Case No. 77810

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, inclusive,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable MICHAEL VILLANI, District Judge
District Court Case No. A750520

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 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 16th day of October, 2019.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

ROUTING STATEMENT

The Supreme Court should retain this appeal to address whether the Court should create various judicial exceptions to NRS 41A.071's medical-expert affidavit requirement: (1) when the complaint that alleges that a licensed nurse administered the wrong medication to a patient during a course of treatment, and that the licensed nurses failed to properly monitor the patient thereafter; or (2) whenever a licensed nurse's negligence in rendering medical treatment occurs in a nursing home. The appeal also seeks an exemption from the affidavit requirement through a judicial expansion of the categories of *res ipsa loquitur* circumstances under NRS 41A.100(1) to encompass a nurse's administration of the wrong medication. 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. Under NRS 41A.071, if a complaint that states a claim for professional negligence is filed without a medical expert affidavit, the complaint is void. Can a complaint—which alleges that a licensed nurse administered the wrong medication during a course of treatment, and that licensed nurses failed to properly monitor the patient thereafter—avoid the expert-affidavit requirement by stating that the claim is for ordinary, rather than professional, negligence?

2. Does the elder-abuse statute in NRS 41.1395 apply to the exclusion of the expert-affidavit requirement in NRS 41A.071 whenever the a licensed nurse's negligence in rendering medical treatment is alleged to occur in a nursing home?

3. Does a licensed nurse's administration of the wrong medication during a course of treatment categorically constitute *res ipsa loquitur* under NRS 41A.100(1) so as to avoid the expert-affidavit requirement?

STATEMENT OF THE CASE

This is an appeal from a district court order granting summary judgment against plaintiffs for failure to attach to their complaint a supporting medical-expert affidavit pursuant to NRS 41A.071. Despite plaintiffs' efforts to style their complaint as claims for corporate negligence and elder abuse, all of their claims hinged on licensed nurses' negligence in administering medication to and monitoring a patient. The district court held that the complaint stated claims of professional negligence to which the expert-affidavit requirement applied.

STATEMENT OF FACTS

A. Factual Background

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

According to plaintiffs, Ms. Curtis suffered from dementia, hypertension, chronic obstructive pulmonary disease, and renal insufficiency. (1 App. 4). 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 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 App. 130). Nurse Dawson instead administered morphine. (1 App. 131). 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 App. 131).

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 need to monitor Ms. Curtis and assess her "baseline" because morphine affects

each individual differently. (1 App. 131). 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 App. 131, 133). A licensed nurse administered Narcan to Ms. Curtis at 1:29 p.m. and 1:32 p.m. (1 App. 133).

Licensed nurses continue to monitor Ms. Curtis overnight, checking her vital signs "every fifteen minutes for one hour and then every four hours." (1 App. 133). Ms. Curtis "was alert and verbally responsive" at 5:00 p.m. that same day, but licensed nurses were to continue monitoring her. (1 App. 133-34).

Ms. Curtis Dies

The next morning, Ms. Curtis was found in her room unresponsive at 11:00 a.m. (1 App. 134). Emergency medical services transferred Ms. Curtis to Sunrise Hospital for treatment. (1 App. 135). Three days later, on March 11, 2016, Ms. Curtis died. (1 App. 136).

B. Procedural History

Plaintiffs Sue for Damages

On February 2, 2017, Laura Latrenta sued as Ms. Curtis's heir and the personal representative of her estate, asserting claims against respondents (collectively, "Life Care Center") for (1) abuse and neglect of an older person; (2) wrongful death by the estate of Mary Curtis; (3) wrongful death by Laura Latrenta; and (4) tortious breach of the implied covenant of good faith and fair dealing. (1 App. 1-8). Plaintiffs did not assert any claim for professional negligence under NRS Chapter 41A, did not name Nurse Dawson as a defendant, and 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, in the course of rendering treatment to Ms. Curtis, administered the wrong medication, morphine, which was prescribed to another patient, and that Nurse Dawson and other licensed nurses on duty failed to properly monitor or treat Ms. Curtis for her administration of morphine, leading to Ms. Curtis's death five days later. (1 App. 4–5).

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. (1 App. 5).

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 App. 32). 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." (2 App. 306, 307 ("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." (2 App. 304-05).

Plaintiffs appealed.

SUMMARY OF THE ARGUMENT

The district court properly dismissed plaintiffs' action for failure to file a supporting medical expert affidavit. NRS 41A.071 provides that an action for professional negligence that is filed without an affidavit must be dismissed. This is a necessary tool for triaging the merit of claims of professional negligence, as well as those that purport to be claims of corporate or ordinary negligence but that in substance allege the negligence of some medical provider. At this stage of the litigation, a district judge can easily see whether the complaint is filed in good faith based upon competent expert medical opinion. The district judge's discretion in enforcing this preliminary marker of merit does not predetermine all aspects of the litigation, including the application of

the noneconomic-damages cap in NRS 41A.035: a plaintiff who properly files the medical-expert affidavit could ultimately prevail, after discovery and a trial on the merits, prevail on a theory other than professional negligence. But at the outset, the district court acts reasonably in requiring a complaint that appears to be founded on an allegation of professional negligence to include the affidavit that NRS 41A.071 requires.

To effectuate NRS 41A.071's purpose, 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. Applying that rule, the district court correctly found that plaintiffs' complaint stated claims of professional negligence: Nurse Dawson administering the wrong medication during a course of treatment, and life Care Center's licensed nurses thereafter failing to properly monitor Ms. Curtis. Because plaintiffs did not file an affidavit under NRS 41A.071, dismissal was proper.

Enforcing NRS 41A.071 does not "eviscerate" Nevada's elder-abuse statute, as plaintiffs argue. The district court did not hold that

claims against nursing homes always implicate NRS Chapter 41A to the exclusion of NRS 41.1395. Nor did the Legislature intend to categorically exclude professional negligence in nursing homes, as plaintiffs insist. Instead, as the district court properly recognized, plaintiffs may not rely upon NRS 41.1395 to circumvent NRS 41A.071's affidavit requirement.

Finally, none of the statutorily enumerated exceptions apply to excuse plaintiffs from filing an affidavit. NRS 41A.100(1) codified the *res ipsa loquitur* doctrine and provides that, under five specific circumstances, negligence may be presumed without an expert affidavit. Plaintiffs' complaint never alleged *res ipsa loquitur*. Further, none of those circumstances are present here, and plaintiffs fail to present any evidence of the same.

This Court should affirm.

ARGUMENT

Standard of review:[1] Legal issues are reviewed de novo. *Dolorfino v.*

[1] Plaintiffs improperly argue for the first time on appeal that "the lower court's Order should have been styled as one for dismissal, as opposed to summary judgment." (AOB at 9); *Dolores v. State, Emp't Security Div.*, 134 Nev. 258, 261, 416 P.3d 259, 262 (2018) ("Issues not argued

Univ. Med. Ctr. of S. Nev., 134 Nev., Adv. Op. 79, 427 P.3d 1039, 1040 (2018). This Court also "review[s] a district court order granting summary judgment de novo." *Boesiger v. Desert Appraisals, LLC*, 135 Nev., Adv. Op. 25, 444 P.3d 436, 439 (2019). "Pursuant to NRCP 56, a party may properly move for summary judgment where the party establishes that there is no genuine dispute as to any material fact and

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below are deemed to have been waived and will not considered on appeal."). Plaintiffs cite the rule on converting a motion to dismiss into a motion for summary judgment (AOB at 9), but Life Care Center did not bring a motion to dismiss, just a motion for summary judgement. (1 App. 29-125.) Thus, the district court did not convert Life Care Center's motion. *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."). Finally, regardless of which standard of review this Court applies, the district court properly dismissed plaintiffs' claims for failure to satisfy NRS 41A.071's affidavit requirement. *Bongiovi v. Sullivan*, 122 Nev. 556, 575, n.44, 138 P.3d 433, 447, n.44 (2006) ("However, we affirm the district court's decision if it reaches the right result, even if for the wrong reasons."). As the deadline for plaintiffs to refile this action with an expert affidavit had passed, it makes no practical difference whether the judgment is a dismissal without prejudice or summary judgment. *See Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1300, 148 P.3d 790, 792 (2006) ("We conclude that, under NRS 41A.071, a complaint filed without a supporting medical expert affidavit is void ab initio and must be dismissed. Because a void complaint does not legally exist, it cannot be amended."); *see also* NRS 41A.097 (providing that statute of limitations to file a claim for professional negligence is one year after the plaintiff discovers the injury).

the party is entitled to judgment as a matter of law." *Id.*

"The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *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). To survive summary judgment, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the operative facts" and "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (internal quotation marks omitted).

I.

PLAINTIFFS' COMPLAINT FOR PROFESSIONAL NEGLIGENCE WAS PROPERLY DISMISSED FOR FAILURE TO FILE A SUPPORTING MEDICAL EXPERT AFFIDAVIT

A. NRS 41A.071 Helps Courts Triage Cases that Allege a Medical Provider's Negligence

Prior to 2002, health care providers were facing an insurance crisis in Nevada based upon exorbitant premiums, causing them to leave Nevada. *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). In 2002, "[t]he Legislature addressed the medical malpractice

insurance crisis, in part, by capping noneconomic damages, requiring settlement conferences, and supplanting the existing malpractice screening panels with the expert affidavit requirement under NRS 41A.071." *Id.* And, "NRS 41A.071's affidavit requirement was implemented to lower costs, reduce frivolous lawsuits, and ensure that [professional negligence] actions are filed in good faith based upon competent expert medical opinion." *Id.* at 738, 334 P.3d at 405.

NRS 41A.071's affidavit requirement is thus a preliminary tool for district court judges to triage cases that, on their face, present issues of professional negligence. And to effectuate the Legislature's intent and preclude plaintiffs from circumventing the affidavit requirement, this Court has delineated the following rule: if the gravamen of a claim entails medical judgment, diagnosis, or treatment, then the claim is for professional negligence, which in turn requires a supporting expert affidavit. By statute, therefore, a complaint that alleges professional negligence does not survive dismissal simply by alleging facts that, if true, would entitle the plaintiff to relief. If a complaint alleging professional negligence is filed without an expert affidavit, the complaint is treated as if it never existed and is dismissed.

The rule prevent a plaintiff from artfully restyling claims for professional negligence as claims for ordinary negligence to avoid seeking an affidavit.

This case is a prime example. As discussed immediately below, the gravamen of plaintiffs' claims is for professional negligence—Ms. Curtis was prescribed incorrect medication during a course of treatment and that Life Care Center's licensed nurses failed to properly monitor Ms. Curtis thereafter—yet plaintiffs pleaded their claims as corporate negligence and elder abuse to avoid NRS 41A.071's affidavit requirement. The district court recognized the artful pleading and recognized that plaintiffs needed to attach an expert affidavit. In refusing to excuse plaintiffs' violation of NRS 41A.071, the district court did not speak to the merits of plaintiffs' claims. This Court should affirm.

B. No Matter How a Claim is Pleaded, if the Gravamen of the Claim, When Considered Under the Totality of Circumstances, Involves Medical Judgment or Treatment, then It Is for Professional Negligence

An action for professional negligence must include a supporting expert affidavit to survive dismissal. This ensures that claims for professional negligence are based upon competent medical expert

opinion, saving litigation costs and court resources.[2] NRS 41A.071. "Professional negligence" is "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. In turn, a "provider of health care" includes a "licensed nurse." NRS 41A.017.

Failure to file an affidavit pursuant to NRS 41A.071 renders the complaint "void ab initio." *Peck v. Zipf*, 133 Nev. 890, 892, 407 P.3d 775, 778 (2017) (internal quotation marks omitted); *Wheble v. Eighth Judicial Dist. Court*, 128 Nev. 119, 123, 272 P.3d 134, 137 (2012) ("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 'commenced.'").

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[2] "The 2015 Legislature amended NRS 41A.071 to substitute 'professional negligence' for 'medical malpractice' and repealed NRS 41A.009." *Zhang v. Barnes*, Docket No. 67219, 2016 WL 4926325, 382 P.3d 878, at *4 n.2 (Nev. Sept. 12, 2016) (Order Affirming in Part, Reversing in Part, and Remanding). Thus, for consistency and accuracy, this brief replaces references to "medical malpractice" with "professional negligence."

1. Professional Negligence Encompasses Negligence in Medical Judgment, Diagnosis, or Treatment

When determining whether a claim is for professional or ordinary negligence, this Court "look[s] to the gravamen or 'substantial point or essence' of each claim rather than its form." *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 643, 403 P.3d 1280, 1285 (2017). And, the gravamen of a claim is for professional negligence when the "[a]llegations of breach of duty involve[s] medical judgment, diagnosis, or treatment." *Id.* at 642, 403 P.3d at 1284.

Facilities that offer health care provider services, however, will often also offer services by *non*-health care providers, such as social workers. *Compare DeBoer v. Sr. Bridges of Sparks Fam. Hosp.*, 128 Nev. 406, 411, 282 P.3d 727, 731 (2012) ("Aside from the wide range of medical services healthcare-based facilities provide, they also offer diverse nonmedical services to the public, including, but not limited to, aftercare planning with social workers."), *with* NRS 41A.017 (defining "[p]rovider of health care" to include "licensed nurses"). Because these services by non-health care providers "do not involve medical judgment, treatment, or diagnosis," they are subject to ordinary negligence

standards. *Szymborski*, 133 Nev. at 641, 403 P.3d at 1284.

2. An Allegation that a Licensed Nurse Administered the Wrong Medication is a Claim of Professional, Not Ordinary, Negligence

A health care provider's administration of medication during a course of treatment, even if the medication was incorrect, is quintessentially a matter of professional negligence for NRS 41A.071's affidavit requirement. *See* NRS 41A.015 ("'Professional negligence' means the failure of a provider of health care, *in rendering services,* to use reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." (emphasis added)); *see also Speaks v. Vishnuvardhan Rao*, 117 N.E.3d 661, 673 (Ind. Ct. App. 2018) (concluding that a claim against a doctor and hospital staff for administering the wrong medication "boil[s] down to a question of whether a given course of treatment was medically proper and within the appropriate standard, which is the quintessence of a malpractice case" (internal quotation marks omitted)); *Graham v. Rite Aid Corp.*, Docket No. 240500, 2003 WL 21079858, at *2 (Mich. Ct. App. May 13, 2003) ("We conclude . . . that defendant's negligence in dispensing the wrong medication occurred within the

course of its professional relationship with plaintiff. Because the issues in this case involve dispensing prescriptions, they raise questions involving medical judgment and are therefore medical malpractice claims."); *Rejman v. Shang*, No. 2:15-CV-367-JCM-GWF, 2016 WL 4216781, at *2-3 (D. Nev. Aug. 8, 2016) (acknowledging that an allegedly unconsented to administration of medicine by a nurse is a matter of professional negligence).

The Georgia Court of Appeal's holding in *Grady General Hosp. v. King* is instructive:

> [W]e review a nurse's administration of medication as within the scope of nursing duties involving professional skill and judgment. *For example, whether the medication was "wrong" or "incorrect" necessarily involves professional judgment.* Accordingly, because the administration of medication involves the professional skill and judgment of a nurse, and nurses are licensed professionals . . . , we hold that the plaintiffs' claim for failing to properly administer [the patient's] medication is a claim of professional negligence.

653 S.E.2d 367, 368 (Ga. Ct. App. 2007) (emphasis added) ("The practice of nursing is recognized as a profession subject to its own general standards of care and qualifications.").

3. An Allegation that a Licensed Nurse Failed to Properly Monitor a Patient is a Claim of Professional, Not Ordinary, Negligence

This Court has likewise held that a health care provider's failure to monitor a patient is a matter of professional negligence. In *Lewis v. Renown Regional Medical Center*, the plaintiff sued a medical facility for both professional negligence and abuse and neglect of a vulnerable person in violation of NRS 41.1395. Docket No. 74300, 2018 WL 6721372, 432 P.3d 201, at *1 (Nev. Dec. 18, 2018) (Order of Affirmance). The district court dismissed plaintiff's suit, including the abuse-and-neglect claim, "finding that all of his claims sounded in professional negligence and were time barred by NRS 41A.097(2)'s one year statute of limitations." *Id.*

Plaintiff appealed the dismissal of his claim for abuse and neglect under NRS 41.1395, arguing that that claim "is distinct from his claim for professional negligence because the claim for abuse and neglect alleges that [defendant] failed to provide a vulnerable person [ ] with services required to maintain her physical and mental health in violation of NRS 41.1395, whereas his professional negligence claim alleged that [defendant] breached its duty to [plaintiff's wife] by

rendering substandard care." *Id.*

This Court rejected plaintiff's argument, and in examining the gravamen of plaintiff's abuse and neglect claim, concluded that the alleged abuse was really just the failure to monitor in the course of medical treatment:

> The gravamen of [plaintiff's] claim for abuse and neglect is that [defendant] failed to adequately care for [plaintiff] by failing to monitor her. Put differently, [defendant] breached its duty to provide care to [plaintiff] by failing to check on her every hour per the monitoring order in place. . . . [Plaintiff's] allegations that [defendant] failed to check on [plaintiff] while she was under a monitoring order necessarily involves a claim for a breach of duty in the administration of medical treatment or judgment.

Id. at *2 (emphasis added).

4. Professional Negligence is Considered under the Totality of the Conduct Alleged, Not One Discrete Act in a Vacuum

"Professional negligence" is "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). And, courts have broadly interpreted language similar to NRS 41A.015 to hold that "a negligent act *that occurs in the*

rendering of services for which the health care provider is licensed is professional negligence." *See, e.g., Mansion v. Vintage Pharmaceuticals LLC*, Docket No. C-13-2996-EMC, 2013 WL 5645159, at *3 (N.D. Cal. Oct. 16, 2013) (emphasis added); *see also So v. Shin*, 151 Cal. Rptr. 3d 257, 265 (Cal. Ct. App. 2013) (similar).

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." *Cruz v. Centro Medico de P.R.*, 13 P.R. Offic. Trans. 931, 955-56 (P.R. 1983) ("The totality of [the health care provider's] actions show indifference and poor professional judgment vis-à-vis the real possibility that, given the nature of the injury, an infection could ensue, an infection such as gas gangrene."); *Critser v. McFadden*, 593 S.E.2d 330, 332 (Ga. 2004) (providing that whether defendant's professional negligence caused plaintiff's medical condition must be considered under "the totality of the facts and circumstances" of the services provided).

Further, a plaintiff may not rip out individual acts from a chain of relevant events, filtering out all of the acts except those that seem to

require little or no skill, and then seek damages with respect to those acts for purposes of circumventing NRS 41A.071's affidavit requirement. *Flores v. Presbyterian Intercommunity Hosp.*, 369 P.3d 229, 234 (Cal. 2016) ("A medical professional or other hospital staff member may commit a negligent act in rendering medical care, thereby causing a patient's injury, even where no particular medical skills were required to complete the task at hand."); *id.* at 235 (holding that, in determining professional negligence, "the test is not whether the situation calls for a high or a low level of skill, or whether a high or low level of skill was actually employed"); *Bellamy v. Appellate Department*, 57 Cal. Rptr. 2d 894, 900 (Cal. Ct. App. 1996).

Applying a similar statute, the California Court of Appeal held that bungling a simple task that does not require the exercise of professional judgment still constitutes professional negligence if it is an integral part of the medical service:

> That the alleged negligent omission was simply the failure to set a brake on the rolling X-ray table or the failure to hold the table in place, *neither of which requires any particular skill, training, experience or exercise of professional judgment, does not affect our decision*. We presume that during the course of administering an examination or therapy like that which [the patient] underwent, an X-ray technician

> may perform a variety of tasks, such as assisting the patient onto the table, manipulating the table into one or more desired positions, instructing the patient to move from one position to another, activating the X-ray machine, removing the photographic plates, assisting the patient from the table, etc. *Some of those tasks may require a high degree of skill and judgment, but others do not. Each, however, is an integral part of the professional service being rendered.* Trying to categorize each individual act or omission . . . into "ordinary" or "professional" would add confusion in determining what legal procedures apply if the patient seeks damages for injuries suffered at some point during the course of the examination or therapy.

Bellamy, 57 Cal. Rptr. 2d at 900 (emphases added).

5. Asserting a Negligent Training and Supervising Claim Against an Employer Does Not Transform the Negligence from Professional to Ordinary

Even when a plaintiff purposefully omits a health care provider (e.g., licensed nurse) as a defendant and only asserts claims against the employer, those claims are not separate and distinct from the underlying acts of professional negligence; they are one and the same. *See Zhang v. Barnes*, Docket No. 67219, 2016 WL 4926325, 382 P.3d 878, at *7 (Nev. Sept. 12, 2016) (Order Affirming in Part, Reversing in Part, and Remanding,) ("When negligent hiring claims are inextricably linked to the underlying professional negligence, . . . the negligent hiring claim is more akin to vicarious liability than an independent

tort."); *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)).

In *Zhang v. Barnes*, plaintiff argued that his direct claim against a physician's employer for the physician's professional negligence did not implicate NRS Chapter 41A because "liability for negligent hiring, training, and supervision is not 'based upon professional negligence,'" and the employer "does not fit into the statutory definition of 'provider of health care.'" Docket No. 67219, 2016 WL 4926325, 382 P.3d 878, at *4. This Court rejected the plaintiff's argument, explaining as follows:

> In cases such as this, when a negligent hiring, training, and supervision claim is based upon the underlying negligent medical treatment, the liability is coextensive. *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.*

Id. at *7 (emphasis added). This Court concluded that, "[i]t is clear to us, in this case, that the allegations against [the employer] were rooted in [the physician's] professional negligence." *Id.*

A claim of negligent hiring, supervision, or training escapes NRS 41A.071's affidavit requirement only "where the underlying facts of the case do not fall within the definition of [professional negligence]"—i.e., when the injury is caused by *non*-health care providers performing *non*-health care related services. *Szymborski*, 133 Nev. at 647–48, 403 P.3d at 1288. *Szymborski* made clear that the exception applies only when the underlying negligence consists in *non*-health care providers (there, "social workers, case managers, and [Masters of Arts]") performing *non*-health care related services (there, "not finding [the patient] suitable accommodations and transportation *after he was medically discharged*"). *Id.* (emphasis added).

As a corollary, a claim against an employer facility for failing to offer adequate health care services to a patient (e.g., supervising and training licensed nurses in rendering professional services) is effectively a claim for professional negligence in rendering substandard health care services and requires a medical-expert affidavit. *Lewis*, Docket No.

74300, 2018 WL 6721372, 432 P.3d 201, at *1 (Nev. Dec. 18, 2018) (Order of Affirmance) ("We are not convinced by [plaintiff's] arguments that a healthcare provider's failure to provide care to a patient presents a claim distinct from a healthcare provider's administration of substandard care; both claims amount to a claim for professional negligence where it involves a breach of duty involving medical judgment, diagnosis, or treatment."). This makes sense, as substantiating the underlying professional negligence of the health-care provider (via the medical-expert affidavit) is a prerequisite to showing that there was any negligence in the decision to hire, train, or supervise that health-care provider.

C. The Gravamen of Each of Plaintiffs' Claims is for Professional Negligence

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:.

Plaintiffs alleged that "following [Ms. Curtis's] hospital course[,] she was transferred to [Life Care Center] *for continuing subacute and*

memory care." (1 App. 4) (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 administer medication to Ms. Curtis. (*Id.*). 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. (*Id.*).

Then, according to plaintiffs, Nurse Dawson and the other licensed nurses neglected the nursing protocol or inadequately monitored Ms. Curtis's reaction to the morphine, which could have prevented her death. (1 App. 5 ("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."); *id.* ("Defendants eventually called 911 and emergency personnel transported Ms. Curtis to Sunrise Hospital, where she was diagnosed with anoxic brain encephalopathy."); AOB at 4 ("The facility received an order for Narcan [by nurse practitioner Socaoco] 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 [sic].”),[3] 5 (“[T]he nursing home failed to properly monitor [Ms. Curtis] thereafter.”). These are quintessentially matters of professional negligence.

Plaintiffs wrongly argue that their complaint cannot be for professional negligence because they intentionally omitted Nurse Dawson as a defendant, referred to Life Care Center’s licensed nurses as “staff” and “employees,” and asserted direct claims against Life Care Center for negligent supervision and training. (AOB at 9 (plaintiffs “pleaded a direct cause of action against” Life Care Center), 10 (plaintiffs “did not file an action against Nurse Dawson”), 13 (“Those theories must reach the jury as [Ms. Curtis] has framed and supported them, not as others might wish them to be.”). But this is mere artful pleading to avoid the affidavit requirement, which this Court has already rejected.

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[3] While plaintiffs appear to suggest that Life Care Center’s licensed nurses never prescribed Narcan to Ms. Curtis, they in fact did so to counteract the effects of the morphine. (1 App. 133 (“Nurse Sansome gave [Ms. Curtis] Narcan at 1:29 p.m. and . . again at 1:32 p.m.”).

Further, despite plaintiffs' contention on appeal, nowhere in the complaint did they allege that Life Care Center was understaffed or under budgeted. (*Compare* AOB at 12 ("This under budgeting and understaffing . . . were the real cause behind" Ms. Curtis's death), *with* 1 App. 1-8). Instead, plaintiffs alleged that Life Care Center negligently trained and supervised its licensed nurses. (1 App. 6 (Life Care Center "had a duty to properly train and supervise [its] staff and employees"), 7 (same). In any case, these allegations arise from, and are coextensive with, plaintiffs' allegations of professional negligence. *See Zhang*, Docket No. 67219, 2016 WL 4926325, 382 P.3d 878, at *7 ("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."). The staffing or budgeting is a problem only if the licensed nurses' underlying negligence caused Ms. Curtis's death, but it is precisely those allegations that require the medical-expert affidavit.

Plaintiffs seek to distract from the issues with an allegation that Ms. Curtis previously fell while under Life Care Center's care, supposedly showing that Life Care Center's negligence was ordinary

and not professional. (AOB at 11 (providing that the district court "ignore[d] [Plaintiffs'] allegations regarding the falls and other injuries suffered by [Ms. Curtis]")). But this ancillary allegation is not the gravamen of plaintiffs' claims: plaintiffs do not allege that Ms. Curtis died because she fell; they allege that she died because licensed nurses failed in the performance of their professional duties.

Finally, plaintiffs wrongly argue that the reasonableness of the licensed nurses' actions here—e.g., reviewing a patient's clinical record; administering morphine to a patient receiving subacute and memory care; assessing a patient's reaction to morphine; understanding the physiological effects of morphine and whether it is typically harmful or fatal to particular individuals, including the elderly; determining what is considered a significant dosage of morphine; administering Narcan to counter morphine overdose; providing ongoing assessments of a patient's physical and mental health; properly monitoring patients; understanding the appropriate situation and protocol for communicating with a physician; assessing medical emergency situations—can be determined by common knowledge, and thus, is

ordinary negligence.[4] Perhaps recognizing the absurdity of this contention, plaintiffs improperly seek to isolate a single act—Nurse Dawson administering morphine—from the chain of events and further distill the act to a mere error in judgment that is "not a mistake in medical discretion." (AOB at 17, 18 ("[A] lay person accidentally giving the wrong 'medication' to the wrong family member would not commit a professional negligence.")).

Even that isolated act constitutes an error of medical judgment in the course of treatment—i.e., professional negligence. There is no exception for low-skill acts during treatment.[5] Regardless, the proper analysis is whether the gravamen of a health care provider's *collective*

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[4] Plaintiffs omit these relevant nursing duties and services in their Opening Brief; however, below, plaintiffs heavily relied on these facts in seeking punitive damages. (*See, e.g.,* 1 App. 130-43). For example, Plaintiffs allege below that Life Care Center's licensed nurses "continue[d] to monitor Mary overnight, with vital signs taken every fifteen minutes for one hour and then every four hours," and that "Mary was alert and verbally responsive" on March 7." (1 App. 133). Thus, despite plaintiffs' arguments on appeal, this matter was not as simple as a licensed nurse administering medication to Ms. Curtis and leaving her to die.

[5] Indeed, the Legislature *did* except specific acts of obvious negligence from the medical-affidavit requirement, as discussed in Part III, but giving a patient the wrong medication is not one of the exceptions.

acts and omissions while rendering services demonstrate professional negligence. *Cruz v. Centro Medico de P.R.*, 13 P.R. 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"). Accordingly, plaintiffs' complaint states claims of professional negligence, requiring dismissal for failure to include an expert affidavit.[6]

[6] Plaintiffs fail to address, let alone cogently dispute, their fourth cause of action for tortious breach of the implied covenant of good faith and fair dealing. (*See generally* AOB; 2 App. 214-56.) Nevertheless, "[i]t is settled that an action against a [health care provider] arising out of his negligent treatment of a patient is an action sounding in tort and not one based upon a contract." *Egan v. Chambers*, 129 Nev. 239, 241, n.2, 299 P.3d 364, 365, n.2 (2013) (internal quotation marks omitted). In the event plaintiffs attempt to improperly provide arguments relating to their tortious breach claim, this Court should decline to entertain them. *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671, n.7, 262 P.3d 705, 715, n.7 (2011) ("[A]rguments raised for the first time in an appellant's reply brief need not be considered.").

II.

REQUIRING A SUPPORTING MEDICAL-EXPERT AFFIDAVIT FOR CLAIMS OF PROFESSIONAL NEGLIGENCE IN A NURSING HOME DOES NOT "EVISCERATE" NEVADA'S ELDER-ABUSE STATUTE

Plaintiffs misrepresent the district court's analysis of NRS 41.1395, Nevada's elder-abuse statute. According to plaintiffs, the district court characterized their claims as professional negligence solely because the alleged negligence arose out of a skilled nursing facility. (AOB at 19-23). Plaintiffs base their argument on the district court's statement that, "[a]s the gravamen of Plaintiffs' allegations sound in professional negligence, NRS Chapter 41A applies to all of Plaintiffs' claims to the exclusion of NRS 41.1395." (2 App. 294).

But this was not the district court's holding, as demonstrated by its plain language. Instead, the district court required the expert affidavit because plaintiffs' complaint involves allegations of medical judgment, diagnosis, and treatment. (2 App. 289-97). To the extent that NRS Chapter 41A and NRS 41.1395 conflict, the affidavit requirement in NRS 41A.071 applies, regardless of whether such an

affidavit is required under NRS 41.1395.[7] It is plaintiffs who are improperly seeking to circumvent NRS Chapter 41A.

A. The District Court's Order Never Held that All Claims against Nursing Homes Implicate NRS Chapter 41A to the Exclusion of NRS Chapter 41

Plaintiffs attack a position that the trial court and Life Care Center never adopted. Not every service provided in a nursing home is subject to NRS Chapter 41A to the exclusion of the elder-abuse statute. (1 App. 29-125; 2 App. 289-97). The district court correctly looked not to the location of the alleged harm, but to the allegedly harmful conduct. The district court applied NRS 41A.071's affidavit requirement because the complaint alleged negligence in medical judgment, diagnosis, or treatment—claims of professional negligence.

While some of the remedies and requirements of elder-abuse statute conflict with those in NRS Chapter 41A,[8] here there is no need

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[7] NRS 41.1395 ("Elder Abuse statute") provides, in relevant part, that "if an older person or a vulnerable person suffers a personal injury or death that is caused by abuse or neglect . . . , the person who caused the injury, death or loss is liable to the older person or vulnerable person for two times the actual damages incurred by the older person or vulnerable person."

[8] *See Brown v. Mt. Grant Gen. Hosp.*, No. 3:12-CV-00461-LRH-WGC, 2013 WL 4523488, at *6 (D. Nev. Aug. 26, 2013) (providing that NRS

to delve into the conflict. The elder-abuse statute does not forbid a medical-expert affidavit, and NRS 41A.071 requires one.

B. The Legislature Did Not Preclude Professional Negligence Claims in Nursing Homes

The legislative history provides plaintiffs no refuge. Plaintiffs cite to a proposed amendment seeking to define health care providers to categorically include "skilled nursing facilities," which the Legislature declined to adopt. (AOB at 21-22.) Plaintiffs argue that, because the Legislature declined to define skilled nursing homes as health care providers, NRS 41A.071's affidavit requirement must not apply to any negligent acts in a nursing home. Alternatively, plaintiffs argue that a health care provider who commits professional negligence in a nursing home is always subject to the elder-abuse statute. This was not the intent of the Legislature.

Chapter 41A "contains a restriction on compensable damages, see NRS § 41A.035, and a shorter than normal limitations period, see NRS § 41A.097. In contrast, [NRS] 41.1395 provides for double damages and the default limitations period, see NRS § 11.190").

As Nevada's federal district courts have recognized, plaintiffs' argument is incompatible with the legislative history of NRS Chapter 41A and Nevada's elder-abuse statute:

> [T]he elder abuse statute was *not intended as a remedy for torts that sound in medical malpractice* such as those alleged here. As revealed by [the Elder Abuse statute's] legislative history, Nevada's Attorney General proposed the elder abuse statute in order to incentivize private attorney generals to enforce *criminal prohibitions against elder abuse*. The Attorney General explained, "The burden of proof required in a civil action is not as high as that in a criminal trial, so it is hoped that this will help victims to recover for their losses." Minutes of the Nev. State Legislature: Hearing on Senate Bill No. 80 Before the Senate Comm. on Judiciary, Ex. D, 1997 Leg., 69th Sess. (Feb 12, 1997). The double-damages recovery and an additional attorney's fee provision were designed to encourage private attorneys "to prosecute [elder abuse] cases when criminal prosecutors cannot." *Id*. (statement of Deputy Attorney General Brand). *Therefore, the elder abuse statute's history reveals that it was initially concerned with criminal conduct—conduct whose mens rea element usually exceeds mere negligence*.

Brown v. Mt. Grant Gen. Hosp., No. 3:12-CV-00461-LRH, 2013 WL 4523488, at *6 (D. Nev. Aug. 26, 2013) (emphasis added). While the legislative history of the elder-abuse statute demonstrates that it was concerned with criminal conduct, plaintiffs here have conceded that "Nurse Dawson was exercising no criminal intent." (AOB at 18).

Regardless, we do not need to guess as to legislative intent because NRS 41A.017 plainly defines health care providers to include licensed nurses. *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014) ("If a statute is clear on its face, we will not look beyond its plain language."). Thus, it is immaterial that the Legislature declined to define health care providers to include skilled nursing homes; licensed nurses are already accounted for. It is plaintiffs who seek to rewrite the statute to exempt the negligence of licensed nurses from NRS 41A.071's affidavit requirement whenever they step into a nursing home.

C. Plaintiffs Cannot Circumvent NRS Chapter 41A.071's Affidavit Requirement by Pleading Elder Abuse

Like their claims for negligent hiring, supervision, and training, plaintiffs' elder-abuse claim is just another evasion of NRS 41A.071's affidavit requirement:

> [T]he Nevada Supreme Court has signaled a disapproval of artful pleading for the purposes of evading [NRS Chapter 41A's] limitations. . . . If the Nevada Supreme Court casts a jaundiced eye on the artful pleading of intentional torts, *it is likely to view the artful pleading of elder abuse similarly*. In the end, it seems, Nevada courts look to the nature of the grievance to determine the character of the action, not the form of the pleadings.

Brown v. Mt. Grant General Hosp., No. 3:12-CV-00461-LRH-WGC, 2013 WL 4523488 (D. Nev. Aug. 26, 2013) (emphasis added) (internal quotation marks and citations omitted). The possibility of greater damages under the elder-abuse statute at the end of the case (*see* AOB 19-20) is no excuse for skipping the medical-expert affidavit at the beginning.

III.

NONE OF THE STATUTORY EXCEPTIONS EXEMPT PLAINTIFFS FROM FILING THE SUPPORTING MEDICAL EXPERT AFFIDAVIT

Plaintiffs argue for the first time on appeal that they are excused from providing an expert affidavit because their complaint supposedly relied solely upon the *res ipsa loquitur* doctrine, specifically two statutory exceptions that allow negligence to be inferred without an affidavit. (AOB at 23-29). But plaintiffs' complaint does not solely rely upon the *res ipsa loquitur* doctrine, defeating the doctrine's application in the first place. Plaintiffs also never introduced or pointed to any facts that would support their argument.

A. Plaintiffs' Complaint Relies on Specific Acts of Negligence, Not *Res Ipsa Loquitur*

Initially, plaintiffs' complaint fails because it does not solely rely on *res ipsa loquitur*.

1. Res Ipsa Loquitur *Applies Only when the Plaintiff Does Not Make Specific Allegations of Negligence*

"[T]he expert affidavit requirement does not apply when the malpractice action is based *solely* on the res ipsa loquitur doctrine." *Szydel v. Markman*, 121 Nev. 453, 454, 117 P.3d 200, 201 (2005) (emphasis added). But "[w]here the plaintiff in his complaint gives the explanation of the cause of the accident, that is to say, where the plaintiff, instead of relying upon a general allegation of negligence, sets out specifically the negligent acts or omissions complained of, the doctrine of res ipsa loquitur does not apply." *Austin v. Dilday*, 55 Nev. 357, 362, 36 P.2d 359, 359 (1934); *see also White v. Mazda Motor of Am., Inc.*, 99 A.3d 1079, 1091 (Conn. 2014) (providing that the plaintiff fails to allege a theory of res ipsa loquitur "especially when the plaintiff also asserts a negligence claim through allegations of specific acts of negligence"); *Dunn v. Nexgrill Indust., Inc.*, 636 F.3d 1049, 1058 (8th Cir. 2011) ("Because they did not plead res ipsa, and because they pled

specific acts of negligence on the part of [defendant], they cannot recover under a res ipsa theory.").

2. Plaintiffs Alleged Specific Acts of Negligence, Taking the Complaint Out of Res Ipsa Loquitur

Plaintiffs' complaint does not rely solely upon the res ipsa loquitur doctrine. (1 App. 1-8). In fact, plaintiffs allege specific acts of professional negligence committed by Nurse Dawson and the other licensed nurses that led to Ms. Curtis's death, contrary to any theory of res ipsa loquitur. (1 App. 4-5). Accordingly, plaintiffs may not rely upon NRS Chapter 41A.100(1)'s affidavit exception.

B. NRS 41A.100(1) Displaces Common Law Res Ipsa Loquitur, Enumerating Just Five Specific Circumstances when a Medical Expert Affidavit is Not Required

"[I]n drafting NRS 41A.100(1), the Legislature specifically codified the res ipsa loquitur doctrine and determined that *in those specific enumerated circumstances*, a medical affidavit is not required." *Peck v. Zipf*, 133 Nev. 890, 894, 407 P.3d 775, 779 (2017) (emphasis added). Plaintiffs try to analogize their complaint to two of the specifically enumerated circumstances to excuse their failure to provide a medical affidavit: (1) "[a]n injury was suffered during the course of treatment to

a part of the body not directly involved in the treatment or proximate thereto"; or (2) "[a] surgical procedure was performed on the wrong patient or the wrong organ, limb or part of a patient's body." NRS 41A.100(1)(d)-(e).

Common law *res ipsa loquitur* may not be used to supplement NRS 41A.100(1)'s affidavit exception; instead, the evidence supporting *res ipsa loquitur* must fit precisely within the statutorily enumerated circumstances. *Johnson v. Egtedar*, 112 Nev. 428, 433, 915 P.2d 271, 274 (1996).

C. Administering Morphine is Not a Surgery Under NRS 41A.100(1)(e)

By emphasizing the language in subsection (e) of NRS 41A.100[9] (AOB at 27), plaintiffs appear to argue that the administration of morphine to Ms. Curtis is equivalent to "[a] surgical procedure [ ] performed on the wrong patient or the wrong organ, limb or part of a patient's body." NRS 41A.100(1)(d)-(e). But the administration of morphine here is plainly not surgery.

[9] NRS 41A.100(e) provides that "[a] surgical procedure was performed on the wrong patient or the wrong organ, limb or part of a patient's body."

In *Peck v. Zipf*, the plaintiff "argued that the insertion of an intravenous (IV) needle constitutes surgery" under NRS 41A.100(1)(a). 133 Nev. 890, 893, 407 P.3d 775, 778 (2017). This Court disagreed, holding that the "plain and ordinary meaning" of the word "surgery" as used in NRS 41A.100(1)(a) "does not include the insertion of an IV needle because that is not an 'operative measure.'" *Id.* at 894, 407 P.3d at 779.

Likewise, here, Nurse Dawson's administration of morphine to Ms. Curtis is not a "surgery." (1 App. 131 ("At approximately 10:00 a.m. Nurse Dawson popped out two pills, crushed them, put them in applesauce, and gave them to [Ms. Curtis]."). NRS 41A.100(1)(e) does not apply here.

D. Administering the Wrong Medication to the Right Body Part Does Not Implicate NRS 41A.100(1)(d)

Nor do plaintiffs fall within the exemption for an injury "to a part of the body not directly involved in the treatment or proximate thereto." NRS 41A.100(1)(d).

1. The Exception Requires Actual Evidence that the Wrong Body Part was Treated

NRS 41A.100(1) provides, in relevant part, that a plaintiff seeking to avoid filing an expert affidavit can only do so "*where evidence is presented* that the provider of health care caused the personal injury or death occurred" under the five enumerated circumstances. (Emphasis added.). In *Busick v. Trainor*, this Court held that NRS 41A.100(1)(d) did not apply to plaintiff's theory of the case because he "failed to present evidence" to demonstrate that "nerve injury was neither 'directly involved' nor 'proximate thereto' his hip replacement." Docket No. 72966, 2019 WL 1422712, 437 P.3d 1050, at *1-2 (Nev. Mar. 28, 2019) (Order Affirming in Part, Reversing in Part, and Remanding). A conclusory statement that a *res ipsa* exception applies is not enough to escape the affidavit requirement.

2. Plaintiffs Do Not Explain How the Brain is Not Involved in Ms. Curtis's Treatment

Plaintiff does not point to any evidence, or even any allegation, that the brain is a "part of the body not directly involved" nor "proximate [to]" the administration of morphine. (*See generally* AOB). Instead, plaintiffs just state the conclusion that "[t]he administration of

morphine to Mary Curtis literally falls under NRS 100.1.(d) [sic]." (*See* AOB at 27; *see also* AOB at 28 (conclusively stating that "[w]hatever might be treated by the exceptionally strong pain-killer of morphine, it was not this part of Mary Curtis's body that needed treatment.").) That conclusory statement does not bring plaintiff's complaint within the exception to NRS 41A.071's affidavit requirement.

3. The Brain is Directly or Proximately Involved in the Treatment of Subacute and Memory Care

This Court has held that NRS 41A.100(1)(d) applies only when the evidence clearly demonstrates that an injured part of the body is not directly or proximately involved in the course of treatment. *See, e.g., Dolorfino v. Univ. Med. Ctr. of S. Nev.*, 134 Nev., Adv. Op. 79, 427 P.3d 1039, 1041 (2018) (holding that plaintiff's "tooth injury was not 'directly involved' or 'proximate' to her hysterectomy"); *Banks v. Sunrise Hosp.*, 120 Nev. 822, 833, 108 P.3d 52, 60 (2004) (holding that "[t]he brain is not directly or proximately related to the rotator cuff surgery"); *cf. Busick v. Trainor*, Docket No. 72966, 2019 WL 1422712, 437 P.3d 1050, at *1-2 (holding that injury to plaintiff's nerve "run[ning] from the spine to the toes" *was* "directly involved" or "proximate" to hip replacement surgery so as to preclude NRS 41A.100(1)(d)'s application).

Plaintiffs alleged below and concede on appeal that Ms. Curtis was admitted as a patient at Life Care Center "for subacute and memory care." (AOB at 28; 1 App. 4). And while this matter is appropriately one for medical-expert opinion, it is difficult to imagine that the brain is not directly or proximately involved in a treatment for subacute and memory care, or the administration of morphine. *See DeJesus v. Flick*, 116 Nev. 812, 814, 7 P.3d 459, 461 (2000) ("[t]he brain damage caused Flick to suffer . . . memory loss"), *overruled on other grounds by Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008).

E. Nurse Dawson's Failure to Follow a Physician's Order During a Course of Treatment is Not Res Ipsa Loquitur

Finally, professional negligence arising from a nurse's failure to follow protocol or a physician's directive is not one of the enumerated exceptions under NRS 41A.100(1). This Court's holding in *Andrew v. Coster* is on point:

> In [plaintiff's] complaint, he claimed that [defendant], a nurse, negligently and prematurely removed his catheter in direct opposition to the doctor's instructions. This alleged medical malpractice, not following the doctor's orders, does not fall into one of the enumerated exceptions in NRS 41A.100(1), and thus, under NRS 41A.071, required a medical expert affidavit."

Docket No. 70836, 2017 WL 6597159, 408 P.3d 559, at *1 (Nev. Dec. 22, 2017) (Order of Affirmance).

Here, plaintiffs repeatedly argued that Nurse Dawson committed ordinary and not professional negligence because she administered the wrong medication in contravention of a physician's order. (AOB 16 ("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."), 28 ("[O]r at least her physician was not seeking to treat it at that time."); 1 App. 4 (alleging that Nurse Dawson "administered to [Ms. Curtis] a dose of morphine prescribed to another resident. Ms. Curtis was not prescribed morphine")). But plaintiffs do not even pretend that disobeying a physician's order is one of the exceptions to the affidavit requirement under NRS 41A.100(1). Thus, based on plaintiffs' own argument, NRS 41A.100(1)'s affidavit exception does not apply here.

IV.

LIFE CARE CENTER'S REGULATIONS DO NOT ESTABLISH NEGLIGENCE *PER SE* OR EXCUSE PLAINTIFFS FROM FILING A SUPPORTING MEDICAL EXPERT AFFIDAVIT

Plaintiffs are not exempt from filing an expert affidavit merely

because Life Care Centers has regulations. Contrary to plaintiffs' argument, NRS 41A.100(1) does not establish negligence *per se* or an exemption to the affidavit requirement whenever there is evidence of "the regulations of the licensed medical facility wherein the alleged negligence occurred." (AOB at 24 (quoting NRS 41A.100(1))).

A. Negligence *Per Se* Requires the Violation of a Statutory Duty

"A negligence per se claim arises when a duty is created by statute." *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 828, 221 P.3d 1276, 1283 (2009). Specifically, "[a] civil statute's violation establishes the duty and breach elements of negligence when the injured party is in the class of persons whom the statute is intended to protect and the injury is of the type against which the statute is intended to protect." *Id.*

B. NRS 41A.100(1) Does Not Create Duties for Negligence *Per Se*

Plaintiffs' argument is contradicted by NRS 41A.100(1)'s plain language. NRS 41A.100(1) does not establish a duty on health care providers, plaintiffs are not in the class of persons whom NRS 41A.100(1) is intended to protect, and plaintiffs' alleged injury is not the

type against which NRS 41A.100(1) is intended to protect. Indeed, "the regulations of the licensed medical facility" are not statutory duties at all.

NRS 41A.100(1) instead serves to protect health care providers by establishing a minimum evidentiary requirement for plaintiffs—i.e., unless plaintiffs produce a certain type of evidence, there can be no liability. NRS 41A.100(1) (providing that "[l]iability for personal injury or death *is not imposed* upon any provider of health care . . . *unless* evidence consisting of . . . the regulations of the licensed medical facility wherein the alleged negligence occurred is presented" (emphasis added)). But meeting that bare evidentiary minimum at trial—"expert medical testimony, material from recognized medical texts or treatises or the regulations of the licensed medical facility"—does not get the plaintiff a presumption of negligence (or negligence *per se*) the way the statutory *res ipsa loquitur* exceptions do. Otherwise, plaintiffs' interpretation would lead to an absurd result: while expert testimony, treatises, and facility regulations can be and regularly are disputed, plaintiffs here would give those materials the force of presumption every time a plaintiff introduces them. Unlike the *res ipsa loquitur*

exceptions, these evidentiary requirements for trial do not excuse a plaintiff at the beginning of the case from having to file the medical-expert affidavit under NRS 41A.071 along with the complaint.

CONCLUSION

This Court should affirm the district court's decision.

Dated this 16th day of October, 2019.

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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 9,005 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 16th day of October, 2019.

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