation. In this circumstance, Nurse Dawson gave Mary Curtis someone else's dose of morphine. (*See id;* APP 130-131).

The nursing home failed to timely address its mistake in administering the drug. The facility received an order for Narcan to attempt to block the effects of the morphine, but, despite having just administered a large dose of an un-prescribed narcotic to a resident, the nursing home staff affirmatively declined to send Mary Curtis to hospital. The staff chose not send Mary out even thought they were aware of the danger posed to her, doubtlessly aware of the nursing home conglomerate's drive to reduce resident return-to-hospital and to increase census. *See* APP191-193.

Due to the short staffing of the Certified Nurse's Assistant ("CNA") staff, the nursing home failed to properly monitor Mary Curtis thereafter. Around 11:00 a.m. the day after the erroneous morphine dosage, Laura Latrenta came to check on her mother, only to find her unresponsive and with her mouth hanging open. APP184. According to Mary Curtis's roommate, Mary had been "out of it," yet no one had come to check on Mary all day. (*Id.*) Subsequently, after EMS had been called and Mary Curtis transported to hospital, she was diagnosed with anoxic brain encephalopathy and died. Her death certificate identifies as her immediate cause of death as morphine intoxication. APP210. These matters, along with instances where the nursing home permitted Mary Curtis to fall and injure herself (APP165-167), were the subject of Ms. Latrenta's Complaint in the Clark County District Court, as recounted below.

On February 2, 2017, Ms. Latrenta filed a 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 elder abuse statute, wrongful death and breach of contract. Specifically, Ms. Latrenta's Complaint alleged (1) abuse/neglect of an older person falling under Nevada's elder abuse statute, NRS 41.1395, (2) wrongful death, on behalf of the Estate of Mary Curtis (NRS 41.0185), (3) wrongful death on behalf of Laura Latrenta herself (NRS 41.0185), and (4) a bad faith tort. APP001-8. 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.

The lower court nonetheless granted summary judgment in favor of LCC because Ms. Latrenta did not file an affidavit-of-merit pursuant to NRS 41A.071, concurrently with her Complaint. Despite finding that LCC Licensed Practical Nurse Esheila Dawson had mistakenly delivered morphine to Mary Curtis prescribed for another resident, the lower court also made this finding:

> The Court finds that Defendants' 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. LPN Dawson and the other nursing staff monitoring Ms. Curtis are providers of health care pursuant to NRS 41A.017. Said acts and omission are a provision of medical services which give rise to Defendants' liability. Therefore, the provisions of NRS Chapter 41A apply.

APP292-293. The lower court then came to this conclusion:

> The administration of morphine by an LPN 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. * * * As the gravamen of Plaintiffs' allegations sounds in professional negligence NRS Chapter 41A applies to all of Plaintiffs' claims to the exclusion of NRS 41.1395.

APP295.

In other words, the lower court found and concluded that LCC's liability was for indirect, *i.e.*, vicarious liability, a liability based solely on the acts and omissions

of its nursing staff. Evidence of the under budgeting, understaffing, and all-around poor management of the existing staff, making the job of Nurse Dawson and those tasked with monitoring the residents (the CNA staff) virtually impossible to perform without tragic errors, were ignored by the lower court as potential bases for the cause of action. The lower court in effect concluded as a matter of law that no other facts bore upon, or could give rise to, LCC's liability—not understaffing, not operational errors in staff scheduling, not corporate awareness of the nursing home's past problems with improperly administering medication ("passing meds")—and the lower court did not address Ms. Latrenta's evidence of direct liability or falls at the facility whatsoever in its Order.

SUMMARY OF 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. Her position rests upon four grounds: First, operational decisions of the owner/managers of the LCC nursing home constituted the proximate cause for the mistaken drug administration. Thus, the actual gravamen of the Complaint subsists in direct as well as vicarious liability against LCC (inasmuch as corporate acts issue through agents), and in ordinary as opposed to professional negligence.

Second, Nurse Dawson's mistake in delivering morphine was also one of ordinary negligence, to which the requirements of NRS 41A.071 do not apply. She

did not render any medical or professional judgment in deciding to deliver the morphine in error. Rather, being in a rush due to the scheduling pressures placed on her by the nursing home (*See* APP171-179), she recklessly misidentified to whom the drug was prescribed, and gave morphine to the wrong person.

Third, applying the requirement for an affidavit-of-merit, NRS 41A.071, to this circumstance here would impermissibly eviscerate the protections of NRS 41.1395. This latter statute is directed to, among other things, preventing elder neglect and abuse in Nevada nursing homes. There have been no alterations in Nevada law directed to reducing the elder abuse statute's protections nor to adding requirements shielding Nevada's nursing homes. Finally, even if giving the wrong drug to the wrong person could be construed as a medical or nursing negligence, it was an instance of malpractice *res ipsa loquitur*, codified in NRS 41A.100.

LEGAL ANALYSIS AND ARGUMENT

The Nevada Supreme Court reviews a summary judgment order *de novo*. *Butler ex rel. Biller v. Bayer*, 168 P.3d 1055, 1061 (Nev. 2007) (*citing Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82, 87 (Nev. 2002)). Summary judgment should only be granted by a district court when, after reviewing the pleadings and discovery on file, and viewing them in a light most favorable to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. NRCP 56(c); *see also Lee v. GNLV Corp.*, 22 P.3d 209, 211 (Nev.

2001) (*citing Butler v. Bogdanovich*, 705 P.2d 662, 663 (Nev. 1985)). A genuine issue of material fact exists where the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Valley Bank of Nevada v. Marble*, 775 P.2d 1278, 1279 (Nev. 1989).

In truth, the lower court's Order should have been styled as one for dismissal, as opposed to summary judgment. While presentation of matters outside the pleadings will convert a motion to dismiss to one for summary judgment, such a conversion is not triggered by a court's "consideration of matters incorporated by reference or integral to the claim," 5B Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure: Civil* § 1357 at 376 (3d ed. 2004). "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)). Certainly the need and omission of an affidavit-of-merit in the Mary Curtis Complaint is a question integral to this claim.

I. Allegations of understaffing and negligent management of the existing staff at Life Care Center constitute a direct liability claim sounding in ordinary negligence, not in professional negligence.[4]

If the lower court had looked only at the pleadings of the Complaint, certainly Ms. Latrenta pleaded a direct cause of action against LCC.

[4] This argument was preserved below (*See e.g.*, APP220).

> * * * [***T***]***hey*** ***controlled the budget*** for said Defendant which ***impacted resident care***, collected accounts receivable, prepared audited financial statements, contracted with various vendors for services, and ***provided direct oversight for said Defendants in terms of financial and patient care responsibility***.

APP002, (emphasis added).

> As a ***direct and proximate*** result willful negligence and intentional and unjustified conduct, Ms. Curtis suffered significant injuries and death. Defendants' conduct was a direct consequence the motive and plans set forth herein, and Defendants are guilty malice, oppression, recklessness, and fraud, an award punitive and exemplary damages.

APP005 (emphasis added). Ms. Latrenta argued and marshalled a large weight of evidence going to prove up this direct cause of action. *See e.g.*, APP126-213. She even produced a warning letter to the LCC President Beecher Hunter and CEO Forrest Preston warning of medication errors being "covered up" at the facility, but to no avail. APP212-213.

Ms. Latrenta did not file an action against Nurse Dawson. She brought action against LCC, and none of the entities of LCC are covered under the definition of "provider of health care" pursuant to NRS 41A.017. They are however one of the main concerns of Nevada's elder abuse and neglect statute, NRS 41.1395. The lower court noted that it "should look to the nature of the grievance to determine the character of the action, not the form of the pleadings." APP293. This is a correct statement of the law, but unfortunately, the lower court went astray through clever argumentation by LCC. The actual "nature of the grievance," as shown by the

evidence proffered (*See* APP126-163) should have convinced the lower court that there was a direct cause of action for elder abuse and neglect and for wrongful death, but LCC's position throughout has been deceptively simple: Mary Curtis' death certificate lists morphine intoxication. Morphine is a commonly prescribed medication. Ersheila Dawson was a nurse. Ergo, an affidavit-of-merit was required. That is, LCC has taken the position that Ms. Latrenta's only theory of liability against it subsists solely in liability vicarious to that of Nurse Dawson and the other professional staff at the facility.

Not so.

As an initial point, this oversimplification simply ignores Ms. Latrenta's allegations regarding the falls and other injuries suffered by Mary Curtis. These other injuries have nothing to do with the morphine administration. They are related to the failure to ensure that an adequate number of properly trained staff were at the nursing home to meet the residents' needs.

Moreover, the mechanism of an injury does not dictate the cause of action. The legal concept of proximate cause assesses the relationship between the causes in the chain of causation, with the effect, to assign blame to the most properly blame-worthy. Proximate cause stands next to the effect "not necessarily in time or space but in causal relation." *See* BLACK'S LAW DICTIONARY 1225 (6th ed. 1990).

First, as an initial point, the CNA staff are not professionals listed under NRS 41A.015. More importantly, LCC twists the nature of the primary allegations against them, which are allegations of direct negligence. Even if it were true that Nurse Dawson's mistake constituted a professional negligence to which an affidavit-of-merit would normally be required to bring action (a point which Ms. Latrenta obviously contests, see argument above and below), it would still have been error for the lower court to dismiss LCC for the lack of affidavit. Ms. Latrenta has alleged that LCC under budgeted and understaffed its facilities. This under budgeting and understaffing, along with the poor management of the existing nursing home staff, were the real cause behind both Nurse Dawson giving the wrong resident morphine and the CNAs' failure to monitor. These direct managerial decisions were the proximate cause for Mary Curtis's damages.

This is not artful pleading. Laura Latrenta is blaming LCC for what the latter did and what the latter failed to do. The lower court's citation to *Symborski v. Spring Mountain Treatment Center*, 403 P.3d 1280 (Nev. 2017), and *Brown v. Mt. Grant Gen. Hosp.*, 2013 WL 4523488 (D. Nev.), describing Nevada law's laudable predilection for elevating substance over form in reading pleadings, was thus misplaced. This is a direct action claim directed toward decisions regarding operation, management, and staffing of a nursing home, and such are not matters of professional negligence in this instance.

Those theories must reach the jury as Ms. Latrenta has framed and supported them, not as others might wish them to be. In *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 773 S.E.2d 144, 146 (S.C. 2015), a South Carolina trial court bifurcated a nursing home's negligence from that of its owning corporate structure. The plaintiffs in that case had alleged that staffing decisions were the root cause of injury to their nursing home resident family member. By bifurcating however, the trial court in effect ruled that the owning corporation's potential liability was vicarious. Succinctly, such a bifurcation would mean that the cause of action against the corporation would automatically fail if the cause of action against the nursing home conglomerate failed. The Supreme Court of South Carolina ultimately determined that the trial court had misapprehended the nature of the plaintiffs' claims against the defendants and reversed the lower court's order confirming the same. *Id.* at 147. The *Morrow* plaintiffs' claims against the nursing home corporation were independent and direct, and not simply vicarious. "[D]irect corporate liability attaches due to a breach of a duty which runs directly between a parent company and a patient, arising from negligence in actions such as leaving a hospital underfunded, understaffed, or undertrained so as to provide substandard care." *Id.* at 146; s*ee also Montgomery Health Care Facility, Inc. v. Ballard*, 565 So.2d 221, 225–26 (Ala.1990) (finding parent corporation of nursing home could be held liable for patient's death where corporation controlled day-to-day operations of

home). By bifurcating the case, the South Carolina trial court was "prevent[ing] [plaintiffs] from being architects of their own complaint, and deprives them of bringing their case against the defendant of their own choosing"). *Morrow v. Fundamental Long-Term Care Holdings,* 773 S.E.2d at 146.

Laura Latrenta's allegations here are similar. Ms. Latrenta has alleged that LCC's decisions regarding staffing, staff management, resource allocation, budgeting, and send-to-hospital policy, are at the root of Mary Curtis's death. Ms. Latrenta has alleged that the CNAs' failure to monitor Nurse Dawson's medication mistake were also the function of LCC's negligent supervision, and of a staff overtaxed in terms of numbers of personnel and resources available. These allegations as to how LCC handled its staff and staffing numbers are allegations involving ordinary negligence, rather than professional negligence. Accordingly, Ms. Latrenta was not required to file an affidavit-of-merit for her direct liability claims against LCC.

II. Even if the claim against Life Care Center is deemed vicarious, administering a lethal dose of a drug for which a patient is not prescribed is a matter of ordinary negligence, not of professional negligence, obviating the need for an affidavit-of-merit.[5]

Chapter 41A sets out both whom, and what actions, are covered under the rubric of "professional negligence." NRS 41A.017 establishes to whom the

[5] This argument was preserved below (*See e.g.*, APP229).

strictures of Chapter 41A can apply (and nursing homes are definitely not on the list, see argument below), and this could potentially include Nurse Dawson. However, Ms. Latrenta's case was never intended to be, nor was it pleaded as, an action for "professional negligence" falling under that chapter because logically the actions in question do not fit under it, even as applied to Nurse Dawson. The text of NRS 41A.015 reads in pertinent part as follows:

> **41A.015 "Professional Negligence" defined**
>
> "Professional negligence" means a negligent act or omission to act by a provider of health care ***in the rendering of professional services***, which act or omission is the proximate cause of a personal injury or wrongful death....

Obviously not every tort that Nurse Dawson could commit, *e.g.*, causing an auto accident, would constitute professional negligence. "Rendering professional services" is at the root of Chapter 41A. The gravamen of rendering professional services is perforce the application of professional judgment/discretion, of a professional, in the profession involved. In this case, LCC is in effect hiding behind Nurse Dawson, but Nurse Dawson was not applying her professional judgment to administer morphine. To the contrary, she was applying her ordinary judgment, in error in this instance, that the drugs she was merely delivering had been prescribed to Mary Curtis. That is, she was not engaging in some sort of professional nursing task, for which her professional expertise would come into action, *e.g.*, performing a venipuncture phlebotomy on a patient ("taking blood"). In sum, Nurse Dawson

made an ordinary mistake, rather than a mistake arising from the application of professional discretion. Let us be clear, Nurse Dawson is a licensed practical nurse, not a physician. She has no discretion as to whether or not to administer medications.

This Court has recently demarked a boundary here in no uncertain terms:

> Allegations of breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for medical malpractice. * * * If, on the other hand, the reasonableness of the health care provider's actions can be evaluated by jurors on the basis of their common knowledge and experience, then the claim is likely based in ordinary negligence.

Szymborski v. Spring Mountain Treatment Center, 403 P.3d 1280, 1284-1285 (Nev. 2017). Surely here the lay jurors can evaluate the unreasonableness of Nurse Dawson's act from their own common knowledge. If so, this tort is one of ordinary negligence.

"[A] court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of ***medical judgment beyond the realm of common knowledge and experience***." *Davis v. United States*, 2009 WL 890938 *5 (M.D. Pa. 2009) (emphasis added) (*citing Smith v. Friends Hosp.*, 928 A.2d 1072,

1075–76 (Pa. Super. 2007)).[6] Indeed, the converse of the facts at bar sounds in ordinary negligence: The denial of available, prescribed medication when alleged as a cause of action does not involve an issue of medical judgment. *See Jones v. United States*, 91 F.3d 623, 625 (3d Cir.1996) (a prisoner denied prescribed medication case). It constitutes a breach of an ordinary standard of care. *Id.* Further, some States have identified a number of pertinent policy implementation areas with regard to medications, in which a healthcare provider's breach of duty may give rise to a suit for ordinary negligence, rather than for medical malpractice. These include "fail[ing] to promulgate ***adequate safety rules*** relating to the handling, storage, and ***administering of medication***." *See Iodice v. U.S.*, 289 F.3d 270, 277 (4th Cir. 2002) (emphasis added) (*quoting Bost v. Riley*, 44 N.C. App. 638, 262 S.E.2d 391, 396 (N.C. Ct. App.1980)).

At hearing, the lower court appears to have misunderstood whether Ms. Latrenta's cause of action revolved around a professional mistake, a discretionary decision to administer morphine: "[T]he facility is only liable because of the sub-standard nursing care, giving morphine to someone who is allegedly allergic to the morphine." APP272. In fact it was a mistake in personal identification, not a mistake in medical discretion. That is, it would have been a breach in the standard

[6] With due regard for NRAP 36(c)(2), this case is offered for persuasive value only. As an unpublished case—as well as a federal case from another jurisdiction—it is of course not binding in any way.

of care (though without damages), if Nurse Dawson had administered non-prescribed morphine to Mary Curtis and the morphine had somehow proven therapeutic.

LCC's counsel argued at hearing that "there's absolutely no doubt that the administration of medication by a licensed nurse is under 41A." APP281. But here's the rub: It isn't "medication," if it's a prescription drug that hasn't been prescribed for the person to which it is given.

The matter might have been clearer had the circumstance been one where Nurse Dawson was administering the morphine illicitly, *i.e.*, illegally dealing drugs. While Nurse Dawson was exercising no criminal intent in giving Mary Curtis morphine, she wasn't exercising her nursing judgment in giving it either. Likewise, a lay person accidentally giving the wrong "medication" to the wrong family member would not commit a professional negligence. They would be, like Nurse Dawson, committing a simple ordinary negligence. On this ground alone the lower court erred as a matter of law in dismissing this case, and must be reversed.

III. To shield Life Care Center under the affidavit-of-merit requirement of NRS 41A.071 under these circumstances would serve to eviscerate NRS 41.1395, Nevada's elder abuse statute in the context of all nursing home residences. [7]

The question here is whether Ms. Latrenta's claims sound in professional negligence, or in the abuse or neglect of an older/vulnerable person? The trial court recognized that NRS 41.1395 and Chapter 41A are mutually exclusive in this regard. "As the gravamen of Plaintiffs' allegations sounds in professional negligence, NRS Chapter 41A applies to all of Plaintiffs' claims to the exclusion of NRS 41.1395." APP294. It seems that the trial court believed that, because the person delivering the care was a nurse, and because the care involved was healthcare, this necessarily triggered NRS 41.071.

This would mean that most anything that happened at a nursing home would be subject to the affidavit requirement of NRS 41.071. If even custodial mistakes occurring at a nursing home are considered instances of professional negligence, Nevada's elder abuse statute would be entirely eviscerated at the very location where it is needed most, *i.e.*, at nursing homes that purport to assume responsibility for some of Nevada' most vulnerable persons.

One notes that the elder abuse statute envisions a different set of damages (double damages), *see* NRS 41.1395.1., provides for attorneys' fees, *see*

[7] This argument was preserved below (*See e.g.*, APP222-223).

NRS 41.1395.2., and sets a different Statute of Limitations, *see* NRS 41A.097 (setting a different Statute of Limitations for professional negligence). Thus, they each provide different remedies, presumably aimed at different circumstances. Granting LCC a shield under Chapter 41A would lead to the anomalous result of the elder abuse statute being unavailable against the very institutions to which the statute pertains in large part.

This is so because LCC is made up mainly of corporate entities, artificial persons. Such persons act only through their natural person agents, who in this circumstance would include registered nurses and licensed practical nurses. It seems highly unlikely that the Nevada legislature intended for NRS 41.1395 to protect nursing home residents only from the deprivations of the nursing home's janitorial staff. Thus, it cannot be that everything the nursing staff does or fails to do constitutes professional negligence.

In *Symborski v. Spring Mountain Treatment Center*, 403 P.3d 1280 (Nev. 2017), the Nevada Supreme Court recognized that Nevada courts would have to analyze the underlying gravamen of certain pleaded causes of action in order to determine if they had to meet an affidavit requirement. The elder abuse statute provides:

> "Neglect" means the failure of ***a person who has assumed legal responsibility or a contractual obligation for caring for an older person or a vulnerable person***, or who has voluntarily assumed responsibility for such a person's care, ***to provide food,***

> ***shelter, clothing <u>or services</u>*** within the scope of the person's responsibility or obligation, which are necessary to maintain the physical or mental health of the older person or vulnerable person.

NRS 41.1395.4.c. (emphasis added). Taking Mary Curtis to toilet, providing her with clean clothing, making sure she does not fall down, making sure she takes (the correct) medications, and just generally monitoring her condition are just some of the actions of care that one assumes when caring for an older person. Regardless of the training of the person providing the services, are all these actions of care provided at a nursing home instances of medical/nursing professional judgment or services? No. The fact is, lay family members perform many of the tasks that Nurse Dawson and the LCC staff were called upon, including "passing meds" and monitoring, even without formal medical training.

The Nevada legislature has never seen fit to add nursing homes to § 41A.017's list of providers of health care. It certainly had the opportunity to do so in 1997, when Nevada's elder abuse and neglect statute was enacted. In fact, the legislature has recently ***rejected*** the proposal to add nursing homes.

> Our first proposed amendment is intended to add further clarity to this bill by enhancing the language in Section 2 to ensure that <u>all</u> health care providers are specifically included in the definition of "provider of health care" in NRS 41A.017. These changes would help to make it clear that NRS Chapter 41A applies to all providers of health care, whether the care in question was provided by a medical professional in a hospital, a surgical center, an obstetric center, a skilled nursing facility, or any other medical facility.

> There are three Key NRS sections dealing with professional negligence in the medical field with definitions of "provider of health car" – NRS 41A.017, NRS 42.021 (8)(d), and NRS 629.031(1). With this bill amending the definition of "provider of health care" in one of these, NRS 41A.017, we wanted to ensure that any changes are made across the board. Our amendment proposes to cross-cite the definitions between the relevant statutes, and syncs the language across these definitions, to make it clear that they cover the same entities and individuals.
>
> * * *
>
> Our second proposed amendment is intended to add further clarity to Nevada's statutes regarding professional negligence in the medical realm by making clear that a plaintiff cannot circumvent the limitations of NRS 41A by improperly bringing additional under NRS 41.1395 (the elder abuse statute).
>
> Our skilled nursing facilities have repeatedly had to defend themselves against attorneys bringing what should be clear 41A claims under the auspices of NRS 41.1395 as well. This puts our facilities in jeopardy of being forced to pay out significant damages under NRS 41.1395 for causes that are rightfully included under the limits of 41A. Skilled nursing facilities are forced to expend hundreds of thousands of dollars engaging extensive discovery and pretrial motion practice defending NRS 41.1395 claims that are rightfully included under NRS 41A.
>
> Allowing attorneys to pursue health care "neglect" or "abuse" claims under NRS 41.1395 renders the cap provided by NRS 41A.035 meaningless. Damages under NRS 41.1395 are not capped and then doubled in addition to attorney fees and costs.

See APP234-236 (Proposed Amendment to S.B. 292). This amendment was not enacted.

Logically then, the failure to properly "pass meds" here—whether ascribed to LCC mismanagement of operations and staff or to Nurse Dawson's recklessness in

personal identification—was an instance of neglect/abuse of the vulnerable person involved. Because there is warrant neither in the letter nor the history of Nevada's statutes to support the conclusion that all mistakes occurring at a nursing home are instances of professional malpractice, the lower court erred as a matter of law in dismissing this case pursuant to NRS 41A.071, and its decision must be reversed.

IV. Administering a lethal dose of a drug for which a patient is not prescribed constitutes professional negligence res ipsa loquitur, falling under the exceptions of NRS 41A.100.1.[8]

"The object of NRS 41A.071's affidavit-of-merit requirement . . . is 'to ensure that parties file malpractice cases in good faith, *i.e.*, to prevent the filing of frivolous lawsuits.'" *Baxter v. Dignity Health*, 357 P.3d 927, 930 (Nev. 2015) (citation omitted). In *Szydel v. Markman*, this Court concluded that the expert affidavit requirement of NRS 41A.071 does not apply when the malpractice action is based solely on the *res ipsa loquitur* doctrine. *Szydel v. Markman*, 117 P.3d 200, 201 (Nev. 2005). An expert affidavit, otherwise mandated by NRS 41A.071, is unnecessary in a *res ipsa loquitur* case falling under NRS 41A.100(1). *Id.* at 204. This is established Nevada law. A professional negligence claim based solely on the *res ipsa loquitur* doctrine may go forward in factual situations where negligence can be shown without expert medical testimony. *Id.*

[8] This argument was preserved below (*See e.g.*, APP224-226).

As an initial point, N.R.S. 41A.100 on its face takes into account (a kind of) negligence *per se* as obviating the necessity for the direct opinion of an expert witness. There are alternatives.

> Liability for personal injury or death is not imposed upon any provider of health care based on alleged negligence in the performance of that care unless evidence consisting of **[1]** expert medical testimony, **[2]** material from recognized medical texts or treatises[9] ***or*** **[3]** ***the regulations of the licensed medical facility wherein the alleged negligence occurred*** is presented to demonstrate the alleged deviation from the accepted standard of care in the specific circumstances of the case and to prove causation of the alleged personal injury or death…

N.R.S. 41A.100 (emphasis added). By extension, this alternative evidence provision should apply to obviate the necessity for an affidavit-of-merit when the facility violates its own regulations and its own safety checklists, *e.g.*, the seven rights of medication administration. And surely a facility violates its own regulations ***by giving a resident someone else's medication***. In fact, an audit report of the facility and the Curtis case by the United States Department of Health and Human Services Centers for Medicare & Medicaid Services contained just such a citation. APP 248-251.

The underlying claim in this case is one for negligence. "To prevail on a

[9] Presumably expert testimony would be required to lay foundation for medical text or treatise evidence supporting negligence. However, the regulations of the facility would not require the same kind of expert foundation; the regulations are the regulations.

negligence claim, a plaintiff must establish four elements. These are: (1) the existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages." *Klasch v. Walgreen Co.*, 264 P.3d 1155, 1158 (Nev. 2011). Medical expert testimony and an affidavit-of-merit requirement would go to which one of these elements? Answer: It would go to establishing the breach in the standard of care.

The purpose of the requirement for expert medical testimony under NRS 41A.100, and by extension for the requirement of an affidavit of a medical expert under NRS 41A.071, is that the fact-finder requires guidance as to whether or not a breach in the standard of care occurred.

> 1. Liability for personal injury or death is not imposed upon any ***provider of health care*** based on alleged negligence in the performance of that care unless evidence consisting of expert medical testimony, material from recognized medical texts or treatises or the regulations of the licensed medical facility wherein the alleged negligence occurred is presented to demonstrate the alleged ***deviation from the accepted standard of care*** in the specific circumstances of the case and to prove causation of the alleged personal injury or death, except that such evidence is not required and a rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented that the provider of health care caused the personal injury or death occurred in any one or more of the following circumstances:
>
> * * *

NRS 41A.100 (emphasis added).

This is so because, the question of whether a breach in the standard of care occurred, in a medical setting, is a question existing outside the ordinary knowledge of the lay fact-finder.

Additional language in the statute notwithstanding, the purpose of the aforementioned statutes does not pertain to providing evidence as to causation. Otherwise, such a requirement would result in a cause of action premised on a healthcare provider administering a drug to a victim requiring expert testimony as to causation while a non-healthcare provider giving the very same drug would not require expert testimony as to causation. Yet the issue of causation would be exactly the same. Only the actor would be different. Only the question of whether a breach in the standard of care in fact occurred, would be different. That is, the difference between these fact scenarios is that the former exists in the context of medical treatment, and the fact-finder is in the position of requiring guidance as to whether the act being complained of constituted a breach in the standard of care. In the latter instance, the fact-finder is not presumed to require such guidance.

NRS 41A.100, goes on to establish exceptions where the doctrine of *res ipsa loquitur* applies, obviating the need for medical expert testimony. These exceptions are:

* * *

> (a) A foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery;
>
> (b) An explosion or fire originating in a substance used in treatment occurred in the course of treatment;
>
> (c) An unintended burn caused by heat, radiation or chemicals was suffered in the course of medical care;
>
> (d) ***An injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto***; or
>
> (e) A surgical procedure was performed ***on the wrong patient or the wrong organ, limb or part of a patient's body***.
>
> 2. Expert medical testimony provided pursuant to subsection 1 may only be given by a provider of health care who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged negligence.
>
> 3. ***The rebuttable presumption pursuant to subsection 1 does not apply in an action in which a plaintiff submits an affidavit pursuant to NRS 41A.071***, or otherwise designates an expert witness to establish that the specific provider of health care deviated from the accepted standard of care.
>
> 4. Nothing in this section shall be construed to preclude any party to the suit from designating and presenting expert testimony as to the legal or proximate cause of any alleged personal injury or death.

NRS 41A.100 (emphasis added).

The administration of morphine to Mary Curtis literally falls under NRS 100.1.(d). "An injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto." Mary Curtis

resided at LCC for subacute and memory care. Whatever might be treated by the exceptionally strong pain-killer of morphine, it was not this part of Mary Curtis's body that needed treatment, or at least her physician was not seeking to treat it at that time.

Notably subsection 3 of the statute provides that the rebuttable presumption from *res ipsa loquitur* is lost if a plaintiff elects to submit an affidavit establishing the "deviation from the accepted standard of care." In effect, the plaintiff submitting such an affidavit is putting the matter in issue, presumably because he or she feels that the matter is in fact in issue, and the defendant would thus be entitled to contest the matter. Under the facts given in this appeal, it would have been counterproductive to put into issue a fact so glaringly obvious—that administering medication to someone for whom it is not prescribed is negligence *per se*, or *res ipsa loquitur*—thereby giving LCC at least the *pro forma* right to contest the issue. "In construing statutes, we must consider the sections together, and that interpretation should be placed upon the language which will give each and every section of the act its proper effect, and which at least will make it ***compatible with common sense*** and the ***plain dictates of justice***." *Gruber v. Baker*, 23 P. 858, 862 (Nev. 1890) (citations omitted). Therefore, in this instance should this Court not view the allegations as sounding in ordinary negligence but as sounding in professional negligence, the breach in the standard of care most assuredly constitutes *res ipsa*

loquitur and therefore, did not require an affidavit-of-merit. Again, the lower court erred as a matter of law in dismissing this case, and must be reversed.

CONCLUSION

It is Ms. Latrenta's position that the lower court erred in dismissing the Complaint, and this Court must therefore reverse the lower court. Her allegations against the LCC ownership and management were direct claims predicated upon operational decisions not involving professional negligence. Thus no affidavit-of-merit is required. Further, the error by the provider of health care in this case, Nurse Dawson, upon whom the lower court grounded its findings and conclusions, was not one of negligence involving an exercise of her professional nursing discretion, or, in the alternative, was certainly a professional negligence *res ipsa loquitur*. Finally, the judgment of the lower court has the effect of eviscerating NRS 41.1395 without legislative mandate for such. The lower court erred as a matter of law in dismissing this case pursuant to NRS 41A.071, and Appellant prays this Court reverse the

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decision of the Clark County District Court and return this case below for trial by jury.

RESPECTFULLY SUBMITTED this ___ day of July, 2019.

KOLESAR & LEATHAM

_____

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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 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)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 6,924 words.

3. 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page 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

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

DATED this 17th day of July, 2019.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1)(B), I certify that I am an employee of Kolesar & Leatham and on the 17th day of July, 2019, I submitted the foregoing ***Plaintiffs'/Appellants' Opening Brief*** to the Supreme Court of Nevada's electronic docket for filing and service upon the following:

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