Case No. 82746

In the Supreme Court of Nevada

LYNN YAFCHAK, statutory heir and special administrator to the ESTATE OF JOAN YAFCHAK, deceased,

Appellant,

vs.

SOUTH LAS VEGAS MEDICAL INVESTORS, LLC, d/b/a LIFE CARE CENTER OF SOUTH LAS VEGAS, erroneously named as LIFE CARE CENTERS OF AMERICA, a foreign corporation,

Respondent.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable CHRYSTAL ELLER District Judge
District Court Case No. A-20-822688-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Respondent South Las Vegas Medical Investors, LLC, d/b/a Life Care Center of South Las Vegas is a privately held limited liability company. No publicly traded company owns more than 10% of its stock.

Casey W. Tyler and Zachary J. Thompson of Hall Prangle & Schoonveld, LLC represented respondent in the district court. They and Daniel F. Polsenberg, Joel D. Henriod, Abraham G. Smith, and Kory J. Koerperich of Lewis Roca Rothgerber Christie, LLP represent respondent in this Court.

Dated this 14th day of January, 2022.

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ROUTING STATEMENT

Respondent South Las Vegas Medical Investors, LLC, d/b/a Life Care Center of South Las Vegas ("LCC") agrees that the Supreme Court should retain this case. The relief sought by appellant Lynn Yafchak, as statutory heir and special administrator to the Estate of Joan Yafchak, deceased ("Yafchak")—in particular, the extraordinary request to overrule *Estate of Curtis v. South Las Vegas Med. Investors*, LLC, 136 Nev. 350, 466 P.3d 1263 (2020)—can only be granted, if at all, by the Supreme Court. *See* NRAP 17(a)(11)-(12).

STATEMENT OF THE ISSUES

1. Whether this complaint based on a skilled nursing facility's failure to monitor and care for a patient to prevent injuries and death sounds in professional negligence and is therefore subject to the professional negligence affidavit requirement and statute of limitation of NRS chapter 41A, as stated in *Estate of Curtis v. South Las Vegas Med. Investors*, LLC, 136 Nev. 350, 466 P.3d 1263 (2020).

2. Whether the common-knowledge exception to NRS 41A.071's expert medical affidavit requirement applies to the measures allegedly required to prevent a sick and elderly patient from falling out of bed in the middle of the night and from separately contracting a urinary tract infection.

3. Whether this Court should overrule the recent decision in *Estate of Curtis*, which held that a direct liability claim against a skilled nursing facility does not excuse compliance with NRS 41A.071's affidavit requirement when the claim is based on the professional negligence of providers of health care.

STATEMENT OF THE CASE

This is an appeal from an order dismissing the complaint, the Honorable Crystal Eller, District Judge, presiding. The district court found that the complaint was for professional negligence but did not include a medical expert affidavit and was filed after the statutory limitation period expired. Although the complaint purported to state claims of older person abuse, negligence, and wrongful death, and a survival action, the district court found that the substance of the claims actually involved professional negligence by medical professionals caring for a patient at a skilled nursing facility.

Joan Yafchak, 81 years old and in poor health, was transferred from a hospital to respondent's skilled nursing facility. After almost two months at the skilled nursing facility, Joan fell out of her bed in the middle of the night and broke her collarbone. Three weeks later, Joan exhibited irregular vital signs, and the nursing facility transferred her to a hospital. The hospital diagnosed Joan with a urinary tract infection, e. coli, and sepsis. Joan died six days later in hospice care.

More than a year later, Joan's daughter, Lynn Yafchak, as statutory heir and special administrator to the Estate of Joan Yafchak ("Yafchak"),

filed a complaint alleging that the skilled nursing facility, South Las Vegas Medical Investors, LLC, d/b/a Life Care Center of South Las Vegas[1] and Does 1-10 (collectively "LCC") caused Joan's injuries and death. LCC moved to dismiss the complaint. The district court applied *Estate of Curtis v. South Las Vegas Medical Investors, LLC*, 136 Nev. 250, 466 P.3d 1263 (2020), which involved the same skilled nursing facility, and found that Yafchak's complaint stated claims for professional negligence involving the medical judgment, diagnosis, or treatment of medical professionals at LCC. Because Yafchak did not attach a medical expert affidavit as required by NRS 41A.071, and because the complaint was not filed within one year of Joan's death as required by NRS 41A.097(2), the district court dismissed the complaint.

In this appeal, Yafchak now argues that *Estate of Curtis* does not apply because Joan's injuries were not the result of a single event caused by easily ascertained health care providers. Yafchak further argues that, even under *Estate of Curtis*, negligence causing Joan's falls and urinary tract infection can be assessed without expert testimony. Finally, Yafchak

[1] The complaint erroneously names respondent South Las Vegas Medical Investors as "Life Care Centers of America, a Foreign Corporation, d/b/a Life Care Center of South Las Vegas."

and the amicus, Nevada Justice Association ("NJA"), ask this Court to overturn *Estate of Curtis*. LCC now responds to those arguments.

STATEMENT OF FACTS

A. Joan Is at LCC for About Three Months Between Hospitalizations

Joan Yafchak was born in 1937 and was 81 at the time of the events described in the complaint.[2] JA 3 ¶1, 6. On February 24, 2019, Joan was hospitalized due to dehydration, dementia, bloody stool, and Clostridioides Difficile Infection ("C-Diff"). JA 3 ¶9. After the hospital stabilized Joan, she was transferred to Life Care Center of South Las Vegas, a skilled nursing facility, on February 28, 2019.[3] JA 3 ¶9. As described below, Yafchak alleges that Joan "fell numerous times," JA 3 ¶10, including once when she fell out of her bed and broke her collar bone. JA 3 ¶11. Joan remained under LCC's care until May 11, 2019, when LCC transferred her back to a hospital "due to irregular vital signs." JA 4 ¶13. At the hospital, Joan was "immediately admitted to the ICU and diagnosed with a urinary

[2] For the purposes of the motion to dismiss only, LCC accepts as true the factual allegations made in the complaint.

[3] The complaint alleges, and the opening brief repeats, that this occurred on "February 28, 2020," but Joan is alleged to have died on May 17, 2019. Presumably, "2020" is a typo that should be "2019."

tract infection, e-coli, and sepsis." JA 4 ¶13. The hospital released Joan to hospice care on May 15, 2019, and Joan died on May 17, 2019. JA 4 ¶14. The complaint does not allege the medical cause of Joan's death.

B. Yafchak Sues LCC and Does 1-10 Generally Alleging Their Negligence Caused Joan's Death

Yafchak filed her complaint on October 8, 2020, alleging four causes of action labeled as "Abuse/Neglect of an Older Person," JA 3, "Negligence," JA 6, "Wrongful Death," JA 7, and a "Survival Action," JA 8. The complaint alleges that LCC caused Joan's injuries and death, but is obscure about *who* specifically acted negligently, *what* negligent acts allegedly caused Joan's injuries and death, or *how* that negligence was the cause of Joan's injuries and death. The complaint names Does 1-10 as defendants, each of whom are alleged to be "agents, servants, employees and partners" of South Las Vegas Medical Investors and each other, who "were acting with[in] the course and scope of such employment" with South Las Vegas Medical Investors. JA 2 ¶4. But the complaint does not allege any specific acts by a Doe defendant or distinguish between any particular actions by defendants.

The complaint alleged negligence broadly but describes just two specific incidents. First, Yafchak implies that LCC failed to assess Joan as

a fall risk and then nurses failed to sufficiently monitor Joan to prevent her from falling from her bed. The complaint alleges that Joan "was a high risk of falling, which should have been assessed at the time of admission" into Life Care Center of South Las Vegas. JA 3 ¶9. Yafchak then claims that Joan "fell numerous times" while in LCC's care, JA 3 ¶10, but describes just one incident and just one injury: On April 19, 2019, at 1:30 in the morning, Joan was sleeping in a room "by the nurse's station" when she fell out of her bed and broke her collar bone. JA 3 ¶11.

Second, Yafchak appears to imply—but does not allege directly—that LCC could have identified or prevented Joan's urinary tract infection, e. coli, and sepsis by handling Joan's lethargy and shaking in a different manner. On May 6, 2019, Joan's daughter, Lynn Yafchak, found Joan "very lethargic and shaking in her bed." JA 4 ¶12. Lynn asked LCC what was wrong with Joan, and LCC said that Joan was cold and gave Joan a blanket. JA 4 ¶12. Joan later slept from May 9 to May 11, 2019, which was not her normal sleeping pattern. JA 4 ¶ 12. Lynn expressed her concern about this to LCC, but they "ignored and disregarded her concerns." JA 4 ¶12. Lynn, who is a named plaintiff in the complaint, did not allege to whom she expressed concern or what role those persons

played at the nursing facility.

The remainder of the complaint amounts to a general allegation that LCC must not have taken care of Joan's daily needs appropriately or else she would not have been injured or died. Yafchak alleges that LCC "knew, or should have known, that [Joan] was a fall risk, and had a dangerous bacterial infection, and depended on [LCC] to monitor her infection and her safety." JA 4 ¶15. Joan depended on LCC to "assist her with her daily basic needs, including toileting assistance, turning her in her bed, bathing, feeding, fluids, and making sure she does not fall." JA 4 ¶15. The complaint does not allege or explain how LCC acted negligently in the assistance of these "daily basic needs" or how that negligence would have caused Joan's injuries or death, other than that LCC "failed to sufficiently staff the nursing home with enough qualified employees to meet all of [Joan's] daily needs." JA 4 ¶17.

The complaint additionally alleges that although LCC "owed a duty of services of care to [Joan] with regard to her safety, health, and welfare, they failed to provide services necessary to maintain her physical and mental health." JA 5 ¶20. Yafchak further alleges that LCC is liable for punitive damages because LCC's failure to provide services necessary to

maintain Joan's physical and mental health were made "with conscious disregard of the health and safety of [Joan]." JA 5 ¶21. Yafchak alleges that LCC "acted with reckless, oppression, fraud, and malice in connection with their neglect to" Joan. JA 5 ¶21.

The complaint does not actually allege how Joan died. It generally alleges that LCC caused Joan's death, but does not state that she died from a urinary tract infection, e-coli, sepsis, or any other condition that was a result of LCC's alleged negligent conduct. Ultimately, LCC is left to guess which individual actors, and which actions or inactions, are alleged to have caused Joan's injury and death.

C. The District Court Dismissed Yafchak's Complaint Because It Alleges Professional Negligence

LCC moved to dismiss Yafchak's complaint in the district court because it was a disguised claim for professional negligence that was filed without an expert medical affidavit and after the statutory limitation period expired. JA 11-25. Yafchak responded that this was an elder abuse case involving a skilled nursing facility as an entity, not a professional negligence case involving medical professionals, so the statutory requirements for professional negligence did not apply. JA 27-37. In making its decision, the district court noted that "especially after the

Curtis case, . . . the law in this area is very clear." JA 12:6-7.

Applying *Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC,* 136 Nev. 350, 466 P.3d 1263 (2020), the district court determined that Yafchak's complaint was for professional negligence involving "assessments and decisions that need to be made . . . by a medical professional." JA 12:2-23. The district court found that Yafchak's claims "despite their labels, each sound in the alleged professional negligence of Life Care Center of South Las Vegas' nursing or medical staff, who are providers of health care, during the professional relationship with their patient." JA 116 ¶7. As a result, NRS 41A.071 required Yafchak to submit an affidavit or declaration of merit to support the allegations, which Yafchak failed to do. JA 116 ¶8, 9. Because the complaint was not supported by an affidavit or declaration of merit, the district court dismissed the complaint without prejudice. JA 116-17 ¶10.

The court further found that because the complaint was for professional negligence, the statute of limitations expired on May 17, 2020, which was one year after Joan's death. JA 117 ¶12-14. Because Yafchak did not file the complaint until October 8, 2020, the district court dismissed the complaint with prejudice. JA 118 ¶16. Yafchak now appeals.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal of a complaint for failure to attach an expert medical affidavit. *See Szymborski v. Spring Mountain Treatment Center*, 133 Nev. 638, 640, 403 P.3d 1280, 1283 (2017). This Court also engages in de novo review when a district court applies the statute of limitations to dismiss a complaint under NRCP 12(b)(5). *See Holcomb Condominium Homeowners' Ass'n, Inc. v. Stewart Venture, LLC*, 129 Nev. 181, 186-87, 300 P.3d 124, 128 (2013) ("When the fact are uncontroverted, as we must so deem them here, the application of the statute of limitations is a question of law that this court reviews de novo."). Under NRCP 12(b)(5), the Court "accept[s] all of the plaintiff's factual allegations as true and draw[s] every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief." *Szymborski*, 133 Nev. at 640, 403 P.3d at 1283 (quoting *DeBoer v. Sr. Bridges of Sparks Fam. Hosp.*, 128 Nev. 406, 409, 282 P.3d 727, 730 (2012)).

NRS 41A.071, for its part, requires a district court to dismiss "an action for professional negligence . . . if the action is filed without an affidavit" from a medical expert that supports the allegations in the complaint. The affidavit must identify by name, or describe by conduct,

"each provider of health care who is alleged to be negligent" and factually set forth "a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms." NRS 41A.071(3)-(4). A complaint that alleges professional negligence but does not attach a medical expert affidavit is "void ab initio and must be dismissed." *Washoe Medical Center v. Second Judicial Dist. Court*, 122 Nev. 1298, 1300, 148 P.3d 790, 792 (2006).

SUMMARY OF THE ARGUMENT

The gravamen of Yafchak's complaint is that LCC failed to properly monitor and assess Joan as a fall risk and to prevent or timely diagnose her infections, which caused Joan's broken collar bone, urinary tract infection, e. coli, sepsis, and death. Yafchak and the NJA rely on the complaint's nebulous structure and bare allegations, in conjunction with the liberal pleading standard, to rewrite the complaint to sound in ordinary negligence by non-medical professionals. There are, however, only a few specific factual circumstances that Yafchak actually alleges in the complaint, each of which directly involved medical judgment, diagnosis, and treatment that would necessarily be performed by providers of health care at LCC. The remainder of Yafchak's arguments rely on one of two

faulty premises: (1) a skilled nursing facility should be strictly liable when one of its patients suffers a urinary tract infection or fall in the facility; or (2) if a plaintiff sues a skilled nursing facility directly, rather than naming individual medical professionals responsible for the negligence, then the plaintiff can evade the statutory requirements that would otherwise be applicable for claims for professional negligence. Both premises should be soundly rejected by this Court. Accordingly, the district court correctly dismissed the complaint, because the gravamen of the allegations actually made in Yafchak's complaint sound in professional negligence based on providers of health care at LCC.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY DISMISSED YAFCHAK'S COMPLAINT BECAUSE IT SOUNDED IN PROFESSIONAL NEGLIGENCE

This appeal can be decided by a straightforward application of *Estate of Curtis v. South Las Vegas Medical Investors, LLC*, 136 Nev. 350, 466 P.3d 1263 (2020). *Estate of Curtis* involved the same skilled nursing facility as this case, and this Court rejected the same arguments now repeated by Yafchak. *Id.* at 351-52, 466 P.3d at 1265. In particular,

Yafchak argues, as the Estate of Curtis did, that it was "excused from complying with NRS 41A.071 because it asserted claims directly against" the nursing facility and "that requiring an expert affidavit [would] defeat[ ] the purpose of Nevada's elder abuse statute, NRS 41.1395." *Id.* at 352, 466 P.3d at 1265; AOB at 9 (arguing that "it was proper to sue only LCC"); AOB 40-49 (arguing that the older person abuse statute and the professional negligence statutes "cannot be reconciled").

In *Estate of Curtis*, the plaintiff alleged that a nurse mistakenly administered morphine to Curtis that was prescribed for a different patient. *Estate of Curtis*, 136 Nev. at 351, 466 P.3d at 1265. LCC administered Narcan to counteract the morphine and chose to keep Curtis at the nursing facility rather than send her to the hospital. *Id.* LCC monitored Curtis's vital signs at 5 p.m. on the day the morphine was administered and recorded that she was alert and responsive, but at 11 a.m. the next morning Curtis's daughter found Curtis unresponsive in her room. *Id.* Curtis died three days later of morphine intoxication. *Id.*

Curtis's estate and Curtis's daughter sued LCC for abuse and neglect of an older person, wrongful death, and tortious breach of the covenant of good faith and fair dealing. The complaint alleged that the erroneous

administration of morphine and Curtis's death were caused by LCC's "negligent mismanagement, understaffing, and operation of the nursing home." *Id.* at 352, 466 P.3d at 1265. "The Estate did not explicitly assert any claim for professional negligence, did not name [the nurse] as a defendant, and did not file an expert affidavit under NRS 41A.071." *Id.* at 351, 466 P.3d at 1265. Still, the district court found that the claims were for professional negligence. *Id.* at 352-53, 466 P.3d at 1265-66.

This Court agreed that any claim against LCC for the failure to monitor Curtis after the morphine was improperly administered was for professional negligence. *Id.* at 358, 466 P.3d at 1269-70 (finding that the decision not to transfer to a hospital and not regularly checking vital signs "required some degree of professional judgment or skill"). But this Court held that giving Curtis a medication meant for another patient was a matter of common knowledge that did not involve medical diagnosis, judgment, or treatment and therefore did not require an expert medical affidavit. *See Estate of Curtis*, 136 Nev. at 356-57, 466 P.3d at 1269 (holding that there was no medical judgment involved in administering the wrong medication so no expert testimony was required to assess the nurse's action).

Applying *Estate of Curtis*, as the district court did, this Court should hold that Yafchak cannot circumvent NRS 41A.071's affidavit requirement by asserting only direct claims against LCC.

A. The Professional Negligence Statutes Apply to Skilled Nursing Facilities When They Act Through Providers of Health Care

In arguing repeatedly that skilled nursing facilities are not providers of health care under NRS 41A.017, Yafchak and the NJA miss the point. Skilled nursing facilities do provide services to their residents that are not medical in nature and are not protected by the professional negligence statutes when doing so. *See* NRS 449.01517 (including services ranging from "[t]he elimination of wastes from the body" to "[l]aundry" to "[t]ransportation"). But skilled nursing facilities also provide various medical services to patients through doctors and nurses that are providers of health care under NRS 41A.017. *See* NRS 449.0039 (defining "[f]acility for skilled nursing" as "an establishment which provides continuous *skilled nursing* and related care *as prescribed by a physician to a patient* in the facility who is not in an acute episode of illness and whose primary need is the availability of such care on a continuous basis") (emphasis added); *see also* NRS 449.0151(6) (including "[a] facility for skilled nursing" as a

"[m]edical facility"). So even if a skilled nursing facility is not itself an enumerated provider of health care, a skilled nursing facility does provide medical care through various providers of health care.

The professional negligence statutes apply to a skilled nursing facility when it provides health care through its nurses and physicians. Directly contrary to Yafchak's and the NJA's arguments in this appeal, the first heading in the *Estate of Curtis* opinion reads: "Direct liability claims against a nursing home facility do not excuse compliance with NRS 41A.071's affidavit requirement." 136 Nev. at 353, 466 P.3d at 1266. Nevada law therefore establishes that a plaintiff must comply with the professional negligence statutes when a claim is based on theories of liability that involve the professional negligence of a provider of health care. *See id.* at 353, 466 P.3d at 1267 (recognizing that when claims for negligent hiring are inextricably linked to professional negligence they are for vicarious liability and "cannot be used to circumvent NRS Chapter 41A's requirements"); *Szymborski v. Spring Mountain Treatment Center*, 133 Nev. 638, 647-48, 403 P.3d 1280, 1288 (2017) (analyzing a negligent supervision, hiring, and training claim based on whether the underlying facts were for ordinary negligence or professional malpractice).

Accordingly, if a claim against a skilled nursing facility involves medical diagnosis, judgment, or treatment made by a provider of health care, even if that provider is not named in the complaint, then the claim sounds in professional negligence and is subject to the professional negligence statutes.

B. Yafchak's Complaint Sounds in Professional Negligence Based on Medical Diagnosis, Judgment, and Treatment by Providers of Health Care

A claim is for professional negligence if it involves "medical diagnosis, judgment, or treatment." *Szymborski v. Spring Mountain Treatment Center*, 133 Nev. 638, 641, 403 P.3d 1280, 1284 (2017). Although a plaintiff may label a claim as something other than professional negligence, courts "must look to the gravamen or 'substantial point or essence' of each claim rather than its form" when determining if the claim is for professional negligence. *Szymborski*, 133 Nev. at 643, 403 P.3d at 1284. If a claim alleges duties arising out of a health care provider and patient relationship, or alleges a "breach of duty involving medical judgment, diagnosis, or treatment," then the claim sounds in professional negligence. *Szymborski*, 133 Nev. at 642, 403 P.3d at 1284. "By extension, if the jury can only evaluate the plaintiff's claims after presentation of the standards

of care by a medical expert, then it is a [professional negligence] claim." *Szymborski*, 133 Nev. at 642, 403 P.3d at 1284.

1. The Gravamen of Yafchak's Complaint Alleges Professional Negligence

Yafchak's first cause of action is titled "Abuse/Neglect of an Older Person." JA 3-6. Under NRS 41.1395(1), a person who abuses or neglects an "older person" over 60 years of age, which causes personal injury or death to the "older person," is liable for two times the actual damages caused. "Abuse" includes, among other things, the "willful and unjustified . . . [d]eprivation of . . . services which are necessary to maintain the physical or mental health of an older person." NRS 41.1395(4)(a)(2). "Neglect" is "the failure of a person who has assumed legal responsibility or a contractual obligation for caring for an older person . . . to provide food, shelter, clothing or services within the scope of the person's responsibility or obligation, which are necessary to maintain the physical or mental health of the older person." NRS 41.1395(4)(c). If the person who abused or neglected the older person acted "with recklessness, oppression, fraud or malice," then they are responsible for attorney fees and costs of the suit to recover damages.

The sole duty explicitly alleged in Yafchak's first claim for relief is

that LCC "owed a duty of services of care to [Joan] with regard to her safety, health, and welfare." 5 JA ¶20. But the complaint also implies that LCC had other more specific duties. For example, Yafchak alleged that Joan "was a high risk of falling, which should have been assessed at the time of admission." JA 3 ¶9. Yafchak also alleges that Joan depended on LCC "to monitor her infection and safety" and to "assist with [Joan's] daily basic needs, including toileting assistance, turning her in her bed, bathing, feeding, fluids, and making sure she does not fall." JA 4 ¶15. Yafchak's allegations also imply a duty of LCC to "sufficiently staff the nursing home with enough qualified employees to meet all of [Joan's] daily needs." JA 4 ¶17.

The second cause of action for "negligence" alleges that LCC "in caring for [Joan], had a duty to exercise the level of knowledge, skill, and care of those in good standing in the community." JA 6 ¶29. It further alleges that LCC "had a duty to properly train their staff and employees to act with the level of knowledge, skill, and care of nursing homes in good standing in the community." JA 6 ¶30. The complaint makes the conclusory assertion that LCC was "negligent and careless in their actions and omissions, as though fully set forth herein." JA 6 ¶31. The third cause

of action for wrongful death and fourth cause of action for survival do not allege any new duties. *See* JA 7-8.

On their face, the alleged duties to assess fall risk and to monitor Joan's infections are allegations of duties arising from the relationship between a health care provider and a patient, which involve medical diagnosis, judgment, and treatment. *Cf. Estate of Curtis*, 136 Nev. at 358, 466 P.3d at 1269-70 (holding that the failure to monitor a patient after being administered a drug required "judgment calls on what constitutes proper supervision"); *Gaddis v. Chatsworth Health Care Center, Inc.*, 639 S.E.2d 399, 402 (Ga. Ct. App. 2006) (holding it was medical malpractice when "the decision over what specific fall precautions to take was left to the medical judgment of" the medical staff at nursing home). Although the duty to assist Joan with her daily basic needs could potentially be nonmedical under NRS 449.0151, Yafchak's only factual allegations about how LCC allegedly breached those duties reveals that they are indeed related to LCC's medical diagnosis, judgment, and treatment of Joan.

At the heart of Yafchak's claims is an argument that LCC should have properly assessed Joan and monitored her more appropriately to prevent falls and infections while she was at the nursing home. The

factual allegations to support her claims are very limited and are the same for each cause of action: The first is that Joan had a dangerous bacterial infection and other medical conditions before being admitted to the skilled nursing facility, including dehydration, dementia, bloody stool, and C-Diff. JA 3 ¶9, 15. The next is that Joan fell out of her bed at 1 a.m. and broke her collar bone while at the nursing facility, and that her room was near the nurse's station. JA 3 ¶11, 18. The last is that Joan was lethargic, shivering, and she unusually slept for two days before she was transferred to the hospital. JA 4 ¶12. Yafchak alleges LCC determined that Joan was cold and gave her a blanket, and disregarded Yafchak's concerns about Joan's sleeping pattern. JA 4 ¶12. Joan was then admitted to the intensive care unit and diagnosed with a urinary tract infection, e. coli, and sepsis at the hospital. JA 5 ¶19. These are the only specific factual allegations in the complaint to support Yafchak's claims.

Based on these factual allegations, it is apparent Yafchak's complaint involves the following medical diagnoses, treatment, and judgments by LCC staff:

- when and how to assess whether Joan was a fall risk;
- which fall risk precautions were necessary based on Joan's

individual medical conditions;

- the frequency with which to monitor Joan if she was a fall risk in bed;
- the actions necessary to prevent Joan from contracting a urinary tract infection, e. coli, or sepsis;
- the appropriate course of treatment and monitoring of Joan's medical condition to prevent falls or infections;
- the timely diagnosis of Joan's infections; and
- the determination of how to treat Joan and when to send her to the hospital based on her medical condition.

At a minimum, a medical expert would be required to explain to the jury the following:

- how to properly determine if Joan was a fall risk;
- the reasons Joan was a fall risk and why LCC should have diagnosed her as a fall risk;
- how Joan's particular risk of falling related to the fall that broke her collar bone on April 19, 2019;
- the precautions that LCC failed to take that could have prevented that fall;

- the parameters of the duty of the nurses at the nearby nurse's station to prevent Joan's fall and how they could have prevented Joan from falling out of the bed in the middle of the night;
- the care and treatment that LCC had a duty to provide to prevent Joan's urinary tract infection, e. coli, and sepsis;
- the causes of Joan's urinary tract infection, e. coli, and sepsis;
- how LCC failed to provide care and how it caused Joan's urinary tract infection, e. coli, and sepsis;
- how frequently Joan should have been toileted to eliminate waste to prevent infections in light of her medical conditions;
- what symptoms Joan exhibited that LCC failed to timely diagnose as infections;
- what steps LCC failed to take that could have resulted in an earlier diagnosis of those infections;
- why and when LCC should have transferred Joan to a hospital; and
- how LCC's timing and provision of care for Joan caused her injury and death.

Accordingly, Yafchak's complaint alleges duties and breaches that

necessarily involve LCC's medical diagnosis, judgment, and treatment of Joan. And the complaint is founded on issues of fall risk and monitoring of infection that would require expert testimony for the jury to assess whether LCC acted negligently. *See Estate of Curtis*, 136 Nev. at 358, 466 P.3d at 1270 (recognizing that "a juror could not properly evaluate the failure-to-monitor allegations by relying merely on common knowledge and experience"). As a result, the complaint sounds in professional negligence and is subject to NRS 41A.071's affidavit requirement and NRS 41A.097(2)'s one-year limitation period. *See id.* at 358, 466 P.3d at 1269-70. Because the complaint did not include a medical expert affidavit, and was filed more than one year after Joan's death, the district court properly dismissed the complaint.

2. The Alleged Negligence and Cause of Yafchak's Injuries and Death Are Not Common Knowledge

Yafchak argues in the alternative that her claims and damages can be limited to those related to Joan's urinary tract infection and falls, because the causes of those injuries are within the common knowledge exception to the affidavit requirement. *See* AOB at 5, 13-21. In *Curtis*, the court held that "[t]he common knowledge exception provides that where lay persons' common knowledge is sufficient to determine negligence without

expert testimony, the affidavit requirement does not apply." 136 Nev. at 350, 466 P.3d at 1265. The common knowledge "exception's application is extremely narrow and only applies in rare situations." *Id.* at 356, 466 P.3d at 1268. The exception is meant for instances of "blatant negligence" and does not include "situations that involve professional judgment." *Id.* (citing to *Smith v. Gilmore Memorial Hosp., Inc.*, 952 So. 2d 177, 181 (Miss. 2007)). For example, administering a medication to one patient, when it was prescribed for a different patient, did not require an expert affidavit under the common knowledge exception; a jury did not need an expert to understand that it was negligent. *See id.* at 350, 466 P.3d at 1265.

a. NEITHER A URINARY TRACT INFECTION NOR A FALL FROM BED IN THE MIDDLE OF THE NIGHT IS A MATTER OF COMMON KNOWLEDGE

It is not within the common knowledge of a jury to understand how LCC's actions would cause an elderly woman with multiple medical conditions to contract a urinary tract infection or fall from a bed in the middle of the night. Indeed, Yafchak's argument that a urinary tract infection is within the common knowledge of jurors assumes each juror has had a urinary tract infection or "been educated" about one. *See* AOB at 17. Similarly, when determining negligence for any falls, Yafchak assumes the

jurors can "look at LCC's own fall assessment and plan for Joan, as well as LCC's guidelines, policies, and procedures regarding patients deemed as fall risks." AOB at 21. But a matter is not within the common knowledge of jurors if it must be assumed that jurors have their own specialized knowledge, or that they can look to LCC's own assessment or an internal policy to determine the standard. *See Estate of Corrado by Meyers v. Rieck*, 960 N.W.2d 218, 225 (Mich. Ct. App. 2020) ("[T]he very fact that information outside the realm of common knowledge and experience (i.e., the standing order) would be required to determine liability supports the conclusion that plaintiff's proposed claim sounds in medical malpractice.").

(i) Urinary Tract Infection

A urinary tract infection is a medical condition. The proper supervision or monitoring of a patient's medical condition involves medical diagnosis, treatment, and judgment. *See Estate of Curtis*, 136 Nev. at 358, 466 P.3d at 1270 (recognizing that "a juror could not properly evaluate the failure-to-monitor allegations by relying merely on common knowledge and experience"). Unlike administering a medication to the wrong patient, leaving a foreign object in a patient during surgery, or performing surgery on the wrong body part, the negligence that could cause a urinary tract

infection would not be obvious to a jury. *See* NRS 41A.100 (providing res ipsa loquitur exceptions to the affidavit requirement); *see Apkan v. Life Care Centers of Am., Inc.*, 918 N.W.2d 601, 610-611 (Neb. Ct. App. 2018) (considering whether "the causal link between the defendant's negligence and the plaintiff's injuries is sufficiently obvious to laypersons that a court can infer causation as a matter of law"). A medical expert would be required to explain how a person develops a urinary tract infection, how a person with Joan's medical conditions might develop a urinary tract infection, and how Joan's urinary tract infection was caused by LCC's negligent acts.

Specifically, it is not a matter of common knowledge how frequently someone with Joan's medical conditions needed to urinate or be cleaned to avoid a urinary tract infection—or even if those are the right (or only) causative factors to consider. Nor is it within common knowledge how a urinary tract infection relates to the other medical conditions Joan experienced before and during her time at LCC. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 249, 955 P.2d 661, 671 (1998) (discussing medical expert testimony that a plaintiff's medical condition would result in recurrent urinary tract infections requiring hospitalization). Finally, it

is not within a juror's common knowledge how a urinary tract infection could lead to death, especially given the other conditions Joan was experiencing at the same time. A medical expert would be necessary to explain what duties a nurse or doctor had to prevent Joan from contracting a urinary tract infection while in LCC's care.

Although it may be ordinary negligence if a negligent act causes a patient to fall off a toilet and injure herself, *see* NRS 449.01517(1), the judgment about how often to take a patient to the toilet to avoid a urinary tract infection—especially when the patient is suffering from underlying medical conditions—involves professional medical judgment, diagnosis, and treatment. *Cf. Estate of Curtis*, 136 Nev. at 357, 466 P.3d at 1269 (drawing a distinction between professional judgment involved in prescribing a medication and the ordinary negligence of implementing that prescription by giving it to the wrong patient); *Montanez v. Sparks Family Hosp., Inc.*, 137 Nev., Adv. Op. 77, 499 P.3d 1189, 1193 & n.2 (2021) ("cleanliness protocols" necessary to prevent bacterial infection were dictated by medical professional standards, not janitorial standards). Accordingly, the medical judgment about how often to bathe and toilet Joan based on her medical conditions, and how to prevent a urinary tract

infection in light of Joan's other conditions, were matters of medical judgment and expertise.

(ii) Fall Risk

The implementation of fall risk protocols involves medical judgment. *See, e.g.*, *Gaddis v. Chatsworth Health Care Center, Inc.*, 639 S.E.2d 399, 402 (Ga. Ct. App. 2006) (holding it was medical malpractice when "the decision over what specific fall precautions to take was left to the medical judgment of" the medical staff at a nursing home); *Turner v. Renown Regional Medical Center*, Docket Nos. 77312, 77841, 2020 WL 1972790 *2 (Nev. Apr. 23, 2020) (unpublished order of affirmance) (holding a claim was for medical malpractice when it required "evaluation of [a hospital's] response to [a patient's] individual needs as a high-fall-risk patient, which involves medical judgment and treatment"). Yafchak's complaint does not allege what negligent acts or inactions caused Joan to fall out of bed. The complaint instead indicates that Joan's room was "located by the nurses' station," suggesting that *nurses*, rather than non-medical employees, failed to adequately monitor Yafchak during the night. JA 3 ¶11.

The appropriate level of monitoring based on a patient's medical condition is a medical judgment. *See Estate of Curtis,* 136 Nev. at 358, 466

P.3d at 169-70. Although Yafchak describes the risk of falling as something laypersons experience daily, laypersons do not deal with the risks of falling as a result of medical conditions or a caretaker's negligence. There are numerous factors involving medical diagnosis, judgment, and treatment that can go into a fall-risk analysis of a person with medical conditions that are not within a juror's common understanding. To understand how a nurse was responsible for Joan's fall, an expert would have to explain how Joan's conditions put her at risk of falling out of bed, why the nurses should have recognized Joan as a fall risk, and what actions a nurse should have taken to prevent Joan from falling out of her bed in the middle of the night. *See Turner*, 2020 WL 1972790 *2 (determining whether hospital "fell below the standard of care require[d] expert testimony as to the acceptable standard of care for treating a high-fall-risk patient").

Although Yafchak on appeal asserts the lack of a bed railing—a factual allegation that does not appear in the complaint—is a matter of ordinary knowledge based on whether a person is a fall risk or not, the matter is not so simple. *See* AOB at 21. Whether a bed railing should be up or down would depend on the underlying medical condition of the

patient and a medical judgment. Courts often find that bed positioning and the use of bedrails are matters of professional negligence. *See Murillo v. Good Samaritan Hosp.*, 160 Cal. Rptr. 33, 36 (Ct. App. 1979) (holding "whether it was negligent to leave the bedrails down" was a question of professional negligence); *Mt. Sinai Hosp. of Greater Miami, Inc. v. Wolfson*, 327 So. 2d 883, 884 (Fla. Dist. Ct. App. 1976) (complaint including failure to provide proper and adequate bedrails was for medical malpractice); *White v. Glen Ret. Sys.*, 195 So. 3d 485, 494 (La. Ct. App. 2016) (holding that it was a medical function when the bed was positioned too high based on an assessment of the patient's condition). Indeed, the decision to use a bedrail could itself be a professionally negligent act depending on the patient's underlying conditions and behaviors. *See, e.g.*, *Bryant v. Oakpointe Villa Nursing Centre*, 684 N.W.2d 864, 873-74 (Mich. 2004) (use of a bedrail was a medical judgment, which posed a risk of asphyxiation for a dementia patient).

Other medical diagnoses, judgment, or treatment issues that could lead to a patient falling in the middle of the night include

- the prescription of medications that increased the fall risk;
- the failure to prescribe medications to alleviate a fall risk;

- the level of monitoring and supervision necessary based on the patient's then-existing medical condition;
- the proper diagnosis of the medical conditions the patient is experiencing that would make the patient a fall risk; and
- the positioning of a patient in bed based on their medical needs and how that related to the fall.

Inherent in each of these circumstances is medical judgment by medical professionals, as opposed to ordinary negligence that has nothing to do with the judgment involved in a person's treatment. *Compare, e.g.*, *Chandler General Hosp., Inc. v. McNorrill*, 354 S.E.2d 872, 876 (Ga. Ct. App. 1987) (example of ordinary negligence where orderly chose to remove 292-pound plaintiff from a stretcher but then dropped the plaintiff because he was not strong enough); *Goodman v. Living Centers-Se., Inc.*, 759 S.E.2d 676, 679 (N.C. Ct. App. 2014) (example of ordinary negligence where long-term nursing facility placed an I.V. apparatus next to the bed in a position where it fell and hit the patient).

Accordingly, the complaint fails to allege any act of blatant negligence within the common knowledge of jurors that is sufficient to escape the medical expert affidavit requirements. Further, there is no obvious causal

connection between LCC's acts and Joan's fall or urinary tract infection such that they are matters of ordinary negligence within the common knowledge of jurors. *See Apkan*, 918 N.W.2d at 610-611.

As discussed immediately below, Yafchak's assertions to the contrary rely on disguised assertions of strict liability and factual circumstances not actually alleged in the complaint.

b. YAFCHAK'S ASSERTIONS OF ORDINARY NEGLIGENCE RELY ON STRICT LIABILITY THEORIES AND FACTUAL ALLEGATIONS NOT IN THE COMPLAINT

Yafchak's common-knowledge assertions are a thinly-veiled argument for strict liability. The complaint simply alleges that Joan fell and broke her collarbone, and that she contracted a urinary tract infection at the nursing facility. Yafchak does not allege how LCC acted negligently and thereby caused those injuries. Instead, Yafchak appears to assume that Joan could not have fallen or contracted a urinary tract infection unless LCC negligently cared for her—or that LCC is responsible for those injuries regardless of fault. Even on appeal, Yafchak is not clear about what negligent act she alleges caused Joan to fall out of bed. *See* AOB 21 (speculating about whether the evidence might show "there was not a bed railing . . . or some other preventative measure" to keep Joan from falling out of bed). Yafchak's reliance on the fact of injury alone to establish

negligence amounts to a strict liability or an "accident-free environment" claim that should be rejected.

In *Bryant*, a Michigan case whose reasoning was adopted in both *Szymborski* and *Curtis*, the plaintiff claimed that "defendant 'failed to assure that plaintiff's decedent was provided with an accident-free environment.'" 684 N.W.2d 864, 873 (Mich. 2004). The court quickly dispensed with that claim, holding that "strict liability is inapplicable to either ordinary negligence or medical malpractice." *Id.* Here, Yafchak similarly assumes that because LCC took custody and care of Joan, and Joan later suffered injuries, LCC must have been negligent while caring for Joan.

Yafchak uses this assumption for multiple purposes. One is to argue that the negligence resulting in Joan's injuries can be assessed by a juror's common knowledge. Another is to establish negligence in the absence of underlying factual allegations to support a negligent act. Both uses should be rejected, because strict liability or "accident-free environment" claims have no place in a claim for negligence and the liberal pleading standard does not permit a court to infer facts that were not alleged.

3. Yafchak and the NJA Rely on an Expansion of the Notice Pleading Standard to Rewrite a Factually-Obscure Complaint

Nevada is a notice pleading state, but that does not allow a court to infer factual allegations that are not actually made in the complaint. Notice pleading means the failure to use "precise legalese" or correctly identify "the legal theory relied upon" is not fatal to a complaint so long as it gives fair notice of the issues to the defendant. *See Liston v. Las Vegas Metropolitan Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995). It also means that, unlike federal courts who scrutinize the plausibility of factual allegations in a complaint, *cf. Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), a Nevada court should accept all factual allegations in the complaint as true and draw reasonable inferences from those facts in favor of the plaintiff. *See DeBoer*, 128 Nev. at 410, 282 P.3d at 730. But a liberal pleading standard still requires the complaint to allege the facts necessary to support a claim for relief. *See Liston*, 111 Nev. at 1578, 908 P.2d at 723 ("'Notice pleading' requires plaintiffs to set forth the facts which support a legal theory, but does not require the legal theory relied upon to be correctly identified."); *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (holding that courts "liberally construe pleadings to place into issue

matters which are fairly noticed" but still requiring that "[a] complaint must set forth sufficient facts to establish all necessary elements of a claim for relief"). This is particularly true in cases under NRS chapter 41A, when general allegations are equally consistent with a claim of professional negligence.

a. A Court Cannot Infer Factual Allegations Based on Conclusory Allegations of Duty or Breach

A liberal pleading standard does not allow a court to infer factual allegations that are not actually made in a complaint. *See Nuccio v. Chi. Commodities, Inc.*, 628 N.E.2d 1134, 1138 (Ill. App. Ct. 1993) ("We accept as true all well-pleaded facts and reasonable inferences therefrom, but we need not accept conclusions or inferences which are not supported by specific factual allegations."). Indeed, the Nevada Supreme Court has found conclusory allegations of breach insufficient to defeat a motion to dismiss when there are no facts alleged to support the allegation. In *Curtis*, for example, the court rejected the plaintiff's conclusory allegation that LCC was liable for negligent staffing, training, and budgeting, because "no factual basis was alleged." 136 Nev. at 354, 466 P.3d at 1267. Similarly, in *Szymborski*, the court rejected the plaintiff's arguments that health care professionals were involved in simple negligence in discharge

planning because the complaint failed to allege a set of facts supporting that claim. 133 Nev. at 645, 403 P.3d at 1286.

Szymborski and *Curtis* are consistent with other courts who refuse, even under a liberal pleading standard, to credit conclusory allegations of duty or breach when no factual basis is alleged to support the claim. *See, e.g.*, *Nuccio*, 628 N.E.2d at 1138 (determining that "basic legal deficiencies in a pleading," like missing factual allegations, "cannot be aided by a general rule of liberal construction"); *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 885 (Del. Ct. Ch. 2009) ("Conclusory allegations, however, without supporting factual allegations, will not be accepted as true."); *Mayer v. Sanders*, 695 N.Y.S.2d 593, 595 (App. Div. 1999) (dismissing complaint under a liberal pleading standard where the plaintiff "merely set forth conclusory allegations of negligence" and there were "no factual allegations in the complaint sufficient to state a cause of action").

Here, Yafchak's complaint is viable under a theory of ordinary negligence only if the court focuses on the duties and breaches alleged and then uses the liberal pleading standard to reverse-engineer a set of facts that could be based in ordinary negligence. Of course, the court could always imagine a set of circumstances involving ordinary negligence that

causes a fall or infections in a nursing home. The correct analysis, however, begins with the facts actually alleged in Yafchak's complaint and whether those facts, if true, entitle Yafchak to relief under a theory of ordinary negligence. *See Szymborkski*, 133 Nev. at 640-41, 403 P.3d at 1283.

b. YAFCHAK IMPROPERLY RELIES ON FACTS NOT ALLEGED IN THE COMPLAINT TO ARGUE THAT HER CLAIMS ARE BASED IN ORDINARY NEGLIGENCE

Yafchak argues, for example, that Joan fell numerous times at the nursing facility. But the complaint does not describe any of those falls and does not allege that Joan was injured from any fall other than the one on April 19, 2019 at 1:30 a.m., when she fell out of bed and broke her collarbone. As a result, the court should not consider any other potential fall when determining whether the complaint is for ordinary negligence or professional negligence. Further, in the one fall incident actually alleged, Yafchak failed to allege that a non-medical provider was responsible, but instead pointed the blame at the nearby nurse's station. On appeal, Yafchak asserts for the first time that Joan may have fallen out of her bed because the bed lacked an appropriate railing or some other safeguard. *See* AOB 21. That allegation is absent from the complaint. The court has no

basis to infer, in the absence of any factual allegation in the complaint to support it, that Joan fell out of bed because of ordinary negligence by LCC.

The NJA, for its part, argues that the court must infer that non-health care providers were the negligent actors responsible for Joan's injury and death. *See* Amicus Brief at 30. But Yafchak's complaint does not allege any facts that this court can accept as true involving non-health care providers. Yafchak never alleges that a certified nursing assistant or other non-health-care provider was responsible for Joan's fall; the only implication of the actual allegation is that nurses in the nearby nurse's station failed to prevent the fall. Similarly, the complaint does not describe who was involved in providing care for Joan when she was lethargic and shaking in her bed before sleeping abnormally, despite the named plaintiff, Lynn Yafchak, being a witness to the incident. If non-medical staff were responsible for the incident, Yafchak could have and should have alleged it. In the absence of facts suggesting otherwise, it would be a doctor or a nurse who was responsible for recognizing a change in Joan's condition and properly diagnosing the condition and transferring her to the hospital. *See Estate of Curtis*, 136 Nev. at 358, 466 P.3d at 1270 ("that LCC decided not to transfer Curtis to the hospital" was a decision that "required some

degree of professional judgment or skill").

c. IT WOULD ENCOURAGE PLAINTIFFS TO CIRCUMVENT THE AFFIDAVIT REQUIREMENT BY FILING LESS DETAILED COMPLAINTS IF THE COURT INFERRED FACTS AMOUNTING TO ORDINARY NEGLIGENCE

This court should not allow vague pleadings that implicate the conduct of medical professionals, because it defeats the purpose of NRS 41A.071. *See Szydel v. Markman*, 121 Nev. 453, 459, 117 P.3d 200, 204 (2005) (noting the purpose of NRS 41A.071 "is to lower costs, reduce frivolous lawsuit, and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion."). Any application of NRS 41A.071 that encourages a plaintiff to file a purposefully-vague and factually-deficient complaint is counter to the statute's purpose of reducing costs and avoiding frivolous lawsuits. Failing to apply NRS 41A.071 in cases like this one will only incentivize plaintiffs to make their claims against nursing facilities so factually obscure that the alleged negligence and the alleged negligent acts are undeterminable at the motion to dismiss stage of proceedings. Such a rule would allow a plaintiff to slip through the gatekeeping function of NRS 41A.071 to bring frivolous claims against nursing facilities that are actually based on professional negligence by providers of healthcare. Indeed, that is precisely

what Yafchak is attempting in this case.

4. Curtis *is Directly Applicable to This Case, and so Is the Court's Recent Decision in* Montanez

Yafchak attempts to distinguish *Curtis* as "a singular event caused by a nurse and doctor, . . . whereas the negligence in this case was caused by the combined actions and failures of numerous people failing to properly care for Joan." AOB at 5. If one were inclined to agree with Yafchak's factual characterization of this case, it would only be because the complaint obfuscates the culpable parties and the negligent acts. In reality, however, the two discreet incidents alleged in the complaint—a fall out of bed and a misdiagnosed period of shaking and lethargy—necessarily involved providers of healthcare at LCC exercising professional judgment. So, rather than clearly present LCC and the court with descriptions of the alleged negligent acts and actors involved in these incidents, which would readily allow an analysis under *Curtis*, Yafchak muddled those allegations in the complaint. She now relies on that same obscurity to survive the motion to dismiss.

Yafchak's purported distinction between this case and *Curtis* is also incorrect for two additional legal reasons. First, to the extent Yafchak is arguing that LCC can be liable as an entity absent particular negligent

acts by its agents, she is asserting an improper theory of strict liability or a breach of an "accident-free environment" against LCC. *See Bryant*, 684 N.W.2d at 873; *supra*, Section I(B)(2)(b). Second, Yafchak's purported distinction ignores the facts in *Curtis*. In *Curtis*, the singular event clearly attributable to a nurse—administering medicine to the wrong patient—was actually the only claim that did *not* require an expert medical affidavit. *See Estate of Curtis*, 136 Nev. at 358, 466 P.3d at 1269-70. Conversely, the court held that the combined actions of LCC's staff in failing to monitor the patient—the same type of allegations made in this case regarding Joan's fall and her infections—were professional negligence and required an affidavit. Thus, contrary to Yafchak's argument, allegations about negligence by combined members of LCC's staff is exactly what the *Curtis* court held required a medical expert affidavit.

Yafchak's attempt to distinguish or overrule *Curtis* in this case is further undermined by this court's recent opinion in *Montanez v. Sparks Family Hospital, Inc.*, 137 Nev., Adv. Op. 77, 499 P.3d 1189 (Dec. 9, 2021). There, Montanez underwent a surgical procedure on her eye, after which her eye became infected and she went blind. *Montanez*, 137 Nev., Adv. Op. at 2, 499 P.3d at 1191. Montanez sought damages for medical malpractice

and a premises liability claim. *Id.* She did not include a medical expert affidavit. *Id.* Montanez argued that a medical expert affidavit was not required because the negligence fell under the res ipsa loquitur exception in NRS 41A.100(1)(a). Montanez also argued that the infection to her eye could have been caused by a nonmedical mistake, such as the failure to maintain a clean building. *Id.*, 137 Nev., Adv. Op. at 3, 499 P.3d at 1191. Montanez argued that she had no way of knowing before discovery whether the bacteria that infected her eye entered her body through professional negligence or the simple failure to keep the room clean. *Id.*

Although *Montanez* involved a hospital, who is a provider of health care, the negligent act could have been performed by a janitor, who is not a provider of health care. *See id.*, 137 Nev., Adv. Op. at 7-8 n.2, 499 P.3d at 1193 n.2. Still, the court held that "the level of cleanliness that a medical provider must maintain is inherently linked to the provision of medical treatment." *Id.*, 137 Nev., Adv. Op. at 7, 499 P.3d at 1193. Accordingly, a medical expert was necessary to explain the cleaning protocols a hospital should adhere to and explain how negligence involving those "protocols would have caused a bacterial infection like Montanez experienced." *Id.*, 137 Nev., Adv. Op. at 7-8 n.2, 499 P.3d at 1193 n.2. The court also rejected

Montanez's *res ipsa loquitur* argument, noting that the common knowledge exception did not apply. The court reasoned that "[t]here are many ways that bacteria could be introduced into and remain in the body during and/or post-surgery, causing a subsequent infection—some of which do not result from the medical provider's negligence." *Montanez*, 137 Nev., Adv. Op. at 5, 499 P.3d at 1192. Whether the infection "was caused by a medical provider's professional negligence is beyond the purview of the average person's common knowledge" and therefore "outside the intended scope of the exceptions to the affidavit requirement." *Id.*

Yafchak's claim for ordinary negligence is actually weaker than the premises-liability claim in *Montanez*. *Montanez* at least involved an allegation of ordinary negligence that the cleaning staff failed to keep the building clean. No such clear allegation of ordinary negligence is made in this case. Nonetheless, this Court determined that the cleanliness of the building was inherently tied to medical treatment and that the possibility of multiple causative factors for the plaintiff's injury—some medical and some nonmedical—required medical expert testimony to explain causation to the jury.

Here, similarly, testimony from a nurse and/or doctor would be

necessary to explain the duties involved in caring for a patient in Joan's condition and how LCC's actions could have caused Joan to fall in the manner that she did or to contract the infections that she did in light of her other ongoing medical conditions.

Like the eye injury in *Montanez*, Yafchak's injuries are inherently linked to medical diagnosis, judgment, and treatment such that a medical expert is necessary to explain the causative factors for Joan's fall and infections. As discussed above, there are numerous factors involving medical diagnosis, judgment, and treatment that could cause Joan to fall from bed or contract a urinary tract infection. Without a medical expert, the jury would not be able to assess how those injuries could be caused and whether they were in fact caused by LCC's negligent medical diagnosis, judgment, or treatment.

C. A Claim Labeled as "Older Person Abuse" Is Still Subject to The Professional Negligence Statutes When it is Based on the Medical Diagnosis, Judgment, or Treatment of a Health Care Provider

This Court in *Estate of Curtis* already rejected the argument that applying NRS 41A.071's affidavit requirement to cases involving an older person would "eviscerate" the protections of NRS 41.1395. *See* Amicus Brief at 27 (arguing with the conclusion of *Estate of Curtis*). In *Estate of*

Curtis, the plaintiff made the same argument "that requiring an expert affidavit [would] defeat[ ] the purpose of Nevada's elder abuse statute." *Estate of Curtis*, 136 Nev. at 352, 466 P.3d at 1266. This Court disagreed, holding that it was not "persuaded that requiring compliance with NRS 41A.071 eviscerates the protections of NRS 41.1395." *See Estate of Curtis*, 136 Nev. at 358 n.5, 466 P.3d at 170 n.5. The NJA dismisses this holding as "footnote dicta" and urges that application of the professional negligence statutes would indeed eviscerate the protections of the older person abuse statute. *See* Amicus Brief at 3-4, 21, 24, 26-27.

Yafchak and the NJA attempt to create a conflict between the older person abuse statute and the professional negligence requirements that does not exist at this stage of the proceedings.[4] Namely, they frame older person abuse as its own distinct cause of action with a two-year statute of limitation. *See* Amicus Brief at 26-27; AOB at 22-31. And then they argue

[4] The NJA's "footnote dicta" argument is also undercut by the Nevada Supreme Court's later consideration of the Estate of Curtis's claims in Docket No. 79396 (Order of Affirmance, October 23, 2020), where this Court affirmed dismissal of the Estate of Curtis's claims for older person abuse against an LCC administrator as time-barred under the professional negligence statute. *See Estate of Curtis v. S. Las Vegas Med. Inv'rs, LLC*, No. 79396, 474 P.3d 335, 2020 WL 6271201 (Nev. Oct. 23, 2020) (unpublished). This Court in Docket No. 79396 had no issue applying *Estate of Curtis*'s analysis to a claim for older person abuse directly against

that applying the professional negligence statutory scheme to claims involving older person abuse "would cut the limitation period in half, cap noneconomic damages, and increase filing costs." Amicus Brief at 27.[5]

This is a false crisis, because there is no such thing as an independent tort claim for older person abuse under NRS 41.1395. "NRS 41.1395(1) does not constitute an independent cause of action but rather is a provision for special damages." *Borenstein v. Animal Foundation*, 526 F. Supp. 3d 820, 840 (D. Nev. 2021); *Doe v. Clark County School District*, 2016 WL 4432683 at *13 (D. Nev. 2016) (same); *see also Phipps v. Clark County School District*, 164 F. Supp. 3d 1220, 1229 (D. Nev. 2016) (referring to NRS 41.1395 as a provision for "enhanced damages").[6]

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an LCC administrator.

[5] Even if NRS 41.1395 *did* create a cause of action, it did not specify a two-year statute of limitations. The NJA presumably draws from the two-year limitations period for *common-law* negligence claims in NRS 41.190(4)(e). But if we have to look outside NRS 41.1395 anyway, there is no argument that the limitations period in NRS 41A.097 is inconsistent with NRS 41.1395 for acts of older person abuse that arise from professional negligence. Here, even if NRS 41.1395 excused noncompliance with the affidavit requirement of NRS 41A.071, Yafchak's complaint was still untimely filed more than a year after Joan's death.

[6] LCC notes that this Court in an unpublished order recognized NRS 41.1395 as a provision for special damages that must be specifically pleaded. *See Findlay Management Group v. Jenkins*, Docket No. 60920, 131 Nev. 1278, 2015 WL 5728870, at *2 (Sept. 28, 2015) (unpublished order affirming in part, reversing in part, and remanding). Consistent with

When the Legislature creates an independent cause of action, it says so in the statute. *See Richardson Const., Inc. v. Clark County School Dist.*, 123 Nev. 61, 65, 156 P.3d 21, 23 (2007) ("[W]hen a statute does not expressly provide for a private cause of action, the absence of such a provision suggests that the Legislature did not intend for the statute to be enforced through a private cause of action."). Although some of the wording in the legislative history of NRS 41.1395 discusses a "cause of action" for older person abuse, the actual enacted language does not create a cause of action. Instead of providing the ability to bring an "action," which is what the Legislature says when it creates a cause of action, NRS 41.1395 provides double damages and attorney's fees and costs when specific circumstances exist involving injury or death to an older person. *See* NRS 41.1395(1) (providing that "the person who caused the injury, death or loss is liable to the older person . . . for two times the actual damages incurred").

In numerous other instances in NRS chapter 41, the Legislature expressly created causes of "action." *See, e.g.*, NRS 41.085 (providing that in the case of a wrongful death, the heirs and personal representatives of

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NRAP 36(c)(3), however, LCC does not cite or rely on this decision for its

the decedent "may each maintain an action for damages"); NRS 41.134 (providing, in the same chapter as NRS 41.1395, "an action to recover for the person's actual damages" for acts of domestic violence); NRS 41.1345 (providing, in the same chapter, that a person who suffers from the sale or transfer of personal identifying information may "commence an action"); NRS 41.139(1) (providing that first responders "may bring and maintain an action"); NRS 41.1396(1) ("may bring an action"). Similarly, other states who have independent causes of action for older person abuse expressly provided that right of action. *See*, *e.g.*, A.R.S. § 46-455(B) (Arizona statute authorizing a vulnerable adult to "file an action in superior court"); Conn. Gen. Stat. §17b-462(a) (Connecticut statute giving "a cause of action" to elderly person "who has been the victim of abuse, neglect, exploitation or abandonment"); Or. Rev. Stat. § 124.100(2) (Oregon statute authorizing an elderly person to "bring an action" for abuse); Wis. Stat. §50.10 (Wisconsin statute titled "Private cause of action" that states that nursing home residents have "an independent cause of action" to correct conditions in a nursing home). There is no such authorization to bring an "action" in NRS 41.1395, underscoring that it is actually a special damages provision.

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precedential or persuasive value.

In most cases, this legal distinction might not be raised or make a difference, because a plaintiff should be able to allege negligence or an intentional tort if the conduct meets NRS 41.1395's requirements.[7] But here, Yafchak and the NJA rely on the older person abuse statute to *create* an independent cause of action that provides greater rights to older persons that are in conflict with protections for providers of health care under NRS Chapter 41A. In response to the arguments raised by the NJA, this Court should recognize that NRS 41.1395 is a special damages provision, not a standalone cause of action that is in conflict with NRS Chapter 41A.071's affidavit requirement. Because NRS 41.1395 is a statutory special damages provision, not a standalone cause of action with its own statute of limitation, it is only applicable after a plaintiff has proven damages for some other recognized cause of action against a defendant.

Specifically, NRS 41.1395 has no effect on this Court's analysis of

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[7] This could explain why some cases analyze older person abuse as a "claim" in its own right. *See, e.g.*, *Lewis v. Renown Regional Medical Center*, No. 74300, 134 Nev. 973, 2018 WL 6721372 (Dec. 18, 2018) (unpublished). Notably, *Estate of Curtis* itself refers to "older abuse" as a claim in footnote five, although that is not inconsistent with older person abuse being a claim for special damages. Given the NJA's disregard for footnote five of the *Estate of Curtis* opinion, it would be ironic if the court's ambiguous word choice of "claim" were the one thing from *Curtis* that Yafchak and the NJA would preserve.

whether Yafchak's claim is for ordinary negligence or professional negligence. If Yafchak's underlying claims are for professional negligence instead of ordinary negligence, then the complaint must meet NRS 41A.071's affidavit requirement. The Legislature's enactment of a special damages provision for claims involving injury or death to older persons has no effect on the original pleading requirements in a claim for professional negligence. *See Estate of Curtis*, 136 Nev. at 358 n.5, 466 P.3d at 170 n.5. Accordingly, the question that is raised by Yafchak and the NJA—whether special damages awarded under the older person abuse statute may conflict with NRS 41A.035's cap on noneconomic damages for professional negligence—is not an issue before this Court at this time.[8]

Even when a claim involves alleged abuse of an older person, the affidavit requirement plays an important role in preventing frivolous claims against medical professionals. A party can assert a claim for professional negligence with a supporting medical affidavit and then expand its ordinary negligence claims later. *See* NRCP 54(c) (directing that a final judgment should "grant the relief to which each party is

[8]For it to be an issue, Yafchak would have had to have properly asserted a professional negligence claim with an expert affidavit within one year of Joan's death, while also pleading special damages under the older person

entitled, even if the party has not demanded such relief in its pleadings); NRCP 15(b) (allowing amendment of pleadings based on evidence at trial). But a party cannot, as Yafchak apparently attempts to do here, avoid the affidavit requirement at the outset by filing a complaint lacking in specific factual allegations and then proceed with claims that are actually based on the medical judgment, diagnosis, and treatment of medical professionals. *See* NRS 41A.071 (requiring an expert medical affidavit in "an action for professional negligence"); *Washoe Medical Center v. Second Judicial Dist. Court*, 122 Nev. at 1303 (holding that a complaint for medical malpractice that is filed without an expert affidavit is void ab initio and must be dismissed).

II.

THERE IS NO COMPELLING REASON TO OVERTURN *ESTATE OF CURTIS*

This court will not overturn precedent "absent compelling reasons for so doing." *Miller v. Burk*, 124 Nev. 579, 596, 188 P.3d 1112, 1124 (2008). "Mere disagreement" with a prior opinion is not sufficient to overturn it. *Miller*, 124 Nev. at 596, 188 P.3d at 1124. The reasons for overturning must be "weighty and conclusive." *Miller*, 124 Nev. at 596, 188 P.3d at

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abuse statute that would exceed the professional negligence cap.

1124. "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and [the Legislature] remains free to alter what [the courts] have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). Yafchak asserts that this court should overturn *Curtis* because the Legislature intentionally excluded nursing homes from NRS 41A.071 to protect older persons from negligent care. *See* AOB 22.

As a threshold matter, *Curtis* is neither badly reasoned nor unworkable. *See Whitfield v. Nev. State Personnel Commission*, 137 Nev., Adv. Op. 34, 492 P.3d 571, 575 (2021) ("A prior holding that has proven 'badly reasoned' or 'unworkable' should be overruled."). *Curtis* reasonably applied Nevada law and persuasive authority from other jurisdictions to hold that claims based on vicarious liability for actions by providers of health care "cannot be used to circumvent NRS Chapter 41's requirements governing professional negligence lawsuits." *Estate of Curtis*, 136 Nev. at 353, 466 P.3d at 1267. The rule is simple: any claim based on a provider of health care's professional negligence is subject to NRS 41A.071's affidavit requirement. *Curtis* appropriately and reasonably held that a plaintiff

cannot avoid the affidavit requirement by forgoing claims against the negligent provider of health care and instead only suing the entity who would be vicariously liable for the provider's actions. A contrary rule would incentivize gamesmanship where plaintiffs would forgo naming culpable actors to circumvent NRS Chapter 41A—just as Yafchak has done here.

Further, as discussed above, NRS 41.1395 is a statutory special damages provision that is only relevant to damages. It is unnecessary at this stage of these proceedings to address the interplay between the professional negligence statutes and the older person abuse statute because there is no actual conflict between NRS 41A.071's affidavit requirement and NRS 41.1395 provision of special damages. Additionally, Yafchak and the NJA's argument that applying NRS 41A.071 to claims involving older person abuse would eviscerate the protections in NRS 41.1395 was explicitly considered and rejected by the court in *Curtis*. *See Curtis*, 136 Nev. at 358 n.5, 466 P.3d at 1270 n.5; *see also Curtis II*, Docket No. 79396, 2020 WL 6271201 (applying *Curtis I* to uphold dismissal of claims for older person abuse against nursing facility and its administrators).

Yafchak's legislative history argument to overturn *Curtis* is also

flawed because it mistakes the Legislature's failure to include skilled nursing facilities in NRS 41A.017 as an express exclusion from the professional negligence requirements. There is a difference, however, between not including skilled nursing facilities in the definition of provider of health care and excluding claims against skilled nursing facilities under NRS Chapter 41A. For all of the legislative history cited by Yafchak and the NJA, nothing in NRS Chapter 41A distinguishes between nurses and doctors who work at hospitals versus those who work at skilled nursing facilities. There is certainly nothing, in either NRS Chapter 41A or NRS 41.1395, that excludes skilled nursing facilities or nurses or doctors who worked at skilled nursing facilities from the protections of NRS Chapter 41A when they are subject to a claim made by an older person. If the Legislature desired, it could have expressly excluded damages under the older person abuse statute from the requirements of the professional negligence statutes. *Cf., e.g.*, Fla. Stat. § 400.023(1)(e) (Florida statute expressly providing that the medical malpractice chapter "does not apply to a cause of action brought under" the nursing home chapter).

Although Yafchak and the NJA frame their arguments in terms of overturning *Curtis*, they are actually asking this Court to write something

into NRS Chapter 41A that the Legislature has not: that claims by older persons against skilled nursing facilities are exempt from professional negligence requirements, regardless of who acted negligently. In light of principles of vicarious liability already considered and applied in *Curtis*, that would be a policy decision for the Legislature. But it not one that the Legislature has yet adopted.

Yafchak's argument about what the Legislature has failed to do cuts both ways. The Legislature has also never excluded actions involving damages under the older person abuse statute from NRS Chapter 41A's requirements. Other states have done so. *Cf., e.g.*, Fla. Stat. § 400.023(1)(e). Accordingly, even though the Legislature has not added skilled nursing facilities to NRS 41A.017, it also has not exempted actions seeking damages under NRS 41.1395 from professional negligence requirements.

Ultimately, when deciding *Curtis*, the court reached a reasonable interpretation of the relationship between vicarious liability and the medical expert affidavit requirement. Yafchak's and the NJA's disagreement with that interpretation is not sufficient to overrule the case.

CONCLUSION

The complaint was properly dismissed because it sounds in professional negligence by providers of healthcare at LCC but did not include an expert affidavit under NRS 41A.071. The complaint was also filed after the statutory limitation period in NRS 41A.097. The minimal allegations in the complaint rest on two incidents at LCC that would have necessarily involved the medical diagnosis, judgment, and treatment of providers of health care at LCC. Yafchak cannot circumvent NRS 41A.071 by suing LCC directly when the underlying negligence is based on professional negligence. LCC therefore asks this Court to apply *Estate of Curtis*, just as the district court did, and affirm the dismissal of Yafchak's complaint.

Dated this 14th day of January, 2022.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 11,834 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 14th day of January, 2022.

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