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

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

LEGAL ANALYSIS AND ARGUMENT

LCC Respondents ("Respondents") misstate the issues. Respondents' Principal Issues Presented (Respondents' Answering Brief, "RAB" at xi.) could be restyled as follows:

1. **NRS 41A.071 creates a requirement for a medical expert's affidavit only when a particular claim complains of professional negligence. Does this statute require a medical professional's affidavit when the complaint in question alleges that a non-health care provider implemented a deliberate policy of understaffing a nursing home facility proportionate to nursing home resident census?**

2. **Does the expert-affidavit requirement in NRS 41A.071 apply to a nursing home conglomerate's negligence in deciding to reduce staffing and increase nursing home resident census without regard to clinical outcomes?**

3. **Does a nurse's misidentification of a nursing home resident, administering a medication intended for someone else, constitute *res ipsa loquitur* under NRS 41A.100(1)?**

In sum, Plaintiffs' ("Ms. Latrenta") claims ***against Respondents*** do not ultimately hinge on a mistaken administration of medication by Nurse Dawson, and the subsequent failure to monitor, as the gravamen of the cause of action; the gravamen of the cause of action against Respondents is that Respondents implemented a deliberate policy of understaffing a nursing home facility proportionate to nursing home resident census, thus making mistaken administration of medication and failure to monitor practically inevitable.

Therefore, Respondents' argument that the ***claim against them*** is one for professional negligence and subject to the affidavit requirement, must fail. First, they are non-providers, not covered by the NRS 41A.017 definition of a provider of health care, and the Nevada legislature has specifically rejected adding defendants like Respondents as providers of health care. (*See* APP234-236 (detailing an amendment to the list of statutory providers that the legislature refused to adopt)). While Respondents continually argue that Ms. Latrenta is attempting to "artfully plead" around NRS 41A.071 to get at them, this is not so. All their examples of "artful pleading" involve instances when a plaintiff attempted to plead around professional negligence in order to get to a statutorily-defined health care provider without implicating Chapter 41A. As such, in reality, with their "artful pleading" argument Respondents are attempting to create a protection under Chapter 41A for non-health care providers, which the legislature specifically declined to recognize.

Second, the direct claim against Respondents is not one for professional negligence, nor could it be. While Ms. Latrenta stands on her position that a vicarious claim, for the error of Nurse Dawson, is not one for professional negligence given the nature of the error, certainly the direct claim against Respondents for controlling the facility such that medication errors and failures to monitor were inevitable cannot be one for professional negligence. More importantly, Ms. Latrenta has made out a direct claim against Respondents, one that is an elder

abuse claim and not one for professional negligence as understood under Chapter 41A.

Thus the hodgepodge of cases cited by Respondents in support of their argument are readily distinguishable. In *Speaks v. Vishnuvardhan Rao*, 117 N.E.3d 661 (Ind. Ct. App. 2018), a drug was allegedly mis-prescribed for plaintiff Mindy Speaks ***by a health care provider***. The fact as recognized by the *Speaks* Court is that the evidence actually indicated that the drug had not been administered at all, and that its presence on a list of medications was a charting error. *Id.* at 668. Moreover and ironically, this case in truth highlights the weakness in Respondents' argument as to *res ipsa loquitur* (see argument below). Said the Indiana Court of Appeals: "A case sounds in ordinary negligence when the factual issues are capable of resolution without application of the health care provider's standard of care." *Id.* at 672-673. A jury in this case would not require expert testimony to know that understaffing a facility proportionate to resident census falls below a standard of care, much less giving someone an un-prescribed narcotic in error.

In *Grady General Hosp. v. King*, 653 S.E.2d 367 (Ga. Ct. App. 2007), the Court of Appeals of Georgia did indeed hold that it was proper to dismiss the plaintiff's claim ***against a health care provider***, that a nurse gave the plaintiff the wrong medication, for failure to attach an expert's affidavit. Additionally, although the Opinion does not make the point clear, there existed a dispute in *Grady General*

Hosp. between the litigants, as to whether the medication administered was indeed "wrong" or an improper course of treatment. If the defendants contested this conclusion, it would certainly be appropriate to demand that the plaintiff provide expert support for a plaintiff's contention of medication error. This is a far cry from the circumstance in this case, where even Respondents admitted that giving Mary Curtis someone else's morphine was wrong and not a proper course of treatment.

Here, there is no dispute. Nurse Dawson gave Mary Curtis someone else's morphine, and it killed her. Nurse Dawson conceded the medication error as a fact. Respondents conceded this as a fact as well. And the death certificate assigned morphine as the cause of death. (APP210) The comparison to *Grady General Hosp.* is thus not apropos.

Manion v. Vintage Pharmaceuticals LLC, 2013 WL 5645159 (N.D. Cal. 2013) was a "wrongful birth" case involving birth control. The health care provider, a pharmacy, dispensed birth control pills improperly packaged, such that plaintiff Ashley Manion was taking a course of placebo pills when she should have been taking the active ingredient pills. How the pills were identified, ordered, and presumably their directions, were all matters falling under pharmaceutical expertise. Moreover, as even Respondents quoted, professional negligence "occurs in the rendering of services for which the ***health care provider*** is licensed." *Id.* at *3 (emphasis added).

Self-evidently, a plaintiff does not allege a ***direct*** claim of ***professional negligence*** against a provider not listed as one of the health care professionals protected under NRS 41A.017. Rather, a plaintiff would allege, as in this instance, a claim of elder abuse. There is no precedent for a non-provider to obtain the protections of Chapter 41A for vicarious claims made by its employee professionals, and there cannot possibly be a protection for a statutory non-provider on a direct claim of elder abuse.

Respondents are studiously ignoring the nature of Ms. Latrenta's claim against them. In this vein, Respondents' citation to *Brown v. Mt. Grant General Hosp.*, 2013 WL 4523488 (D. Nev. 2013) and their selective quotations therefrom are farcical. In *Brown*, the plaintiffs sued a ***health care provider***—a hospital—for various injuries to one Eugene Brown, who happened to be an elderly, incapacitated man. Amongst the causes of actions pleaded under Nevada law were both elder abuse as well as negligence (which was not dismissed), but the U.S. District Court dismissed the former cause of action as improvident. The plaintiffs had attempted to artfully plead the additional elder abuse cause of action. The following reasoning of the *Brown* Court disposed of the question that elder abuse was not a provident claim in that case, but also illustrates why it is a provident claim here:

> [***B***]***oth the plain language of § 41.1395 and its legislative history suggest that the statute targets the relationship between long-term caretakers and their charges***. This is in

> contradistinction to the type of relationship that exists between hospitals and their patients. Indeed, during hearings on § 41.1395, several legislators addressed the statute's potential impact on "nursing homes," "managed care facilities," "long-term care facilities," "group homes," caretaking family members, even homeless shelters, yet no legislator mentioned hospitals or clinics. *See Minutes of the Nev. State Legislature: Hearing on Senate Bill No. 80 Before the Assembly Comm. on Judiciary*, 1997 Leg., 69th Sess. (June 4, 1997) ("[B]y passing this in the present form it would be open season on the nursing homes.") (statement of Assemblyman Sandoval); *Minutes of the Nev. State Legislature: Hearing on Senate Bill No. 80 Before the Assembly Comm. on Judiciary*, 1997 Leg., 69th Sess. (April 15, 1997) (discussing "nursing homes and managed care facilities," "family member[s] volunteering to take on the obligation of taking care of a family member," "group home[s]," and "long-term care facilit[ies]") (statements of Assemblymen Sandoval and Carpenter and Deputy Attorney General Roberts); *Minutes of the Nev. State Legislature: Hearing on Senate Bill No. 80 Before the Senate Comm. on Judiciary*, 1997 Leg., 69th Sess. (June 18, 1997) (discussing "homeless shelters") (statement of Senator Adler). ***The entities discussed by the legislators share a common attribute: they are all, in one way or another, long-term care facilities.*** The absence of hospitals from this list is therefore unremarkable. Unlike long-term care facilities, hospitals are typically acute care facilities—places one goes to receive short-term treatment for treatable ailments. And ***while hospitals go unmentioned in the elder abuse statute, they are explicitly acknowledged in the medical malpractice statutes***. *See* NRS § 41A.009.

Id. at *7.

Just as there is no analogy with the case at hand to *Manion v. Vintage Pharmaceuticals*, there is none to be made with *So v. Shin*, 151 Cal. Rptr. 257 (Cal. Ct. App. 2013) either. In fact *So v. Shin* provides no support to Respondents' position whatsoever. In *So v. Shin* an anesthesiologist's act of showing a patient a

container of the blood and tissue that had been suctioned from the patient's uterus during a dilation and curettage surgery after a miscarriage was not undertaken "in the rendering of professional services." Thus California's shorter Medical Injury Compensation Reform Act limitations period for professional negligence did not apply to patient's negligence claim of outrage against anesthesiologist or her *respondeat superior* claims against medical group and hospital. *Id.* at 666. Again, by virtue of the nature of the error made by Nurse Dawson, a vicarious liability claim against Respondents does not fall under the protections of the professional negligence statutory scheme either.

Similarly there is no analogy to be made with *Graham v. Rite Aid Corp.*, 2003 WL 21079858 (Mich. Ct. App. 2013). Simply dispensing a single medication cannot be an exercise of medical or nursing professionalism, isolated and on its own as an event, unless family members are to be considered practicing medicine every time they give a grandparent a pill prescribed by a physician. Rather, there must be some modicum of professional judgment involved. In *Graham v. Rite Aid Corp.*, there was some professional judgement involved when another health care provider pharmacy gave the patient the wrong medication, and the plaintiffs in effect alleged as much. The plaintiffs in that case alleged in part, that the defendant health care provider was "hiring employees that it knew were incapable of performing their pharmaceutical duties." *Id.* at *1. The pharmacist apparently misidentified the drug,

something requiring professional acumen. Whether this drug misidentification fell below what could be expected of a pharmacist was a question requiring expert testimony.

In *Rejman v. Shang*, 2016 WL 4216781 (D. Nev. 2016), the "unconsented to administration of medicine" (RAB at 16), actually refers to informed consent. Informed medical consent is a question of professional negligence, and the defendant in that case was, yet again, a statutory health care provider.

In contrast, here Ms. Latrenta did not plead fault with Nurse Dawson's competence, training, or even her direct supervision necessarily. Rather, Ms. Latrenta faulted Respondents decision to put Nurse Dawson "behind the eight ball" in a "very chaotic situation" (*see* APP130) such that a medication error, which did occur, was bound to occur. Respondents,

> 4. * * * ***controlled the budget*** for [Life Care Center of Paradise Valley] ***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)).

With regard to failing to monitor Mary Curtis, the key here is that this claim as alleged against Respondents is a direct claim alleged against, again, a statutory non-provider. As such, citation to *Lewis v. Renown Regional Medical Center*, 432 P.3d 201 (Nev. 2018), provides no support for Respondents. In *Lewis*, the plaintiff

sued a hospital for failing to adequately monitor his wife, who subsequently committed suicide. This Court determined that this failure constituted an instance of professional negligence, and thus was governed by the shorter statute of limitations. There was no dispute that the hospital constituted a health care provider, just as there is no dispute that Respondents here are not statutory health care providers. This Court will not add to the list of health care providers, especially when the manifest intent of the legislature was to leave defendants such as Respondents off the list. *State Indus. Ins. System v. Bokelman*, 946 P.2d 179 (Nev. 1997). Respondents' attempted rebuttals, *in toto*, fail.

I. The Gravamen Of Plaintiffs' Claims Against Respondents Is Directed At Business Actions, Taken By Non-Providers, And Not Against The Medication Administration Mistake Made By Nurse Dawson.

It is ironic that Respondents would accuse Ms. Curtis of "rip[ping] out individual acts from a chain of relevant events" (RAB at 19), as it is Respondents that most wish to narrow inquiry to simple provision of a morphine tablet. They studiously avoid any kind of causal inquiry, implying thereby that the root problem was that Nurse Dawson somehow did not recognize the morphine or its properties, or used some kind of professional discretion in administering the tablet. They ignore the clear fact that she mistook the identity of Mary Curtis because she had been called into work at the last moment, that the staff was working as per usual "behind the eight ball," in a "very chaotic situation," and that this was due to Respondents

generally leaving the facility understaffed in order to reduce labor costs. Under Nevada law, proximate cause means a cause "which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred." *Wise v. Southern Tier Express, Inc.*, 780 Fed. Appx. 477, 479 (9th Cir. 2019). By putting Nurse Dawson "behind the eight ball," and in a "very chaotic situation," she became merely the initial mechanism of death and was not an efficient intervening cause; Respondents' policies and procedures initiated the chain of events that inevitably led to Mary Curtis' death and were the proximate cause. By way of analogy, one who contracts a murder for hire does not escape civil or criminal liability simply because the hired gun pulls the trigger.

Respondents knew of the medication-error-understaffing-and-chaos dynamic at their facility—*see e.g.*, APP212-213 (letter to Respondents warning of medication errors being "covered up" at the facility)—but they would now have the Nevada courts believe that the gravamen of Ms. Latrenta's case involved the medication error of one facility nurse. Respondents recite a litany of steps they suggest Nurse Dawson should have taken in administering medication to Mary Curtis, *e.g.*, "understanding the physiological effects of morphine and whether it is typically harmful or fatal to a particular individuals, including the elderly" (RAB at 28), as if to suggest that Nurse Dawson intended to give Mary Curtis morphine but should

have known better.

Deposition testimony from the facility Director of Nursing, Nurse Hecht, paints a different picture:

Q I am just going back and comparing it for a moment.
Back on January 18th, do you see where the census was 78?
A Yes.
Q And then going into February 25th, the census had increased to 85?
A Yes.
Q And then going into March 8th of 2016, the census has now increased to 92. Am I correct?
A Yes.
Q Now, it's also my understanding that corporate wanted the facility to increase the census at the Paradise Valley facility.
A Yes.
Q And that's where we see a medication error has now, in fact, happened.
A Yes.

(APP192-193).

Q It's starting to appear to be that there is a pattern of medication administration problems at the facility. Am I correct?
MS. BROOKHYSER: Speculation.
THE WITNESS: Yeah.
BY MS. BOSSIE:
Q Going to August 3rd of 2015, the wrong medication given to patient. The patient's room number was 108, but patient received 116 resident's medication.
A I see that from the report.
Q And again, the facility being aware that there's an ongoing problem with patients not receiving the right medication. Am I correct?
MS. BROOKHYSER: Foundation. Calls for speculation.
THE WITNESS: Yes.
BY MS. BOSSIE:
Q Going to August 9th of 2015, RN charge nurse, while providing pain IVP, noted that the stock on hand not the same as the pain IVP on the label.
A Yes, I see it.

(APP194-195).

Q Now, I believe we talked about earlier that Thelma Olea was your assistant director of nursing?
A Yes.
Q And she has testified in this matter that there was an ongoing challenge regarding appropriate medication administration prior to the events that happened to Mary Curtis. Obviously, I take it --
A Yes.
Q -- you agree with that –
A I see it.
Q -- statement, based on what we've covered.
A Yes.
Q Give me two seconds.
Thelma also had testified in this matter that at times, both nurses and CNAs would come to her and share their concerns that they needed additional CNAs and nurses. Do you remember that being passed on to you?
A I can't remember, but there might be sometimes, yeah, that it's being said to me that they need more help.
Q Now, we do know it takes people being employees to adequately and appropriately supervise residents, but also to give them adequate and appropriate and timely care.
A Yes.
Q And we have talked about that there was an ongoing issue with the turnover of staff --
A Yes.
Q -- at the Paradise Valley facility.
A Yes.
Q And I take it you can't give me specifics, but you do remember being made aware that nurses and CNAs were sharing their concerns for the need for more help to provide resident care.
MS. BROOKHYSER: Misstates her testimony.
THE WITNESS: Yes. And some patients not every day. Not all the time. Some occasions. Yes.

(APP197-198).

This sheds light then on the position put upon Nurse Dawson when she was called late to fill-in on a hall that she had never worked before, to administer the

prescribed medications. Nurse Dawson testified:

Q Now, I believe you were only assigned to Mary on one occasion?
A One day.
Q So I take it you were not familiar with Mary and her care needs; is that fair?
A For a day, I can't - - you can't say yes, so it would be a no.
Q Now, it's my understanding that you were not normally assigned to the 3- or 400 units at Life Care Centers of Paradise Valley; am I correct?
A No, I was usually on the 1 or the 200 hall.
Q On the one day that you were assigned to Mary, who was on the 300 unit, how did it come to be that you got assigned to that unit from management at Life Care?
A Wow. I believe I got called into work. They were short a nurse, and I got called in. They were short a nurse, and I got called in.

(APP172).

Further, it is reasonable then to infer that staffing shortages then played a part in Respondents' failure to monitor Mary Curtis after the medication error. The facility Certified Nurse's Assistants (CNAs) were overwhelmed with the number of residents to care for and monitor. Said CNA Cherry Uy, who had experience working nights, when speaking about the night shift following Mary Curtis's overdose:

Q Now, when you were working the night shift, Life Care had you responsible for up to 25 residents; am I correct?
A Yes. That's a lot.
Q That's a lot of residents to be assigned to?
A Yeah.
Q Did you feel that this was too many residents?
A Too many.
Q Did you bring it up to your nurse or your supervisor that --
A Yeah. We talk about it, you know. That's why I quit nights, it's a lot, really.

(Supplemental Appendix, SA319-323).

Even Respondents implicitly concede (*see* RAB at 3) that—despite having just administered 120 mg of an un-prescribed narcotic—Respondents' staff did not check on Mary Curtis for some seventeen hours during the night and next morning after the fatal error. Again, Director of Nursing, Nurse Hecht:

> **Q** Were you concerned in any manner that there was a gap from 5 o'clock all the way to the next note, which was done by yourself at approximately 11 o'clock on the 8th?
> **A** I did not see a documentation of the night shift, the 11:00 to 7:00, and the 7:00 to before 11:00 o'clock.
> **Q** And I take it since you are a managing nurse and you were made aware of what happened to Mary, that you found it very concerning that there were no notes by those shifts. True?
> **A** Yes.

(APP200)

> **Q** And then we don't have any note on Mary Curtis from 5 o'clock in the afternoon until you're called by the daughter the next day at 11:00.
> **A** I don't see any notes. Yes.
> **Q** I take it as we've talked about earlier, where everyone has notice and actual knowledge of what's going on with Mary, and there's no note for over 15 to 16 hours on her, is that concerning to you?
> **A** Yes.

(APP204). The 11 o'clock note refers to the note entered by Nurse Hecht immediately subsequent to Laura Latrenta's discovery of her mother unresponsive and her mouth hanging open. (APP184).

The Shift Supervisor for the facility at the time of Mary Curtis's overdose was Nurse Cecilia Sansome. She confirmed that there was pressure from Respondents not to send residents to hospital, but rather "monitor" them at the facility.

Q In the hospital setting, the ratio of nurses to residents or patients like Mary is much lower?
A Yes.
Q And the acute care setting also has more monitoring devices in order to closely monitor the condition of someone like Mary?
A Yes.
Q They also have not only more nurses to closely monitor, they have doctors right there on staff?
A Yes.

(APP315).

Q As part of that training, were you made aware that if a resident ls readmitted back into the acute care setting within that 30-day window, that the hospital could potentially be penalized on some of their reimbursement?
A Yes.

(APP316).

Said Director of Nursing, Nurse Hecht:

Q Now, did that come from corporate to you all at the facility, that you all would need to decrease the bounce back rate to hospitals, which would mean a resident who is discharged from the hospital to the nursing home, that they don't bounce back or return to acute within that 30-day window?
A We were educated in that. Yes.

* * *

Q But you know the bounce back to hospitals were tracked.
A Tracked. Yes.
Q And there was an expectation to lower the bounce back to hospitals.
A Yes.

(APP191).

All the nurses were trained to keep residents at the facility, and not send them to a hospital. Said Licensed Practical Nurse Regina Ramos who took over on shift from Nurse Dawson:

Q My question was a little different, though.
Did management instruct you through in-services to the nurses in the nursing department that, if we can keep the residents in the facility rather than transferring them to the hospital, that they would prefer to maintain the residents at the facility?
A Yes.

(APP317). Having a policy of keeping elderly nursing home residents at the non-health care provider facility when they should go to the hospital, in order to serve the facility's bottom line, is not an instance of professional negligence. It's an egregious instance of elder abuse.

To the extent Respondents recognize that they had a part to play in the harm to Mary Curtis, as opposed to focusing solely on Nurse Dawson, they persist in mischaracterizing its character. They point out that "[a] claim of negligent hiring, supervision, or training escapes NRS 41A.071's affidavit requirement only 'where the underling 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." (RAB at 23). The fatal flaw in this argument is that Ms. Latrenta's claims against Respondents are not ultimately claims regarding negligent hiring, supervision, or training. Such claims would be merely vicarious. Rather, the claims of Ms. Latrenta include direct claims, against Respondents. Respondents inflated the resident census at the facility and held down staffing resources. This is not a question of supervision. The best management in the world cannot supervise someone who is not there. Nor is Nurse Dawson's hiring

or training the issue. The issue is directed to Respondents' decision to woefully understaff a nursing home facility. The act of starving a facility of necessary resources does not fall under the rubric of "medical diagnosis, judgment, or treatment" as to any particular patient or resident.

In *Szymborski v. Spring Mt. Treatment Ctr.*, 403 P.3d 1280 (Nev. 2017), this Court addressed the issue of whether a variety of claims required an expert affidavit pursuant to NRS 41A.071 when made against a statutory provider of health care defendant. The plaintiff was the father of a patient suffering from self-inflicted injuries, and admitted to the Spring Mountain mental health facility. The facility made the decision to discharge the patient, and arranged some logistical details of the discharge. The discharge went poorly, and the plaintiff's son vandalized the plaintiff's home. In complaint against the facility, the plaintiff asserted a number of ordinary as well as medical negligence claims. The trial court decided that the decision and manner of the son's discharge involved medical malpractice and thus required an expert affidavit. Absent such an affidavit, the district court dismissed the case.

This Court reversed in part, recognizing that the gravamen of some of the claims could have sounded in ordinary as opposed to medical malpractice. *Id.* at 1285. The Court employed the following logic to arrive at this conclusion:

> [I]f the jury ***can only evaluate the plaintiff's claims after presentation of the standards of care by a medical expert, then***

> ***it is a medical malpractice claim***. *See Bryant v. Oakpointe Villa Nursing Centre*, 471 Mich. 411, 684 N.W.2d 864, 872 (2004); *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court*, 132 Nev. — —, 376 P.3d 167, 172 (2016) (reasoning that a medical expert affidavit was required where the scope of a patient's informed consent was at issue, because medical expert testimony would be necessary to determine the reasonableness of the health care provider's actions). ***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***. *See Bryant*, 684 N.W.2d at 872.

Id. at 1285-1286.

Here, the fact that a nursing home conglomerate continues to short staff a facility despite having knowledge of the clinical problems at that location is not a matter of medical judgment, diagnosis, or treatment, with regard to which a physician would be expected to execute an affidavit. It is simply a question of callous intent and/or recklessness, about which a lay juror could form an opinion without the need of expert testimony.

Respondents are non-providers. Making decisions to increase resident census and ignore understaffing concerns are not medical procedures. Even if the injury involved relates to medical injury, this does not change the gravamen ***of the actual claim made against Respondents***. To use an illustration involving an analogous circumstance, in *Goldenberg v. Woodard*, 2014 WL 2882560 (Nev. 2014),[1] a

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

physician represented to his patient that he had the competence to perform colonoscopies, when in fact he had never performed one before. After complications arose and the patient-plaintiff suffered injury, the plaintiff sued for, amongst other things, fraud. Self-evidently the material operative fact, whether there had been a misrepresentation, may have seemed to involve a question of professional judgement. Can a physician claim competence in performing a medical procedure, without having had any experience? Nonetheless this Court determined that there was a qualitative difference between a tort such as fraud, from the underlying injury involved. Here, just as a lay juror can determine whether making a claim of competence without any experience constitutes a misrepresentation, a lay juror can determine whether blowing up resident census while there exists a medication administration problem creates liability for the facility.

II. Plaintiffs' Claims Fall Well Outside That Class Of Cases Requiring "Triage" To Separate The Good Faith From The Bad Faith Or Frivolous Claims.

As even Respondents note, the "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." *Zohar v. Zbiegien*, 334 P.3d 402, 405 (Nev. 2014) (emphasis added). Self-evidently, filing a claim based upon administering what proved to be, according to the death certificate, a lethal dose of medication prescribed and intended for another

nursing home resident rather than for Mary Curtis herself, is a good faith claim and not frivolous.

The Respondents attempt to sneak this issue past by slipping in an early mischaracterization of the claim:

> 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.

(RAB at 12 (emphasis added)).

Mary Curtis was not "prescribed" anything by Nurse Dawson. Furthermore, the assertion in Respondents' briefing that Ms. Latrena omitted filing action against Nurse Dawson in order to get around the affidavit requirement is wholly without merit. It is ludicrous to suppose any difficulty in getting a medical expert to opine that giving someone an un-prescribed narcotic falls below the standard of care, if indeed professional negligence were the gravamen of the claim.

Mary Curtis was given morphine intended for someone else. She was given a lethal dose of this medication because, the nurse administering the medication had never been on that wing, did not know the residents, had been called in to care for these residents at the last minute, and was frantically playing catch-up. (APP130) (discussing evidence of a chaotic morning, and Nurse Dawson being called in so that

she began the shift two hours after the shift had begun, "urged to take care of these three people immediately"). That this nurse was put in this position is the fault of the budgeting and understaffing policies of Respondents—as opposed to a one-off failure to supervise—and it is for this reason that Ms. Latrenta filed a direct action against Respondents for elder abuse in this case. It was not an instance of "creative pleading." Respondents are obviously not a "professional," falling under the rubrics of NRS 41A.071, and staffing policies have never in Nevada been covered under the definition of "professional negligence" under NRS 41A.015 and cannot be so covered now. *C.f. Egan v. Chambers*, 299 P.3d 364, 366-367 (Nev. 2013) (holding that this Court may not expand the list of statutory providers to include podiatrists absent legislative amendment).

III. *Res Ipsa Loquitur* Under Nev. Rev. Stat. 41A.100 Does Apply In This Context.

Turning now to Nurse Dawson's medication administration error, to argue against the proposition that "the matter speaks for itself" and that the facts of this case do not fall under one of the exceptions from Nev. Rev. Stat. 41A.100, Respondents rely to some extent on the proposition that in Nevada *res ipsa loquitur* has to be explicitly alleged, and cannot co-exist when specific allegations are made. The fact is however, that the cases cited by Respondents actually make clear that *res ipsa loquitur* is inappropriate only in those situations where "'the plaintiff is not relying solely on circumstantial evidence, but instead alleges and introduces into

evidence specific acts of negligence by the defendant.'" *White v. Mazda Motor of America, Inc.*, 99 A.3d 1079, 1091 (Conn. 2014) (quoting *Gilbert v. Middlesex Hospital*, 55 A.2d 903 (Conn. Ct. App. 2000).

Yet, some facts have to be alleged, even to make out *res ipsa loquitur*, or fault by virtue of the circumstantial evidence. What more circumstantial allegations can exist, than those pleaded by Ms. Latrenta here?

> 18. Despite Defendants' notice and knowledge that Ms. Curtis was dependent on them for proper medication administration, they on 7 March 2016 ***administered to her a dose of morphine prescribed to another resident***. ***Ms. Curtis was not prescribed morphine.***
>
> * * *
>
> 21. Ms. Curtis's death certificate records that her immediate cause of death was morphine intoxication.

(APP004-005 (emphasis added)) It is not as if Ms. Latrenta alleged a bevy of facts which are supposed to add up to negligence. She didn't have to.

As such, Respondents' citations in support of their proposition constitute nothing more than another litany of easily distinguishable cases. In *Austin v. Dilday*, 36 P.2d 359 (Nev. 1934), the plaintiff was apparently injured in an automobile accident, to which he alleged a defective steering mechanism was involved. Yet, he did not, could not under the circumstances, allege that the mere fact that there was an accident constituted *res ipsa loquitur*. Thus, the plaintiffs were not entitled, after

trial, to a rehearing on that theory. This is a far cry from an instance where *res ipsa loquitur* is in effect facially alleged in Ms. Latrenta's Complaint.

In *Dunn v. Nexgrill Industries, Inc.*, 636 F.3d 1049 (8th Cir. 2011), the plaintiff Dunns alleged that a house fire was caused by a defective propane grill. Following summary judgment, *i.e.*, an evaluation of the facts by the judge, and a refusal by the trial court to admit experimental evidence, the plaintiffs argued that *res ipsa loquitur* via circumstantial evidence should have been applied. Yet, said the Eighth Circuit:

> [The Dunns] have failed to establish that they could offer sufficient evidence to prove a product defect through circumstantial evidence. "To prove a product liability claim by inference from circumstantial evidence without proof of a specific defect, a plaintiff must offer evidence that (1) tends to eliminate other possible causes of the injury or property damage, (2) demonstrates that the product was in the same basic condition at the time of the occurrence as when it left the hands of the defendants, and (3) the injury or damages is of a type that normally would not have occurred in the absence of a defect in the product." *Hickerson v. Pride Mobility Prods. Corp.*, 470 F.3d 1252, 1258 (8th Cir.2006).

Id. at 1058. That is, the Dunns had not eliminated all other possible explanations for their house fire, so they could not argue for *res ipsa loquitur* on rehearing. Here, there is no other plausible explanation (as there was no evidence whatsoever of Mary Curtis ingesting morphine tablets other than through Nurse Dawson's administration thereof) for Mary Curtis's death by "morphine intoxication," per the death certificate.

Similarly, in *Andrew v. Coster*, 408 P.3d 559 (Nev. 2017), whether the mistake alleged, resulted in the damages alleged, was an open question. An open question translates into no entitlement to *res ipsa loquitur*. Plaintiff Andrew believed that a catheter had been prematurely removed during a prostate surgery, and that his subsequent complications were a result thereof. Yet, whether the catheter was indeed removed negligently and prematurely was an open question under the circumstances, that would require some medical expertise to answer, regardless of whether the removing nurse followed doctor's orders or not.

In addition to the above, frankly desperate, argument, Respondents' further argument, to the effect that none of the exceptions from NRS 41A.100 apply, smacks of raw sophistry. It is painful to read Respondents' mental gymnastics in arguing that the "wrong medication" was administered to the "right body part," and that in effect Mary Curtis's brain was being treated when Nurse Dawson gave her morphine. Respondents pretend to make it out that Nurse Dawson just happened to choose the wrong medication for administration to treat Mary Curtis's brain. Not so. It would be more correct to say that the right medication was administered to the wrong brain.

Respondents point out that "[t]his 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." (RAB 42). Yet,

it should be self-evident that ***no part of Mary Curtis's body*** was "directly or proximately involved in the course of treatment" ***of another nursing home resident's conditions***.

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 Respondents 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 certainly a professional negligence *res ipsa loquitur*. The lower court erred as a matter of law in dismissing this case pursuant to N.R.S. 41A.071, and Ms. Latrenta prays this Court reverse the decision of the Clark County District Court and return this case below for trial by jury.

RESPECTFULLY SUBMITTED this 15th day of November, 2019.

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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 6,244 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 15th day of November, 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 15th day of November, 2019, I submitted the foregoing ***Appellants' Reply Brief*** to the Supreme Court of Nevada's electronic docket for filing and service upon the following:

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