

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 LYNN YAFCHAK, Statutory Heir and
3 Special Administrator to the ESTATE
4 OF JOAN YAFCHAK, Deceased,

5 Appellants,

6 vs.

7 LIFE CARE CENTERS OF
8 AMERICA, a foreign corporation d/b/a
9 LIFE CARE CENTER OF SOUTH
10 LAS VEGAS; and DOES 1-10,
11 inclusive,

12 Respondent.

Case No.: 82746

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Appeal from the Eighth Judicial
District, The Honorable Crystal Eller
Presiding.

13 **APPELLANTS' OPENING BRIEF**

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1. Real Party in Interest Lynn M. Yafchak is a party to this action in her individual capacity and as special administrator to the estate of Joan Yafchak.

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1 **I. JURISDICTIONAL STATEMENT**

2 The Supreme Court of Nevada has jurisdiction over this matter because the
3 district court issued a final order and judgment dismissing Plaintiff/Appellant Lynn
4 Yafchak's Complaint pursuant to NRS 41A.071 because it did not include a medical
5 expert's affidavit supporting the allegations contained in the action. The primary
6 question on appeal is whether Ms. Yafchak's claims constitute ordinary, rather than
7 professional, negligence as provided in *Est. of Curtis v. S. Las Vegas Med. Invs.,*
8 *LLC*, 136 Nev. 350 (2020).

9 Defendant/Respondent Life Care Centers of America dba Life Care Center of
10 South Las Vegas (hereinafter "LCC") filed its Motion to Dismiss Plaintiffs'
11 Complaint for alleged failure to comply with NRS 41A.071 on December 22, 2020.
12 Plaintiff/Appellant Lynn Yafchak filed an Opposition on January 11, 2021 and LCC
13 filed a Reply on January 20, 2021. The district court heard the matter on January
14 27, 2021, and granted the motion. The Order Granting Defendant Life Care Center
15 of South Las Vegas' Motion to Dismiss Plaintiffs' Complaint was filed on March
16 10, 2021, and the related Notice of Entry of Order was filed on March 11, 2021.

17 Appellant Lynn Yafchak asserts that the district court's ruling is a final order
18 and judgment dismissing her Complaint and establishes the Supreme Court of
19 Nevada's jurisdiction over this appeal.

II. ROUTING STATEMENT

This case is presumptively retained by the Supreme Court because it raises “as a principal issue a question of statewide public importance.”¹ Nev. R. App. P. 17(a)(12). A principal issue in this case is whether actions against nursing homes are subject to NRS 41A.071’s medical affidavit requirement, which requires the determination of whether nursing homes are NRS 41A.017 providers of health care. There is conflicting law on this subject which requires clarification and resolution, including a case opinion from this Court that Appellant humbly requests it overturn. The issue is one of statewide public importance so nursing homes know if they are protected by NRS 41A and attorneys know how to proceed with actions against nursing homes.

According to statute, nursing homes are not providers of health care and actions against them are not subject to NRS 41A.071’s affidavit requirement. Nev. Rev. Stat. 41A.015, 41A.017, 41A.071. The Court of Appeals in *Betts v. Royal Springs Healthcare & Rehab., Inc.*, No. 77323-COA, 2019 WL 5681088 (Nev. App. Oct. 31, 2019) found that nursing homes are not providers of health care because they are not identified in NRS 41A.017. 2019 WL 5681088, at *3. *Betts* is not

¹ The issues on appeal also concern inconsistencies between a published decision of the Supreme Court and an unpublished decision of the Court of Appeals. However, the Court of Appeals decision is **not** published, so the instant case is not presumptively retained by the Supreme Court for this reason alone. NRAP 17(a)(12).

1 published, is not precedent, and it conflicts with the Supreme Court on this issue,
2 *infra*, but it is in accordance with the plain language of NRS 41A.017, which creates
3 the potential for confusion in the future.

4 According to *Est. of Curtis v. S. Las Vegas Med. Invs., LLC*, 136 Nev. 350
5 (2020), NRS 41A.017 need not be examined to determine if an action is a matter of
6 professional negligence subject to NRS 41A.017's affidavit requirement; instead,
7 one must "evaluate whether the claim involves medical diagnosis, judgment, or
8 treatment, or is based on the performance of nonmedical services." *Curtis*, 136 Nev.
9 at 354. If it involves medical diagnosis, judgment, or treatment, it is likely a claim
10 for professional negligence subject to NRS 41A.071. *Id.*

11 Appellant humbly asks this Court to overturn *Curtis* on this issue and defer to
12 NRS 41A.017's plain language. Whether this Court overturns its decision is a matter
13 of statewide importance and also makes this case appropriate for the Supreme Court
14 to retain.

1 **III. ISSUES ON APPEAL**

- 2 **A. WHETHER *EST. OF CURTIS V. S. LAS VEGAS MED. INVS.,***
3 ***LLC*, 136 NEV. 350 (2020) APPLIES TO THIS CASE BECAUSE**
4 **UNLIKE *CURTIS*, THIS CASE DOES NOT INVOLVE A**
5 **SINGULAR EVENT CAUSED BY EASILY ASCERTAINED**
6 **INDIVIDUALS WHO ARE CLEARLY PROVIDERS OF**
7 **HEALTH CARE UNDER NRS 41A.017 (A NURSE AND A**
8 **PHYSICIAN).**
- 9 **B. IF *CURTIS* APPLIES, WHETHER THE ALLEGATIONS AND**
10 **CLAIMS IN APPELLANT’S COMPLAINT REGARDING**
11 **DECEDENT JOAN YAFCHAK’S URINARY TRACT**
12 **INFECTION AND FALLS AT LCC SOUND IN ORDINARY**
13 **NEGLIGENCE OR PROFESSIONAL NEGLIGENCE.**
- 14 **C. WHETHER *CURTIS* SHOULD BE OVERTURNED BECAUSE**
15 **THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF**
16 **NRS 41A.017, 41A.071, AND 41.1395 SHOWS THAT THE**
17 **LEGISLATURE INTENDED TO EXCLUDE NURSING HOMES**
18 **AS NRS 41A PROVIDERS OF HEALTH CARE BECAUSE THE**
19 **PROTECTION OF OLDER AND VULNERABLE PEOPLE**
20 **OVERRIDES THE PROTECTION OF NURSING HOMES AS**
21 **MEDICAL PROVIDERS.**

1 **IV. STATEMENT OF THE CASE**

2 Plaintiff/Appellant Lynn Yafchak is the daughter of decedent Joan Yafchak,
3 Joan's heir, and the Special Administrator of her estate. Joint Appendix ("JA")
4 0001–0009 (Complaint) at ¶ 2. Joan was a resident and patient at Life Care Centers
5 of America dba Life Care Center of South Las Vegas (hereinafter "LCC" or
6 "Respondent"), where their negligent care caused her to sustain multiple physical
7 injuries and infections, which ultimately caused her death.

8 In the underlying action, Lynn pled four causes of action: (1) Abuse/Neglect
9 of an Older Person pursuant to NRS 41.1395, (2) Negligence, (3) Wrongful Death
10 under NRS 41.085, and (4) Survival Action under NRS 41.100. JA 0001–0009
11 (Complaint). She did not plead professional negligence pursuant to NRS Chapter
12 41A (hereinafter "NRS 41A").

13 LCC filed its Motion to Dismiss Plaintiffs' Complaint for alleged failure to
14 comply with NRS 41A.071 on December 22, 2020, arguing that the allegations in
15 Appellant's complaint sounded in professional negligence, not ordinary negligence.
16 JA 0011–0026 (LCC's Motion to Dismiss). Lynn Yafchak filed an Opposition on
17 January 11, 2021, and LCC filed a Reply on January 20, 2021. JA 0027–0091
18 (Opposition) and JA 0092–0101 (Reply). The district court heard the matter on
19 January 27, 2021 and granted the motion, dismissing Plaintiff/Appellant Lynn
20 Yafchak's Complaint pursuant to NRS 41A.071 because it did not include a medical
21 expert's affidavit supporting the allegations contained in the action. JA 0114–0121

1 (Order). The Order Granting Defendant LCC’s Motion to Dismiss Plaintiffs’
2 Complaint was filed on March 10, 2021, and the related Notice of Entry of Order
3 was filed on March 11, 2021. JA 0114–0121 (Order) and JA 0122–0132 (Notice of
4 Entry of Order).

5
6 **V. THE STANDARD OF REVIEW IS *DE NOVO* REVIEW**

7 **A. STANDARD OF REVIEW FOR DISMISSAL OF A
8 COMPLAINT PURSUANT TO NRS 41A.071**

9 Dismissal of a complaint pursuant to the affidavit requirement of
10 NRS 41A.071 is treated as dismissal under NRCP 12(b)(5) and is therefore subject
11 to review *de novo*. *Zohar v. Zbiegien*, 130 Nev. 733, 736 (2014).

12 “The NRS 41A.071 affidavit requirement is a preliminary procedural rule
13 subject to the notice-pleading standard, and thus, it must be ‘liberally construe[d]
14 . . . in a manner that is consistent with our NRCP 12 jurisprudence.’” *Id.* at 739.
15 An NRCP 12(b)(5) motion to dismiss for failure to state a claim should not be
16 granted unless it appears beyond a doubt that the plaintiff could prove no set of facts
17 that would entitle them to relief. *Pankopf v. Peterson*, 124 Nev. 43, 45 (2008).
18 Nevada is a notice-pleading jurisdiction and, therefore its courts liberally construe
19 pleadings to place into issue matters which are fairly noticed to the adverse party.
20 *Hay v. Hay*, 100 Nev. 196, 198 (1984) (citing NRCP 8(a)). When considering an
21 NRCP 12(b)(5) motion, every factual recitation is accepted as true and all reasonable
inferences are drawn in favor of the plaintiff. *Id.* at 198.

1 **B. STANDARD OF REVIEW FOR ISSUES OF STATUTORY**
2 **CONSTRUCTION**

3 Issues of statutory construction are reviewed by the Supreme Court *de novo*.
4 *Zohar*, 130 Nev. at 737. If a statute is clear on its face, the Court will not look
5 beyond its plain language. *Id.* If it is susceptible to more than one reasonable
6 interpretation, however, the Court must resolve that ambiguity by looking to the
7 statute’s legislative history and “construing the statute in a manner that conforms to
8 reason and public policy.” *Id.*

9 **VI. FACTUAL BACKGROUND**

10 Joan Yafchak was born on August 28, 1937, and is therefore an “older person”
11 under NRS §41.1395(4)(d) at all relevant times in this case. JA 0001–0009
12 (Complaint) at ¶¶ 1, 6, 24.

13 On October 9, 2018, Joan had surgery at Desert Springs Hospital and was
14 released to College Park Rehabilitation Center, where she was infected with
15 *Clostridioides difficile* (C. diff) while undergoing rehabilitation. *Id.* at ¶¶ 7–8. Joan
16 was released home, fully recovered, on February 20, 2019. *Id.* at ¶ 8.

17 On February 24, 2019, Joan was taken by ambulance back to Desert Springs
18 Hospital, where she was diagnosed with dehydration, dementia, bloody stool, and C.
19 diff infection. *Id.* at ¶ 9. The hospital stabilized her and transferred her to Life Care
20 Center of South Las Vegas (LCC), a nursing home, on February 28, 2020 for
21 rehabilitation and care. *Id.*

Joan was dependent on LCC to assist her with daily basic needs, including toileting assistance, turning her in bed, bathing, feeding, fluid-intake, and preventing falls. *Id.* at ¶15. Such care is generally provided by nursing homes to their residents. *Id.*

LCC also knew Joan was a high risk for falling, but she fell numerous times while in Respondent's care. *Id.* at ¶¶ 9–10, 15. For example, one incident occurred on April 19, 2019 when Joan was sleeping in her room and fell out of her bed onto the ground, fracturing her collar bone. *Id.* at ¶ 11.

On May 11, 2019, after Joan slept for three days straight and exhibited irregular vital signs, LCC transferred her to Desert Springs Hospital, where she was immediately admitted to the intensive care unit and diagnosed with a urinary tract infection (UTI), *Escherichia coli* (*E. coli*), and sepsis. *Id.* at ¶¶ 12–13.

On May 15, 2019, Desert Springs Hospital informed Lynn there was nothing further they could do for her mother and released her to Infinity Hospice, where she died on May 17, 2019. *Id.* at ¶ 14. Joan's injuries and death were caused by Respondent LCC's failure to properly care for her, provide basic care, and protect her from harm. *Id.* at ¶¶ 16–17.

VII. SUMMARY OF THE ARGUMENT

Appellant makes three arguments in this appeal.

First, the case of *Est. of Curtis v. S. Las Vegas Med. Invs., LLC*, 136 Nev. 350 (2020), which involved the same nursing home defendant as here, LCC, found that

1 the complaint was subject to NRS 41A.071, however, *Curtis* is not applicable to the
2 present case because the facts and culpable parties differ. The negligence in *Curtis*
3 was a singular event caused by a nurse and doctor, who are clear providers of health
4 care defined in NRS 41A.017, whereas the negligence in this case was caused by the
5 combined actions and failures of numerous people failing to properly care for Joan.
6 No single action or person caused Joan's injuries, like in *Curtis*. Therefore, the
7 district court's reliance on *Curtis* was in error and its order should be reversed, as
8 nursing homes are not NRS 41A.017 providers of health care and Appellant's
9 complaint is not subject to NRS 41A.071.

10 Second, if this Court finds that *Curtis* does apply, then Appellant narrows her
11 claims and damages to those related to Joan's UTI and falls, which, according to the
12 law and analysis in *Curtis*, were caused by ordinary negligence, not professional
13 negligence, and are thus not subject to NRS 41A.071. Therefore, the district court's
14 finding that Appellant's allegations concerning Joan's UTI and falls sounded in
15 professional negligence was in error and should be reversed.

16 Third, Appellant respectfully requests this Court to find that the Legislature
17 knowingly excluded nursing homes from NRS 41A.017, even though they
18 administer medical services, and exempt NRS 41.1395 cases, including the present
19 Yafchak case, from being subject to NRS 41A.071 and NRS 41A generally. The
20 plain language and legislative history of NRS 41A.017, 41A.071, 41.1395, and other
21 relevant statutes demonstrates that the Legislature knowingly excluded nursing

1 homes from NRS 41A.017. Older and vulnerable persons, as defined in
2 NRS 41.1395, are in a position to be taken advantage of by their caretakers and
3 caretakers do in fact take advantage of them, but prior to the enactment of
4 NRS 41.1395, it was difficult to find attorneys to pursue such cases because of their
5 low value. NRS 41.1395 is designed to encourage civil attorneys to take these cases
6 to help protect them. The concerns surrounding frivolous lawsuits and unpredictably
7 high verdicts, which instigated NRS 41A protections for providers of health care,
8 simply are not present when the plaintiffs are older, infirm residents of nursing
9 homes. The Legislature decided that given older/vulnerable persons' helplessness
10 and complete reliance on their caretakers, the need to protect them overrides the need
11 to protect nursing homes as medical providers, which is why the Legislature
12 intentionally excluded nursing homes from NRS 41A.017's definition of provider of
13 healthcare. Finding that the Legislature knowingly excluded nursing homes from
14 NRS 41A.017, regardless of the fact they administer medical services, would
15 effectively overrule parts of *Curtis* and require reversal of the district court's order
16 in this case.

17 **VIII. LEGAL ARGUMENT**

18 NRS Chapter 41A (hereinafter "NRS 41A") contains the vast majority of
19 Nevada's restrictions and requirements governing cases alleging professional
20
21

1 negligence.² NRS 41A.071 provides that if a party files an action for professional
2 negligence against a provider of health care without a supporting medical expert
3 affidavit, the district court must dismiss the action. Nev. Rev. Stat. 41A.071; *Est. of*
4 *Curtis v. S. Las Vegas Med. Invs., LLC*, 136 Nev. 350, 350 (2020). “Professional
5 negligence,” otherwise known as medical malpractice,³ is defined as “the failure of
6 a **provider of health care**, in rendering services, to use reasonable care, skill or
7 knowledge ordinarily used under similarly trained and experienced providers of
8 health care.” Nev. Rev. Stat. 41A.015 (emphasis added). Therefore, in order to be
9 subject to NRS 41A.071’s affidavit requirement, an action must (1) make allegations
10 that sound in professional negligence; *and* (2) be asserted against a provider of health
11 care.

12 Providers of health care are expressly listed in NRS 41A.017:

13 “Provider of health care” means a physician licensed pursuant to
14 chapter 630 or 633 of NRS, physician assistant, dentist, licensed nurse,
15 dispensing optician, optometrist, registered physical therapist, podiatric
16 physician, licensed psychologist, chiropractor, doctor of Oriental
17 medicine, medical laboratory director or technician, licensed dietitian
or a licensed hospital, clinic, surgery center, physicians’ professional

18 ² Also applicable to professional negligence actions are NRS 7.095, which limits
19 attorney fees, and NRS 42.021, allowing evidence of collateral benefits at trial and
20 judgment creditors to make periodic payments. When this brief refers to NRS 41A,
21 it means all professional negligence requirements, including those outside NRS 41A
such as NRS 7.095 and NRS 42.021.

³ The terms “professional negligence” and “medical malpractice” are used
interchangeably in this brief.

1 corporation or group practice that employs any such person and its
2 employees.

3 Nev. Rev. Stat. 41A.017 (statute in effect through December 31, 2019, at the time
4 Appellant’s complaint was filed).

5 Nursing homes, also known as skilled nursing facilities (SNFs) defined in
6 NRS 449.0039, are not included in NRS 41A.017. Certain types of facilities that
7 employ doctors, nurses, and other types of individual providers of health care are
8 included in NRS 41A.017—“licensed hospital, clinic, surgery center, physicians’
9 professional corporation or group practice”—but not nursing homes. Nev. Rev.
10 Stat. 41A.017. Respondent LCC, as a nursing home, is not a provider of health care
11 according to NRS 41A.017, thus, Appellant was not required to attach a medical
12 affidavit and the district court erred in ruling that she was. This Court should reverse
13 the district court because (1) *Curtis* does not apply to this case because the
14 negligence was clearly attributable to actions by a nurse and doctor, express
15 providers of health care under NRS 41A.017, and here, the negligence is attributable
16 to the combined actions of numerous LCC employees, and nursing homes are not
17 providers of health care; or alternatively (2) if *Curtis* does apply, Appellant limits
18 her appeal to claims related to her UTI and falls at LCC, which sound in ordinary
19 negligence rather than professional negligence, according to the *Curtis* analysis; or
20 alternatively (3) nursing homes are never NRS 41A.017 providers of health care,
21 even when administering medical services, because the Legislature intentionally

1 omitted them from NRS 41A.017 in furtherance of the objectives of NRS 41.1395,
2 as the need to protect older/vulnerable persons overrides the need to protect nursing
3 homes as medical providers.

4
5 **A. CURTIS DOES NOT APPLY TO THE INSTANT CASE
6 BECAUSE THE FACTS DIFFER IN CRITICAL WAYS**

7 *Curtis* involved the same appellant as the instant case, LCC, but there is a key
8 difference in the facts—the culpable individuals working in the course and scope of
9 employment with LCC in *Curtis* were a nurse and physician, but the Respondent did
10 not include those individuals as defendants. *Est. of Curtis v. S. Las Vegas Med.*
11 *Invs., LLC*, 136 Nev. 350 (2020). Nurses and physicians are expressly stated as
12 providers of health care in NRS 41A.017. The instant case does not involve a
13 singular event with clear culpable parties causing Joan’s injuries, so it was proper to
14 sue only LCC.

15 In *Curtis*, licensed nurse Ersheila Dawson worked at LCC during the time
16 Mary Curtis was a resident at LCC. *Id.* at 351. Curtis was a patient of LCC, who
17 “was to render professional services necessary to maintain Curtis’s physical and
18 mental health.” *Id.* Nurse Dawson accidentally administered to Curtis 120
19 milligrams of morphine that was prescribed for another patient. *Id.* A physician
20 ordered LCC to administer Narcan to counteract the morphine. *Id.* The following
21 morning, Curtis was unresponsive and passed away three days later from morphine

1 intoxication. *Id.* Notably, nurses and physicians are expressly listed as providers of
2 health care in NRS 41A.017.

3 Laura Latrenta, Curtis’s daughter and the heir and personal representative of
4 her estate (collectively “the Estate”), filed a lawsuit against only LCC alleging
5 several claims, including elder abuse and neglect under NRS 41.1395 and wrongful
6 death. *Id.* The Estate did not allege professional negligence. *Id.* The complaint
7 alleged that Nurse Dawson administered the wrong medication to Curtis and
8 thereafter failed to properly monitor or treat her, which led to her death. *Id.* at 352.
9 It alleged that “LCC’s negligent mismanagement, understaffing, and operation of
10 the nursing home led to the erroneous administration of morphine and the failure to
11 treat and monitor Curtis as the morphine took her life.” *Id.*

12 LCC moved for summary judgment because the Estate did not attach an
13 NRS 41A.071 affidavit to its Complaint. *Id.* The district court granted the motion
14 and dismissed the case, finding that “the gravamen of the complaint’s allegations
15 sounded in professional negligence” even though there was not a claim for it. *Id.*
16 The Estate appealed, arguing that (1) its complaint was not subject to NRS 41A.071
17 because LCC, as a nursing home, was not a provider of health care, (2) the
18 complaint’s allegations sounded in ordinary negligence, not professional negligence,
19 and (3) requiring an expert affidavit defeated the purpose of NRS 41.1395. *Id.*

20 In its analysis, the Supreme Court of Nevada first noted that “a licensed nurse
21 falls within the definition of ‘provider of health care’” under NRS 41A.017. *Id.* at

352 n.1. The Court then engaged in a discussion of NRS 41A and negligent hiring, training, and supervision claims against nursing homes, and stated that such claims “cannot be used to circumvent NRS Chapter 41A’s requirements governing professional negligence lawsuits when the allegations supporting the claims sound in professional negligence.” *Id.* at 353. If the underlying negligence sounded in professional negligence, the complaint was subject to NRS 41A.071’s affidavit requirement. *Id.* at 354. The Court then analyzed how to determine if negligence was ordinary or professional, which is discussed in detail and applied to the instant case in the next section, Subsection VIII(C), *infra.* *Id.* at 354–58. The Court ultimately found that Nurse Dawson’s administration of morphine to Curtis was ordinary negligence and the subsequent failure to monitor was professional negligence. *Id.* at 356–58.

The underlying negligence in *Curtis* involved the administration of morphine by Nurse Dawson and orders from the physician at LCC regarding subsequent care. Licensed nurses and physicians are undoubtedly providers of health care, expressly listed in NRS 41A.017. Nev. Rev. Stat. 41A.017 (“‘Provider of health care’ means a physician licensed pursuant to chapter 630 [physician] or . . . licensed nurse . . .”). The negligence and cause of the Estate’s damages was a singular event easily attributed to particular individuals working in the course and scope of their employment at LCC—a nurse’s mistaken administration of morphine to the wrong patient and a physician’s orders regarding monitoring the patient. *Curtis*, 136 Nev.

1 at 356–58. *Notably, this Court in Curtis did not find that nursing homes are*
2 *providers of health care under NRS 41A.017 subject to NRS 41A.071’s affidavit*
3 *requirement.*

4 The facts in the instant case are dissimilar to *Curtis*. Appellant did not assert
5 a claim for negligent hiring, retention, and supervision in her complaint. JA 0001–
6 0009 (Complaint). More importantly, there was no singular event that caused Joan
7 Yafchak’s injuries and death, and the negligence that occurred is not attributable to
8 particular individuals who are NRS 41A.017 providers of health care. It was the
9 combined actions and failures of numerous people not properly caring for Joan,
10 providing basic care, or protecting her from harm, that caused Joan’s demise. *Id.* at
11 ¶¶ 16–17. LCC as a whole, due to poor staffing practices and unqualified employees,
12 failed to assist Joan with her daily basic needs, including toileting, bathing, feeding,
13 fluids, and making sure she did not fall. *Id.* at ¶¶ 15, 17.

14 The present case differs from *Curtis* because Appellant did not circumvent
15 NRS 41A by failing to sue clear providers of health care, like the Estate did in *Curtis*
16 when it did not sue the culpable nurse and physician. There was no clear provider
17 of health care (as defined in NRS 41A.017) who caused Joan’s damages. Therefore,
18 the defendant and culpable party in this case is more straightforward than in *Curtis*.
19 LCC is the culpable party and defendant, and nursing homes are not providers of
20 health care under NRS 41A.017. Therefore, an NRS 41A.071 medical affidavit was
21

1 not required to support Appellant Yafchak's complaint and the district court's
2 dismissal of this case should be reversed.

3
4 **B. JOAN'S DAMAGES CAUSED BY THE UTI AND FALLS ARE A**
5 **RESULT OF ORDINARY NEGLIGENCE, NOT**
6 **PROFESSIONAL NEGLIGENCE, AND THUS ARE NOT**
7 **SUBJECT TO NRS 41A.071'S AFFIDAVIT REQUIREMENT**

8 For this argument, Appellant Yafchak is pursuing only her claims for damages
9 related to Joan's UTI and falls at Respondent LCC. This means that if this Court
10 accepts this argument to the exclusion of the other arguments made on appeal,
11 Appellant waives her damages related to injuries caused by professional negligence.
12 Appellants' allegations related to Joan's UTI and falls at LCC sound in ordinary
13 negligence, not professional negligence, because they involve nonmedical services
14 and/or services that fall within the common knowledge exception, and thus are not
15 subject to NRS 41A.071.

16 **1. Actions Alleging Negligence while Providing Nonmedical**
17 **Services or Services that Fall within the Common Law**
18 **Exception are Not Subject to NRS 41A.071**

19 A court must look to the "gravamen or substantial point or essence" of each
20 claim made in a complaint to determine if it sounds in ordinary versus professional
21 negligence. *Curtis*, 136 Nev. at 354. The court must evaluate whether the claim
"involve[s] medical diagnosis, judgment, or treatment, or [is] based on [the]
performance of nonmedical services." *Id.* (citing *Szymborski v. Spring Mountain*
Treatment Ctr., 133 Nev. 638, 641 (2017)). If the alleged breach involves medical

1 judgment, diagnosis, or treatment, and the jury can only evaluate the claim after a
2 medical expert presents the standard(s) of care, it is likely a claim for professional
3 negligence. *Id.* “If, on the other hand, the reasonableness of the health care
4 provider’s actions can be evaluated by jurors on the basis of their common
5 knowledge and experience, then the claim is likely based in ordinary negligence.”

6 *Id.*

7 There is also a narrow exception, the “common knowledge exception,” where
8 the alleged negligence “involves a medical diagnosis, judgment, or treatment but the
9 jury is capable of evaluating the reasonableness of the health care provider’s actions
10 using common knowledge and experience.” *Id.* “The common knowledge
11 exception provides that where lay persons’ common knowledge is sufficient to
12 determine negligence without expert testimony, the affidavit requirement does not
13 apply.” *Id.* at 350.

14 This Court held in *Curtis* that the common knowledge exception “provides
15 sound guidance to distinguish between ordinary and professional negligence in order
16 to determine whether a party’s claim is subject to NRS 41A.071’s affidavit
17 requirement,” and adopted a two-part test from the Supreme Court of Michigan to
18 determine whether to apply the exception. *Id.* at 355–56. First, does the claim
19 pertain to an action that occurred in the course of a professional judgment? *Id.* at
20 356. Second, does the claim raise questions of medical judgment outside the scope
21

1 of common knowledge and experience? *Id.* If both questions are answered
2 affirmatively, then NRS 41A.071 applies to the action. *Id.*

3 In *Curtis*, this Court found that the mistaken administration of another
4 patient's morphine "constitute[d] ordinary negligence that a lay juror could assess
5 without expert testimony" and the related claim was not subject to NRS 41A.071.
6 *Id.* at 359 (reversing and remanding the matter to the district court in this respect).
7 However, LCC's failure to monitor the patient after administering the medication
8 was subject to NRS 41A.071 because "those allegations challenge whether the
9 health care provider's medical judgment violated the established duty of care and
10 require expert testimony to support." *Id.* This Court thus divided the claims alleged
11 by the plaintiff in *Curtis* into those subject to NRS 41A.071 and those that are not.
12 *See generally, id.* Appellant Yafchak asks the Court to do the same here.

13
14 **2. Appellant's Damages Resulting from Joan's Falls and UTI at**
15 **Respondent LCC were Caused by LCC's Negligence in**
Providing Nonmedical Services or Services that Fall Within
the Common Knowledge Exception

16 Appellant's claims and damages related to her falls and UTI at LCC were
17 caused by Respondent LCC's negligence in providing nonmedical services to Joan.
18 Alternatively, they fall within the common knowledge exception. Indeed, LCC
19 provided medical services to Joan, but LCC was also responsible for providing care
20 for "her daily basic needs, including toileting assistance, . . . bathing, . . . and making
21 sure she does not fall." JA 0001–0009 (Complaint) at ¶ 15. Joan's injuries were

1 caused by LCC's failure to properly care for her in this manner, failure to provide
2 basic care, and failure to protect her from harm. *Id.* at ¶¶ 16–17. These services
3 relate to ordinary negligence and not medical services, therefore, Appellant's claims
4 related to Joan's falls and UTI are not subject to NRS 41A.071's affidavit
5 requirement.

6 According to *Curtis, supra*, there are three categories in which LCC's services
7 may fall: (1) medical services, which involve medical judgment, diagnosis, or
8 treatment, the appropriateness of which cannot be evaluated without a medical
9 expert to present the standard of care; (2) nonmedical services, which can be
10 evaluated by jurors based on their common knowledge and experience, without
11 expert testimony; or (3) services within the common knowledge exception, which
12 involve medical judgment, diagnosis, or treatment and would typically be in the
13 "medical services" category, but are such that jurors are capable of evaluating the
14 medical provider's actions using common knowledge and experience, without expert
15 testimony. *Curtis*, 136 Nev. at 354–55.

16 Here, Joan's falls and UTI at LCC were caused by LCC's negligence in
17 providing nonmedical services to Joan and/or fall within the common knowledge
18 exception.

1 **a. Appellant’s Claim Related to Joan’s Urinary Tract**
2 **Infection**

3 **i. The UTI claim arises from nonmedical services**

4 Joan’s development of a UTI was the result of Respondent’s failure to assist
5 Joan with her basic, nonmedical needs. “Nonmedical services” relating to personal
6 care are statutorily defined in NRS 449.01517:

7 “Nonmedical services related to personal care to elderly persons or
8 persons with disabilities” includes, without limitation:

- 9 1. The elimination of wastes from the body;
10 2. Dressing and undressing;
11 3. Bathing;
12 4. Grooming;
13 5. The preparation and eating of meals;
14 6. Laundry;
15 7. Shopping;
16 8. Cleaning;
17 9. Transportation; and
18 10. Any other minor needs related to the maintenance of personal
19 hygiene.

20 Nev. Rev. Stat. 449.01517.

21 This is not a complete list of all nonmedical services; it contains only those
related to personal care. *Id.* As anyone who has ever had a UTI before or who has
been educated about UTIs knows, UTIs are caused when bacteria from the genital
and anal area enter the urethra and cause an infection in the urinary tract. Holding
urine in the bladder can increase the chances of a UTI because the bacteria sit and
multiply in the bladder. It is common knowledge and experience among laypersons

1 that improper cleaning of the genital and anal area (*i.e.* bathing and hygiene, Nev.
2 Rev. Stat. 449.01517(3), (10)) and improper toileting (*i.e.* eliminating wastes from
3 the body, Nev. Rev. Stat. 449.01517(1)) can cause a UTI.

4 A medical expert is not needed to provide the standard of care regarding
5 bathing, cleaning the genital and anal area, changing underwear, how often a bladder
6 should be emptied, or other hygiene needs and daily care that may cause or increase
7 bacteria in this area because laypersons experience this on a daily basis and have
8 been educated about it since childhood. Respondent LCC's responsibility to bathe,
9 toilet, and assist Joan with hygiene on a regular basis is a nonmedical service it
10 provides to its residents, even if LCC elects to have a nurse perform the tasks. Lay
11 jurors can evaluate whether LCC was negligent in bathing, toileting, and assisting
12 Joan with hygiene without a medical expert presenting the standard of care.
13 Therefore, claims related to Joan's UTI are not medical and are not subject to
14 NRS 41A.071.

15
16 **ii. Alternatively, the UTI claim falls within the common knowledge exception**

17 Applying *Curtis*'s common knowledge exception test also shows that
18 Appellant's claim related to Joan's UTI is not subject to NRS 41A.071. The test
19 asks whether (1) the claim pertains to an action that occurred in the course of a
20 professional judgment; and (2) the claim raises questions of medical judgment
21 outside the scope of common knowledge and experience. *Curtis*, 136 Nev. at 355–

1 56. If the answer to both parts is “yes,” then the claim is subject to NRS 41A.071.

2 *Id.*

3 Applying the first part of the test, LCC’s services leading to Joan’s UTI were
4 not provided in the course of a professional judgment, as stated earlier in this section.
5 Bathing and toileting needs are commonly known and experienced by everyone and
6 do not require a professional’s assessment or judgment, so the first part of the *Curtis*
7 common knowledge test is not satisfied. Even assuming *arguendo* that the answer
8 to the first part is affirmative, the claim does not raise questions of medical judgment
9 outside the scope of a layperson’s knowledge and experience and thereby fails the
10 second part of the test. Lay jurors can evaluate whether LCC was negligent in
11 bathing and toileting Joan using their own common knowledge and experience,
12 without a medical expert presenting the standard of care.

13 Based on the foregoing, Appellant’s claim related to Joan’s UTI is based on
14 nonmedical services, or if the services are found to be medical, the claim falls within
15 the common knowledge exception. Either way, it is not subject to NRS 41A.071’s
16 affidavit requirement and should not have been dismissed.

17
18 **b. Appellant’s Claim Related to Joan’s Falls at LCC Falls
within the Common Knowledge Exception**

19 Again, the common knowledge exception test asks whether (1) the claim
20 pertains to an action that occurred in the course of a professional judgment; and
21 (2) the claim raises questions of medical judgment outside the scope of common

1 knowledge and experience. *Curtis*, 136 Nev. at 355–56. If the answer to both parts
2 is “yes,” then the claim is subject to NRS 41A.071. *Id.*

3 Regarding Joan’s falls at LCC, the answer is “yes” to the first part of the test:
4 LCC’s initial assessment and determination that Joan was a fall risk required
5 professional judgment, and any measures implemented to prevent falls occurred in
6 the course of this professional judgment.

7 As to the second part of the test, there are two subparts: (2a) whether LCC’s
8 initial assessment and determination of Joan as a fall risk raises questions of medical
9 judgment outside the scope of common knowledge and experience; and (2b) whether
10 the measures implemented by LCC to prevent falls raise such questions of medical
11 judgment.

12 As to subpart 2a, the initial determination of whether someone is a fall risk
13 would typically require medical judgment and a layperson would need expert
14 testimony explaining what factors are examined. However, **Respondent admits**
15 **that Joan was a fall risk.** JA 0011–0026 (Motion to Dismiss) at 0014 n.1. This
16 means that LCC’s assessment and determination of Joan as a fall risk is not at issue.
17 The jury would not need to evaluate it in any way because all parties agree that Joan
18 was indeed a fall risk. Therefore, LCC’s initial assessment and determination of
19 Joan as a fall risk **does not** raise any questions of medical judgment outside the scope
20 of common knowledge and experience.

1 As to subpart 2b, the answer is “no.” Joan was a fall risk. Lay jurors can use
2 their common knowledge and experience to review measures implemented by LCC
3 to prevent Joan from falling and determine whether these measures were reasonable.
4 A medical expert is not needed to present the standard of care because laypersons
5 have the experience of everyday life to know what prevents falls and what is
6 inadequate. For example, the Complaint describes one incident that occurred when
7 Joan was sleeping in her room and fell out of her bed onto the ground, fracturing her
8 collar bone. JA 0001–0009 (Complaint) at ¶ 11. If the evidence shows there was
9 not a bed railing or rail guard in place to prevent Joan from falling out of bed, or
10 some other preventative measure, then the jury is capable of using their own
11 knowledge and experience to determine whether LCC had adequate measures in
12 place to prevent Joan from falling out of bed. If there was a bed railing in place, but
13 it was only two inches tall, the jury can use their knowledge and experience to decide
14 if the railing was sufficiently tall to prevent falls. Moreover, jurors can look at
15 LCC’s own fall assessment and plan for Joan, as well as LCC’s guidelines, policies,
16 and procedures regarding patients deemed as fall risks, in their process of determine
17 whether LCC implemented adequate measures to protect Joan from falling.

18 Based on the foregoing, the answers to the second part of the *Curtis* test are
19 both “no.” Appellant’s claim related to Joan’s falls at LCC falls within the common
20 knowledge exception and is not subject to NRS 41A.071’s affidavit requirement.

1 **C. *CURTIS* SHOULD BE OVERTURNED BECAUSE THE PLAIN**
2 **LANGUAGE AND LEGISLATIVE HISTORY OF NRS 41A.017,**
3 **NRS 41A.071, AND NRS 41.1395 SHOWS THAT NURSING**
4 **HOMES WERE INTENTIONALLY EXCLUDED AS**
5 **PROVIDERS OF HEALTH CARE BECAUSE THE NEED TO**
6 **PROTECT OLDER PERSONS FROM NEGLIGENT CARE**
7 **OVERRIDES THE NEED TO PROTECT NURSING HOMES**
8 **FROM FRIVOLOUS LAWSUITS**

9 **1. Background and Overview**

10 NRS 41.1395 applies to actions alleging injuries or losses suffered by an older
11 or vulnerable person based on abuse, neglect, or exploitation (hereinafter
12 collectively referred to as “elder abuse”). This case concerns neglect:

13 “Neglect” means the failure of a person who has assumed legal
14 responsibility or a contractual obligation for caring for an older person
15 or a vulnerable person, . . . to provide food, shelter, clothing or services
16 within the scope of the person’s responsibility or obligation, which are
17 necessary to maintain the physical or mental health of the older person
18 or vulnerable person.

19 Nev. Rev. Stat. 41.1395**Error! Bookmark not defined.**(4)(c). JA 0001–
20 0009 (Complaint) at ¶¶ 5–27.

21 An “older person” is one who is 60 years of age or older and a “vulnerable
22 person” is one who (1) has a physical or mental impairment that substantially limits
23 one or more major life activities; and (2) “[h]as a medical or psychological record
24 of the impairment or is otherwise regarded as having the impairment.” Nev. Rev.
25 Stat. 41.1395(4)(d)–(e). A vulnerable person is also one who has an intellectual
26 disability, severe learning disability, severe mental or emotional illness, or a terminal

1 or catastrophic illness or injury. *Id.* Joan Yafchak was both an older and vulnerable
2 person as defined by NRS 41.1395(4)(d)–(e). Appellant’s complaint alleged her as
3 an older person under the statute (JA 0001–0009 (Complaint) at ¶ 24), however, so
4 this brief will hereinafter use only the term “older,” even though the arguments apply
5 equally to vulnerable persons.

6 NRS 41.1395 provides benefits to attorneys who represent older persons to
7 incentivize attorneys to take their cases. If an older person suffers injury or death
8 caused by abuse or neglect, or loss of money or property caused by exploitation, the
9 defendant is liable for two times the actual damages incurred. Nev. Rev.
10 Stat. 41.1395(1). If it is proven by a preponderance of evidence that the defendant
11 acted with recklessness, oppression, fraud, or malice, then the defendant shall pay
12 the plaintiff’s attorney fees and costs. Nev. Rev. Stat. 41.1395(2).

13 Absent the double damages, fees, and costs provided for in NRS 41.1395,
14 representing elderly clients against nursing homes on a contingency fee is not
15 particularly profitable to attorneys compared to other personal injury cases (with the
16 exception of professional negligence cases, which also typically have narrow profit
17 margins). These clients are elderly and have a shorter future life expectancy, which
18 reduces future noneconomic and economic damages. They do not work, further
19 reducing their economic damages. They are already in nursing homes, which means
20 they are already getting 24/7 medical care to some extent and thus reduces their
21 economic damages related to medical care. They have pre-existing ailments severe

1 enough to place them in a nursing home, which reduces noneconomic damages.
2 Additionally, they often have problems with memory and communication.

3 The difficulties of elder abuse cases were the reason why NRS 41.1395 was
4 enacted. As explained *infra*, the promise of double damages, attorney fees, and costs
5 encourages attorneys to represent older persons in injury, death, and financial
6 exploitation cases, and thereby protect some of the most vulnerable people in the
7 population from harm inflicted upon them by the very people and facilities tasked
8 with caring for them. *See Nev. Rev. Stat. 41.1395(4)(c).*

9 Nursing homes are the facilities typically tasked with caring for older persons.
10 A “facility for skilled nursing,” otherwise known as a nursing home or skilled
11 nursing facility (SNF),⁴ is defined as “an establishment which provides continuous
12 skilled nursing and related care as prescribed by a physician to a patient in the facility
13 who is not in an acute episode of illness and whose primary need is the availability
14 of such care on a continuous basis.” Nev. Rev. Stat. 449.0039. Given this definition,
15 NRS 41.1395 applies to most, if not all, patients at a nursing home because they are
16 either older or vulnerable or both, and require nursing and related care on a
17 continuous, daily basis.

18 There are two different definitions of “providers of health care” in the Nevada
19 Revised Statutes, one in Chapter 629, “Healing Arts Generally,” and one in Chapter

20
21 ⁴ These terms are used interchangeably in this brief.

1 41A, “Actions for Professional Negligence.” Nursing homes fall into language in
2 the former but not the latter. NRS 629.031 was enacted in 1977 and states in
3 pertinent part:

4 **“Provider of health care” defined.** Except as otherwise provided by
5 a specific statute:

6 1. “Provider of health care” means:

7 (a) A physician licensed pursuant to chapter 630, 630A or 633 of
8 NRS;

9 (b) A physician assistant;

10 (c) A dentist;

11 (d) A licensed nurse;

12 (e) A person who holds a license as an attendant or who is certified
13 as an emergency medical technician, advanced emergency medical
14 technician or paramedic pursuant to chapter 450B of NRS;

15 (f) A dispensing optician;

16 (g) An optometrist;

17 (h) A speech-language pathologist;

18 (i) An audiologist;

19 (j) A practitioner of respiratory care;

20 (k) A licensed physical therapist;

21 (l) An occupational therapist;

(m) A podiatric physician;

(n) A licensed psychologist;

(o) A licensed marriage and family therapist;

(p) A licensed clinical professional counselor;

(q) A music therapist;

(r) A chiropractor;

(s) An athletic trainer;

(t) A perfusionist;

(u) A doctor of Oriental medicine in any form;

(v) A medical laboratory director or technician;

(w) A pharmacist;

(x) A licensed dietitian;

(y) An associate in social work, a social worker, an independent
social worker or a clinical social worker licensed pursuant to chapter
641B of NRS;

1 (z) An alcohol and drug counselor or a problem gambling counselor
2 who is certified pursuant to chapter 641C of NRS;

3 (aa) An alcohol and drug counselor or a clinical alcohol and drug
4 counselor who is licensed pursuant to chapter 641C of NRS; or

5 (bb) A medical facility as the employer of any person specified in
6 this subsection.

7 . . .

8 Nev. Rev. Stat. 629.031(1).

9 NRS 41A.017, added in 2004, provides as follows:

10 **NRS 41A.017 “Provider of health care” defined. [Effective**
11 **through December 31, 2019.]** “Provider of health care” means a
12 physician licensed pursuant to chapter 630 or 633 of NRS, physician
13 assistant, dentist, licensed nurse, dispensing optician, optometrist,
14 registered physical therapist, podiatric physician, licensed
15 psychologist, chiropractor, doctor of Oriental medicine, medical
16 laboratory director or technician, licensed dietitian or a licensed
17 hospital, clinic, surgery center, physicians’ professional corporation or
18 group practice that employs any such person and its employees.

19 Nev. Rev. Stat. 41A.017 (statute in effect through December 31, 2019).

20 The fact there are two different definitions for a “provider of health care”
21 indicates that not all medical providers are intended to be subject to NRS 41A.
NRS 41A.017 is a narrower definition because it cherry-picks select providers listed
in NRS 629.031 and identifies specific types of medical facilities instead of
including the catch-all provision in NRS 629.031: ““Provider of health care’ means:
. . . A medical facility as the employer of any person specified in this subsection.”

Nev. Rev. Stat. 629.031(1)(bb). This indicates that the Legislature did not intend

1 for all facilities that provide medical services to be subject to NRS 41A, even if they
2 employ providers of health care.⁵

3 Nursing homes are not expressly identified in either NRS 629.031 or
4 NRS 41A.017. They fall into NRS 629.031(1)(bb)'s catch-all provision because
5 they are a medical facility that employs physicians, nurses, therapists, and potentially
6 other persons specified in NRS 629.031. They do not fall into any part of
7 NRS 41A.017. Up until the *Curtis* decision was published in July 2020, complaints
8 against nursing homes did not attach NRS 41A.071 affidavits and the actions were
9 not subject to the requirements and restrictions of professional negligence actions
10 because nursing homes are not providers of health care under NRS 41A.017.
11 Attorneys and plaintiffs asserted claims for the abuse and neglect of older/vulnerable
12 persons and reaped the benefits of NRS 41.1395.

13 The case of *Est. of Curtis v. S. Las Vegas Med. Invs., LLC*, 136 Nev. 350
14 (2020) upended actions brought against nursing homes and actions brought under
15 NRS 41A and/or NRS 41.1395. The Court in *Curtis* ignored the five types of
16 medical facilities specified in NRS 41A.017 and ruled, essentially, that it does not
17 matter if a nursing home is a defendant; one must disregard the type of facility
18

19 ⁵ A medical laboratory is another type of medical facility that employs NRS 41A.017
20 providers of care (laboratory directors and technicians) but the laboratory itself is
21 not a provider of care. A pharmacy is an example of a facility that is not a provider
of health care under NRS 41A.017 but it provides medical services.

1 providing care and look at whether the services forming the basis of the neglect are
2 medical or nonmedical in nature. *Curtis*, 136 Nev. at 354–56. The Court ignored
3 NRS 41A.017 altogether in deciding if the defendant was a provider of health care,
4 which sets a dangerous precedent. One could also interpret *Curtis* as writing in
5 “nursing home” or “facility for skilled nursing” to NRS 41A.017’s definition of
6 providers of health care.

7 In doing so, ***Curtis* converts all cases against nursing homes into**
8 **professional negligence actions subject to NRS 41A.** In practice, *Curtis* requires
9 NRS 41A.071 affidavits attached to nearly all complaints against nursing homes
10 because there is little clarity and guidance about what services require “medical
11 diagnosis, judgment, or treatment.” *Id.* at 354. Virtually all services a nursing home
12 provides to its residents are administered by, or at the direction of, nurses and
13 physicians, and can thus be said to involve “medical diagnosis, judgment, or
14 treatment.” Sure enough, the defense bar is vigilantly filing motions to dismiss in
15 every case against a nursing home, and plaintiff attorneys simply cannot risk case
16 dismissal and potential legal malpractice by not attaching a medical affidavit.
17 Attorneys have been suing medical providers listed in NRS 41A.017 for years for
18 non-professional-negligence actions, like a slip and fall in the waiting room or a
19 chair breaking when a patient sits in it. *Curtis* makes nursing homes like any of
20 these providers that are clearly identified in NRS 41A.017, even though nursing
21 homes are not in the statute.

1 The problem with making nursing homes a provider of health care subject to
2 professional negligence requirements, and the reason why they continue to be
3 omitted from NRS 41A.017 even after proposing amendments to the Legislature to
4 be included, *infra*, is that the purposes of NRS 41.1395 are diametrically opposed to
5 those of NRS 41A. NRS 41.1395's goal is to encourage and increase elder abuse
6 cases by incentivizing attorneys with the promise of double damages, fees, and costs,
7 while NRS 41A's goal is to decrease medical malpractice lawsuits, explained *infra*.
8 From requiring a medical expert affidavit attached to complaints (NRS 41A.071)
9 and capping noneconomic damages (NRS 41A.035), to reducing attorney fees
10 (NRS 7.095) and affording special privileges exclusively to providers of health care
11 (NRS 42.021), all of these restrictions, requirements, and one-sided benefits were
12 imposed to protect NRS 41A.017 providers of health care, decrease the number of
13 lawsuits against them, increase the costs of litigation, and reduce large, unpredictable
14 verdicts, which would allegedly reduce their insurance premiums.

15 It worked. In 2015, the "Keep Our Doctors in Nevada" (KODIN)
16 organization, which initiated Nevada's medical malpractice tort reform *circa* 2002,
17 represented: "There has been a 50 percent drop in malpractice premiums in the last
18 10 years. Very simply stated, we are in a good place. KODIN did what it set out to
19 do." S.B. 292, Minutes of Hearing of the Senate Committee on Judiciary on Mar.
20 26, 2015, 78th Sess. 14–15 (Nev. 2015); *See* Appellant's Addendum to Opening
21 Brief ("ADD") at 0014–0015. Indeed, fewer and fewer attorneys in Nevada

1 represent plaintiffs in medical malpractice lawsuits anymore because the restrictions
2 get tighter and tighter with every amendment. Medical insurers inevitably force the
3 actions to litigation, where the costs are high and eat into capped damages and
4 limited fees. Many attorneys cannot afford the costs, and for those who can, the
5 risks are too high and potential profit too low. Aside from a handful of attorneys
6 who choose to represent plaintiffs harmed by medical providers on principle rather
7 than for the money, only the most egregious medical malpractice cases are filed—
8 those with plaintiffs who have many years left to live and lots of future medical care
9 in order to offset the cap on noneconomic damages and limited attorney fees. **Such**
10 **plaintiffs are unquestionably the opposite of plaintiffs who are elderly patients**
11 **of nursing homes.**

12 Thus, the *Curtis* decision, making nursing homes providers of health care
13 under NRS 41A.017 and subjecting actions against them to professional negligence
14 requirements, potentially causes a crisis for elderly plaintiffs harmed by nursing
15 homes because attorneys simply will not represent them. The increased costs,
16 capped damages, and limited attorney fees imposed by NRS 41A and NRS 7.095
17 obliterate NRS 41.1395's award of double damages, fees, and costs intended to
18 encourage attorneys to represent elderly plaintiffs.

19 NRS 41A's purpose of decreasing medical malpractice lawsuits is in stark
20 contrast to NRS 41.1395's purpose to encourage attorneys to bring elder abuse and
21 neglect actions. It is why the Nevada Legislature continues to exclude nursing

homes from NRS 41A.017's definition of providers of health care. Appellant, here, respectfully asks this Court to rule that LCC, as a nursing home, is not a provider of health care under NRS 41A.017, and NRS 41A.071 does not apply to NRS 41.1395 actions against nursing homes, effectively overturning the *Curtis* opinion. The plain language of the relevant statutes, as well as their legislative history, support this conclusion.

2. **The Plain Language of NRS 41A.017 Unambiguously Omits Nursing Homes as a Provider of Health Care; Therefore, NRS 41A.071 Does Not Apply to Nursing Homes**

As explained in detail *supra*, NRS 41A.071 requires a medical expert affidavit to be attached to any complaint containing allegations of professional negligence, and professional negligence can only be committed by, and asserted against, providers of health care as defined in NRS 41A.017. Nev. Rev. Stat. 41A.071; Nev. Rev. Stat. 41A.015. The Legislature expressly identified providers of health care subject to NRS 41A.071's affidavit requirement:

“Provider of health care” means a physician licensed pursuant to chapter 630 or 633 of NRS,⁶ physician assistant, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory director or technician, licensed dietitian or a licensed hospital, clinic, surgery center, physicians' professional

⁶ NRS Chapter 630 governs “Physicians, Physician Assistants, Medical Assistants, Perfusionists and Practitioners of Respiratory Care” and NRS Chapter 633 governs “Osteopathic Medicine.”

1 corporation or group practice that employs any such person and its
2 employees.

3 Nev. Rev. Stat. 41A.017 (statute in effect through December 31, 2019).

4 This definition provides an enumerated list of fourteen specific types of
5 medical professionals and five specific types of medical facilities. *Betts v. Royal*
6 *Springs Healthcare & Rehab., Inc.*, No. 77323-COA, 2019 WL 5681088, at *2 (Nev.
7 App. Oct. 31, 2019) (citing Nev. Rev. Stat. 41A.017).⁷ Given the extent and detail
8 of the list, the plain language of NRS 41A.017 is supported by the canon *expressio*
9 *unius est exclusio alterius*, “the expression of one thing is the exclusion of another.”
10 *Id.* (citing *Galloway v. Truesdell*, 83 Nev. 13, 26 (1967)). As stated *supra*,
11 NRS 41A.017 excludes certain providers listed in NRS 629.031’s definition of
12 provider of health care and identifies specific types of medical facilities instead of
13 including the catch-all provision in NRS 629.031, which would include nursing
14 homes. Nev. Rev. Stat. 41A.017 *cf.* Nev. Rev. Stat. 629.031(1)(bb) (“‘Provider of
15 health care’ means: . . . A medical facility as the employer of any person specified
16 in this subsection”). This indicates that the Legislature intentionally excluded
17 certain medical facilities from NRS 41A.017 and did not intend for all facilities that

18
19 ⁷ Appellant understands that an unpublished opinion from the Court of Appeals of
20 Nevada is not binding upon this Court. Appellant cites and quotes language from
21 *Betts* because it states the point Appellant is trying to make more articulately than
Appellant can.

1 provide medical services and employ providers of health care to be subject to
2 NRS 41A.

3 The list of providers in NRS 41A.017 does not include a nursing home. It
4 does not contain any language that could be interpreted to mean a nursing home.
5 The language is not confusingly worded, ambiguous, or vague in any manner. There
6 is no need to go beyond the plain language of the statute.

7 Because the plain language of NRS 41A.017 does not identify a nursing
8 home, SNF, or facility for skilled nursing as a provider of health care, actions against
9 nursing homes cannot allege professional negligence and need not attach a
10 supporting medical affidavit. Nev. Rev. Stat. 41A.071. It was error for the district
11 court in this case and the Supreme Court in *Curtis* to find otherwise, and Appellant
12 respectfully requests this Court to reverse both.

13 **3. The Legislative History of NRS 41A.071, NRS 41A.017, and**
14 **NRS 41.1395 Demonstrates that Nursing Homes were Not**
Intended to be Covered By NRS 41A.071

15 Even though NRS 41A.017 is unambiguous on its face, the legislative history
16 behind NRS 41A.071, NRS 41A.017, and NRS 41.1395 confirms Appellant's
17 interpretation.

1 **a. The Legislative History of NRS 41A.071 Shows that**
2 **the Medical Affidavit was Intended to Increase Filing**
3 **Costs in Order to Decrease the Number of Lawsuits**
4 **Against Providers of Health Care**

5 This brief will keep the legislative history of NRS 41A.071 to a minimum
6 because this Court is undoubtedly familiar with the intent and purposes of NRS 41A.

7 In 2002, Assembly Bill 1 was introduced to the 18th Special Session of the
8 Nevada State Legislature as a result of a purported crisis caused by escalating
9 professional liability insurance premiums allegedly caused by unpredictable,
10 excessive verdicts and settlements.⁸ *See, e.g.*, A.B. 1, 18th Spec. Sess. Pt. 1, 6 (Nev.
11 2002); ADD at 0049. It contained many of the restrictions and requirements that
12 eventually became statutes in NRS 41A, including NRS 41A.071's affidavit
13 requirement. *See* A.B. 1, 18th Spec. Sess. Pt. 1, 3 (Nev. 2002) (stated under the
14 heading, "Expediting Trials"); ADD at 0046; *see also*, A.B. 1, 18th Spec. Sess. Pt. 2,
15 54 § 8 (Nev. 2002) (language of proposed bill); ADD at 0271.

16 Testimony at the bill's legislative hearings made clear that a medical affidavit
17 was necessary to act as a screening mechanism and increase the costs of filing a
18 medical malpractice lawsuit, thereby deterring attorneys from filing lawsuits and

19 ⁸ Senate Bill 2 embodied the first reprint of A.B. 1 with amendments. *See, e.g.*, A.B.
20 1, 18th Spec. Sess. Pt. 5, 275–88 (Nev. 2002); ADD at 0189–0202. The affidavit
21 requirement in Section 8 of A.B. 1 corresponded with section 8 of S.B. 2. A.B. 1,
18th Spec. Sess. Pt. 5, 277 (Nev. 2002); ADD at 0191.

1 reducing the number of lawsuits. *See e.g.*, A.B. 1, 18th Spec. Sess. Pt. 5, 229–31
2 (Nev. 2002); ADD at 0143–0145. A substantive affidavit costing upwards of \$3,000
3 was required so attorneys would have to spend money “on the front end in a
4 meaningful fashion with an affidavit supporting their allegations of negligence,” as
5 opposed to a “\$500, one-line affidavit.” *Id.* at 229–30; ADD at 0143–0144.
6 Proponents emphasized that a substantive affidavit was necessary in order to
7 decrease the number of medical malpractice lawsuits:

8 **[The medical expert affidavit] is basically the only guard we have**
9 **against a jacking up of filings and cases.** If there is no impediment
10 at all on the front end of these cases, there are a number of lawyers out
11 there who file a lot of claims if they can get by cheap to get it on file
and to see if they can move the case in that direction. That is something
we were very intent about trying to avoid. If we are not going to have
the panel, then it had to be substantive at that point. . . .

12 . . .

13 Those costs have been present in the system since 1985 or whenever
14 that act took place and are a barrier to frivolous litigation in the medical
malpractice field. **It is something perceived strongly, not just by the**
15 **doctors but by the panel, as keeping the numbers of claims down**
when the frequency rating is calculated on these things. This is an
essential issue. If we are going to drop the panel and then turn around
16 and increase the frequency, we are defeating **the whole purpose of**
17 **trying to cut down on litigation.** . . .

18 *Id.* at 230–31; ADD at 0144–0145.
19
20
21

1 The Supreme Court has also repeatedly recognized the purpose of the
2 affidavit:

3 NRS 41A.071 was enacted in 2002 as part of a special legislative
4 session that was called to address a medical malpractice insurance crisis
5 “insurers were quoting premium increases of 300 to 500 percent.”

6 The Legislature addressed the medical malpractice insurance crisis, in
7 part, by capping noneconomic damages, requiring settlement
8 conferences, and supplanting the existing malpractice screening panels
9 with the expert affidavit requirement under NRS 41A.071. **NRS 41A.071’s affidavit requirement was implemented to lower costs [expended by providers of health care], reduce frivolous lawsuits,** and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion.

10 *Zohar v. Zbiegen*, 130 Nev. 733, 737–38 (2014) (internal citations omitted)
11 (emphasis added); *Curtis*, 136 Nev. at 352 (“NRS 41A.071 was intended ‘to lower
12 costs, reduce frivolous lawsuits’”) (citing *Washoe Med. Ctr. v. Second Jud. Dist. Ct.*,
13 122 Nev. 1298, 1304 (2006) and *Szydel v. Markman*, 121 Nev. 453, 459 (2005))

14 Thus, it is clear from both the legislative history and this Court that the
15 purpose and intent of NRS 41A.071 is to decrease the number of claims and lawsuits
16 alleging medical malpractice.

17 **b. The Legislative History of NRS 41A.017 Shows that**
18 **the Legislature Intended to Exclude Nursing Homes as**
Providers of Health Care

19 The Nevada Legislature has had ample opportunity to amend NRS 41A.017
20 and add nursing homes as a provider of health care if they so intended.
21 NRS 449.0039, which defines “facility for skilled nursing,” was enacted in 1973.

1 “We presume that the Legislature enact[s a new] statute with full knowledge of
2 existing statutes relating to the same subject.” *NAIW v. Nev. Self-Insurers Ass’n*,
3 126 Nev. 74, 84 (2010). NRS 449.0039 was certainly known to legislators as a type
4 of medical facility by the time the 2002 Special Session of the Legislature convened
5 to address the health care insurance “crisis,” but they elected not to include “facility
6 for skilled nursing” in NRS 41A.017.

7 The Legislature subsequently amended NRS 41A.017 in 2011, 2015, and
8 2019 to include additional types of providers, but still did not add nursing homes.
9 A.B. 289, 76th Sess. 18 § 49 (Nev. 2011) (adding “licensed dietitian”); ADD at 0396;
10 S.B. 292, 78th Sess. 2 § 2 (Nev. 2015) (adding physician assistant and “clinic,
11 surgery center, physicians’ professional corporation or group practice that employs
12 any such person”); ADD at 0412; S.B. 130, 80th Sess. 10 § 11 (Nev. 2019) (adding
13 “holder of a license or a limited license issued under the provisions of sections 22 to
14 51, inclusive, of this act,” *i.e.* persons licensed to engage in radiation therapy and
15 radiologic imaging); ADD at 0426.

16 Particularly relevant to this case are the legislative hearings in 2015 regarding
17 proposed amendments to NRS 41A.017. **During both the Assembly and Senate**
18 **Committees on Judiciary hearings, nursing organizations proposed**
19 **amendments that would have added skilled nursing facilities to NRS 41A.017’s**
20 **definition of provider of health care.** They made largely the same arguments
21 Respondent LCC makes in the instant case and that the Court in *Curtis* made to

1 justify its decision that a medical affidavit should have been attached to the
2 complaint. **Despite these arguments, the Legislature declined to add any**
3 **language related to skilled nursing facilities.**

4 Exhibit H was submitted to the Legislature, proposing two amendments.
5 S.B. 292, Exhibit H proposed to Senate Committee on Judiciary on Mar. 26, 2015,
6 78th Sess. (Nev. 2015); ADD at 0476–0480. The first amendment was to include
7 SNFs in the definition of a provider of health care. *Id.* at H1–H3; S.B. 292, Minutes
8 of Hearing of the Senate Committee on Judiciary on Mar. 26, 2015, 78th Sess. 21
9 (Nev. 2015); ADD at 0021. This amendment proposed “to cross-cite the definitions
10 between relevant statutes NRS 41A.017, NRS 42.021(8)(d), and NRS 629.031(1)
11 (*supra*) “to protect them from having to spend hundreds of thousands of dollars
12 litigating this basic fact - that we [SNFs] are a provider of health care covered under
13 NRS 41A.” S.B. 292, Exhibit H proposed to Senate Committee on Judiciary on Mar.
14 26, 2015, 78th Sess. H1–H3 (Nev. 2015); ADD at 0476–0480.

15 The second proposed amendment would “make clear that a plaintiff cannot
16 circumvent the limitations of NRS 41A by bringing in an additional claim under
17 NRS 41.1395” by adding language to NRS 41.1395 stating that “when an action is
18 due to professional negligence, it will be governed by NRS 41A, and if that occurs,
19 then NRS 41.1395 is no longer an available remedy.” *Id.* at H3–H4; ADD at 0476–
20 0480; S.B. 292, Minutes of Hearing of the Senate Committee on Judiciary on Mar.
21 26, 2015, 78th Sess. 21, 23 (Nev. 2015); ADD at 0021, 0023. **The concern about**

1 **circumventing NRS 41A by asserting a claim under NRS 41.1395 was similar**
2 **reasoning to that made by the Court in *Curtis* to justify examining the services**
3 **at issue rather than the type of medical facility, and it is the same argument**
4 **Respondent here made in the lower court. *Curtis*, 136 Nev. at 353, 358 n.5 *cf.* JA**
5 **0011–0026 (Motion to Dismiss) at 0017–0018.**

6 Exhibit N was also submitted to the Legislature, proposing an amendment to
7 NRS 41A.017 that would include as a provider of health care any “medical facility
8 as defined in NRS 449.0151,” *supra*, effectively adding SNFs to the definition. S.B.
9 292, Exhibit N proposed to Senate Committee on Judiciary on May 26, 2015, 78th
10 Sess. (Nev. 2015); ADD at 0481–0482. Proponents stated the amendment would
11 “ensure that the protections of NRS 41A apply to licensed health care professionals
12 like doctors and nurses regardless of the category of medical facility where they are
13 providing professional services.” *Id.*; S.B. 292, Minutes of Hearing of the Senate
14 Committee on Judiciary on May 26, 2015, 78th Sess. 47–48 (Nev. 2015); ADD at
15 0529–0530. They stated that the concern forming the basis for the proposed
16 amendment was that attorneys “skirted” the protections of NRS 41A by naming only
17 the SNF/post-acute care facility as the defendant, and not the individual providers of
18 health care such as nurses or physicians. S.B. 292, Minutes of Hearing of the Senate
19 Committee on Judiciary on May 26, 2015, 78th Sess. 49 (Nev. 2015); ADD at 0531.
20 **Again, this is precisely the argument and concern set forth in *Curtis* and the**
21 **argument Respondent made in the lower court.**

1 Opponents of the proposed amendment pointed out:

2 When you talk about the skilled nursing facilities, you are also talking
3 about a component of our most vulnerable type of people. These are
4 the people who need a higher level of care, and they are completely
5 dependent upon it. When you have that, they are vested with the rights
and responsibility to care for them. When [SNFs] do not fulfill that
obligation, it is not right to put that burden and cap on the victim or the
people of this state.

6 *Id.* at 51; ADD at 0533.

7 **The Legislature did not agree with the arguments about circumventing**
8 **NRS 41A and rejected all amendments that proposed adding nursing facilities**
9 **to NRS 41A.017's definition of a provider of health care.** Unfortunately, there is
10 no explanation why, however, the Legislature's unceasing refusal to add nursing
11 homes to NRS 41A.017 over the years makes sense once one looks at the legislative
12 history and purposes of NRS 41.1395.

13 **c. The Legislative History of NRS 41.1395 Shows that It**
14 **was Enacted to Encourage and Incentivize Attorneys**
15 **to Represent Older Persons and Increase Lawsuits**
Against Those Legally Responsible for Caring for
Them

16 It is clear from NRS 41.1395's legislative history that the purpose and goal of
17 NRS 41.1395 is to help protect older/vulnerable persons by encouraging and
18 incentivizing attorneys to represent them and bring lawsuits when they are abused,
19 neglected, or exploited. It was a proposed remedy to a serious problem because the
20 elderly population was particularly vulnerable to neglect, abuse, and exploitation,
21 but the offices of the AG and District Attorney were having trouble meeting the

1 burden of proof for criminal cases and civil attorneys were not handling these cases
2 due to their lesser values. As a result, caregivers were getting away with neglecting,
3 abusing, and exploiting their wards.

4 The content of what eventually became NRS 41.1395 was first proposed via
5 Senate Bill 80 and initiated by Nevada’s Office of the Attorney General (AG).⁹
6 S.B. 80, 69th Sess. Combined Legislative History 1, 8 (Nev. 1997) (Bill Summary
7 and 2/10/97 Letter from AG); ADD at 0543, 0551. In 1997, the AG proposed three
8 bills “with regard to protecting the elderly.” *Id.* at 8 (2/10/97 Letter from AG); ADD
9 at 0551. S.B. 80 was explained as follows:

10 The subject of this bill is the creation of a civil cause of action for elder
11 abuse and exploitation. **Its purpose is to encourage private attorneys**
12 **to take up the fight on behalf of elder victims.** The law would allow
13 attorneys to recover fees and costs and would also award triple
14 damages¹⁰ to the victim upon successful conclusion of the suit. **The**
15 **burden of proof required in a civil action is not as high as that in a**
16

17
18 ⁹ S.B. 80 was eventually blended with Assembly Bill 385, which also concerned
19 elder abuse litigation. *See, e.g., id.* at 53–54 (5/8/97 Letter from AG); ADD at 0596–
20 0597.

21 ¹⁰ Treble damages were reduced to double damages in order to allow plaintiffs to
pursue punitive damages in addition to double damages under NRS 41.1395. *See,*
e.g., S.B. 80, 69th Sess. Combined Legislative History 46–47 (Nev. 1997) (Minutes
of Hearing of Assembly Committee on Judiciary, June 4, 1997); ADD at 0589–0590.

1 **criminal trial, so it is hoped that this will help victims to recover for**
2 **their losses.**

3 *Id.* at 8 (2/10/97 Letter from AG) (emphasis added); ADD at 0551.¹¹

4 Former Assemblywoman Barbara Buckley, Esq., Vice Chairman of the
5 Assembly Committee on Judiciary, stated the problem bluntly: “no one [is] bringing
6 these cases now, no one [can] find attorneys to bring these cases. The people [are]
7 getting ripped off and they’re done.” *Id.* at 47 (Minutes of Hearing of Assembly
8 Committee on Judiciary, June 4, 1997); ADD at 0590.

9 The legislative history is replete with evidence that the bill’s purpose was to
10 encourage, motivate, and incentivize attorneys to represent the elderly population
11 because of their vulnerability and special need for help and protection:

12 The Division for Aging Services strongly supports the intent of SB-80.

13 . . .

14 The opportunity for abuse, neglect or exploitation by employees and
15 caregivers is significant due to the frailty of the population we serve
and to our special access to them.

16 *Id.* at 30–31 (4/15/97 Letter from Dep’t of Human Resources, Div. for Aging
17 Services, with attached Impact Statement on S.B. 80); ADD at 0573–0574.

18 Bonnie Brand, Deputy Attorney General, Office of the Attorney
19 General, spoke with regard to serious cases of elder abuse and financial

20 ¹¹ The other two bills proposed by the AG established a new crime called “isolation
21 of the elderly” and required Peace Officer Standards and Training (P.O.S.T.) on
elder abuse. *Id.*

1 exploitation which are very difficult to prove. She concurred by
2 allowing recovery of attorney's fees the private bar would be
3 encouraged to prosecute these cases when criminal prosecutors cannot.
Attorneys would also be able to assist senior citizens when they are at
a stage in their lives where they cannot help themselves.

4 *Id.* at 5 (Minutes of Hearing of Senate Committee on Judiciary, Feb. 12, 1997); ADD
5 at 0548.

6 Pamela Roberts, Deputy Attorney General, Medicaid Fraud Control
7 Unit, addressed the committee. She stated **the purpose of the bill was**
8 **to encourage private attorneys to take up the fight on the behalf of**
9 **elder victims.** The law would allow private attorneys to recover fees
and costs and would award treble damages to the victim upon
conclusion of the suit.

10 Ms. Roberts explained how difficult it was to prove criminal abuse due
11 to the victim's inability to testify and some other evidentiary problems.
She pointed out the burden of proof in a civil action was not as high as
12 a criminal trial, so **it was hoped S.B. 80 would help victims to recover**
their losses, both in terms of damages from abuse and neglect, but
especially when financial exploitation occurred.

13 *Id.* at 24 (Minutes of Hearing of Assembly Committee on Judiciary, Apr. 15, 1997)
14 (emphasis added); ADD at 0567; *see also, id.* at 27 ("much of the discussion on the
15 bill had focused on the neglect and abuse, in terms of physical harm, which might
16 result to an older person"); ADD at 0570.

17 It was explained that one purpose of the award of attorney fees and costs in
18 the bill was so the elderly victim received full restitution, and would not have to pay
19 a portion of the restitution for fees and costs. *Id.* at 6 (Minutes of Hearing of Senate
20 Committee on Judiciary, Feb. 12, 1997); ADD at 0549. The awards of attorney fees,
21

1 costs, and treble damages also provided incentive for lawyers to take these cases
2 because cases brought by older persons are inherently less profitable:

3 Because of [older persons'] age and their frailty they were not
4 necessarily the most popular plaintiffs in terms of the private bar taking
5 the case. [Deputy AG Roberts] said they hoped to create incentives for
6 the private bar of attorneys to take these cases.

7 *Id.* at 43 (Minutes of Hearing of Assembly Committee on Judiciary, June 4, 1997);
8 ADD at 0586.

9 Whereby, S.B. 80 and A.B. 385 created a separate civil cause of action
10 for the rights of the victimized elderly person to sue the offender and
11 allowed for treble damages so lawyers had incentive to take these types
12 of cases.

13 *Id.* at 36 (Minutes of Hearing of Assembly Committee on Judiciary, May 30, 1997);
14 ADD at 0579.

15 SB 80 also includes treble damages and the mandatory award of
16 attorney fees and costs if the elderly victim prevails in the civil trial.
17 These were designed to be incentives for private attorneys to accept
18 otherwise unattractive cases due to limited damage awards. Since
19 elderly victims may be retired and have inherently shorter life
20 expectancies, actual damages awards may be less for an elderly person
21 even though the collateral consequences may be greater.

22 *Id.* at 38 ("Proposed Blending of AB 385 into SB 80"); ADD at 0581.

It is also clear that nursing homes were intended to be subject to
NRS 41.1395's double damages, fees, and costs:

**[T]he potential of liability would include the detrimental conduct
rumored to occur in nursing homes and managed care facilities.**
Most such conduct would fall under section 5, subsection 3 of the bill,

1 dealing with certain obligations for care, making it necessary to
2 maintain an older person's physical or mental health.

3 *Id.* at 25 (Minutes of Hearing of Assembly Committee on Judiciary, Apr. 15, 1997)
4 (emphasis added); ADD at 0568.

5 The legislative history also indicates that NRS 41.1395 was intended to
6 address any and all negligence in the provision of services to the elderly that caused
7 them illness, injury, or death:

8 **Sec. 5.** If a person:

9 . . .

10 3. Who has assumed legal responsibility or a contractual or voluntary
11 obligation for the care of an older person or vulnerable person fails to
12 provide him with food, shelter, clothing **or services that are necessary**
13 **to maintain the physical or mental health of the older person or**
14 **vulnerable person, and the older person or vulnerable person**
15 **suffers an illness, injury or death as a result of such wrongful**
16 **conduct, the person who caused the illness, injury or death is liable**
17 **in treble damages** to the older person or vulnerable person, or the
18 estate of the older person or vulnerable person, for all injury and
19 damage sustained as a result of the wrongful conduct.

20 *Id.* at 18 (First Reprint of S.B. 80); ADD at 0561.

21 **The language was kept intentionally broad in order to encompass all**
possible negligent conduct and provide “the greatest possible protection to
older and vulnerable persons.” *See id.* at 44 (Minutes of Hearing of Assembly
Committee on Judiciary, June 4, 1997) (emphasis added) (rejecting amendments that
would have limited liability because “it was consistent with the committee’s

1 commitment to provide the greatest possible protection to older and vulnerable
2 persons”); ADD at 0587.

3 In addition to providing “the greatest possible protection to older and
4 vulnerable persons,” the AG expressly stated in the legislative history that **the intent**
5 **of S.B. 80 was “trying to address [] the recovery for the victim rather than the**
6 **wrongdoer.”** *Id.* (emphasis added). This is in stark contrast to NRS 41A.071 and
7 NRS 41A in general, which were designed to protect the wrongdoer—providers of
8 health care defined in NRS 41A.017—by limiting lawsuits and damages.

9 **d. The Purposes of NRS 41.1395 and NRS 41A.071**
10 **Conflict and Cannot be Reconciled, Indicating that the**
11 **Legislature Intentionally Excluded Nursing Homes**
from NRS 41A.017’s Definition of Provider of Health
Care

12 The concerns raised by Respondent in the district court and the Supreme Court
13 of Nevada in *Curtis* were expressly discussed in 2015 hearings before the Senate and
14 Assembly Committees on Judiciary when amendments were proposed to add nursing
15 homes as NRS 41A providers of health care. The Legislature did not add nursing
16 homes to NRS 41A.017.

17 The purpose and intent of NRS 41A.071 is to protect providers of health care
18 by increasing filing costs and thereby decreasing the number of lawsuits against
19 providers of health care. In contrast, the purpose and intent of NRS 41.1395 is to
20 protect older persons by providing incentives to attorneys to represent them, thereby
21 increasing the number of lawsuits against those legally responsible for caring for

1 them and doing so in a negligent manner. These purposes diametrically oppose one
2 another and cannot be reconciled; one statute is meant to decrease cases and the other
3 statute is meant to increase cases. Nursing homes cannot be NRS 41A.017 providers
4 of health care because doing so defeats the purposes of and incentives in
5 NRS 41.1395, and renders them meaningless. NRS 41.1395 is intended to protect
6 older and vulnerable persons; NRS 41A.071 is intended to protect providers of
7 health care. **By enacting NRS 41.1395 and excluding nursing homes as providers**
8 **in NRS 41A.017, the Legislature is sending a clear message that the policy**
9 **concerns of protecting some of the most frail in our population, the old and**
10 **vulnerable, override the concerns about protecting nursing homes as medical**
11 **providers.**

12 This is because nursing home residents, *i.e.*, the old and vulnerable, do not
13 present the same risks to medical providers of either the quantity or quality of
14 malpractice lawsuits that younger, healthier individuals present. Fewer attorneys
15 want to take older persons' cases because of their lower value, as explained *supra*,
16 which makes the quantity of lawsuits against nursing homes less of an issue than
17 other medical providers. The quality of such cases is lesser because older persons'
18 lawsuits simply do not have the value of lawsuits brought by younger, healthier
19 individuals, even if the exact same malpractice occurred to them. Medical
20 malpractice tort reform was introduced because unpredictable, excessive verdicts
21 and settlements allegedly caused increased, runaway malpractice insurance

1 premiums, but older persons' lawsuits simply do not have the value to cause
2 unpredictable, excessive verdicts and settlements. This is why nursing homes need
3 not be protected by NRS 41A, and the concern of protecting some of the most
4 vulnerable people in our population—the old and vulnerable—overrides the concern
5 of protecting nursing homes from lawsuits.

6 The Legislature has had nearly two decades to add nursing homes to
7 NRS 41A.017's definition of "provider of health care," but has not. It is notable that
8 nowhere in NRS 41A's legislative history does it mention frivolous lawsuits against
9 nursing homes or a need to protect nursing homes. There is no mention of nursing
10 homes or older/vulnerable plaintiffs in the January 2003 report from the Legislative
11 Subcommittee to Study Medical Malpractice, a subcommittee commissioned by the
12 Nevada Legislature. Legislative Subcommittee to Study Medical Malpractice,
13 LEGISLATIVE COUNSEL BUREAU BULLETIN NO. 03-9 (Jan. 2003); ADD at 0617–
14 0654. And the only mention of older/vulnerable persons in NRS 41A's legislative
15 history was in research about the equivalent law in California, the Medical Injury
16 Compensation Reform Act of 1975 (MICRA), which indicates that MICRA's cap
17 on noneconomic damages unfairly impacted and discriminated against the elderly
18 because they "traditionally do not experience high economic losses, but, rather,
19 experience serious, non-compensable losses when their health and well-being is
20 adversely affected." A.B. 1, 18th Spec. Sess. Pt. 4, 96–97 (Nev. 2002); ADD at
21 0751–0752. This is yet another reason that explains why the objectives of

1 NRS 41.1395 override those of NRS 41A.071 in excluding nursing homes as
2 NRS 41A providers of healthcare.

3 Of course, nursing homes **want** to be protected by NRS 41A and other
4 professional negligence protections, but not every medical provider is protected by
5 NRS 41A. *See Nev. Rev. Stat. 41A.017 cf. Nev. Rev. Stat. 629.031.* When it comes
6 to medical malpractice tort reform, the protection of a medical provider must be
7 balanced with the rights of an injured person who was harmed by a medical
8 tortfeasor. Older and vulnerable persons present a special class of people, unlike
9 other plaintiffs receiving medical care, that are completely helpless and rely entirely
10 on their caregivers. Nursing home residents are at the mercy of nursing home
11 employees for every aspect of their lives, including medical care. The residents are
12 in a position to be taken advantage of in every way, and the Legislature decided that
13 given older persons' vulnerability and exposed position, the need to protect them
14 overrides the need to protect nursing homes, even though nursing homes administer
15 medical services to their older/vulnerable residents. The concerns surrounding
16 runaway verdicts, high value cases, and frivolous lawsuits simply are not present
17 when the plaintiffs are infirm residents of nursing homes who could not take care of
18 themselves even before any negligence occurred. Thus, the need to protect older
19 persons outweighs the need to protect nursing homes, which is why the Legislature
20 intentionally excluded nursing homes from NRS 41A.017's definition of provider of
21 healthcare.

1 **IX. CONCLUSION**

2 Appellant respectfully requests this Court to reverse the district court for the
3 following alternative reasons:

4 (1) *Curtis* does not apply to this case because the negligence in *Curtis* was
5 clearly attributable to actions by a nurse and doctor, who are express providers of
6 health care under NRS 41A.017, but here, the negligence is attributable to the
7 combined actions of numerous LCC employees, and as a nursing home, LCC is not
8 a provider of health care under NRS 41A.017;

9 (2) If *Curtis* does apply, Appellant limits her appeal to claims related to her
10 UTI and falls at LCC, which sound in ordinary negligence rather than professional
11 negligence according to the *Curtis* analysis, contrary to the district court's order; or

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1 (3) Nursing homes are never NRS 41A.017 providers of health care, even
2 when administering medical services, because the Legislature intentionally omitted
3 them from NRS 41A.017 in furtherance of the objectives of NRS 41.1395, as the
4 need to protect older/vulnerable persons overrides the need to protect nursing homes
5 as medical providers.

6 Dated this 15th day of September, 2021.

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

3 Dated this 15th day of September, 2021.

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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