2014 WL 2528405 (Nev.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)
District Court of Nevada.
Clark County

Estate of Charles Thomas CORNELL, Jr., through its Special Administrators Patrick Chapin, Sherry Cornell and Karla Crawford; Sherry Cornell, individually; and Karla Crawford, individually, Plaintiffs,

v.

THI OF NEVADA II AT DESERT LANE, LLC, a Delaware Limited Liability Company, dba Desert Lane Care Center, Desert Lane, LLC, a Delaware Limited Liability Company, Andrew Reese, Stephen Tam, M.D., Alfredo Hibbart, P.A., Susan Acang, R.N., Janet Yee, R.N., Marilyn Anderson, Lsw, and John Does 1-20, Defendants.

No. 11A642525.
January 23, 2014.

Dept. No.: XXX
Date of Hearing:
Time of Hearing:

Defendant, Alfredo Hibbert, P.A.'s Motion for Partial Summary Judgment Re: Vulnerable Person Claims Pursuant to Nrs 41.1395

MPSJ, Robert C. McBride, Esq., Nevada Bar No.: 007082, Marie Ellerton, Esq., Nevada Bar No.: 004581, Mandelbaum, Ellerton & McBride, 2012 Hamilton Lane, Las Vegas, Nevada 89106, Telephone: (702) 367-1234, Facsimile: (702) 367-1978, filing@memlaw.net, for defendant, Alfredo Hibbert, P.A.

COMES NOW, Defendant, ALFREDO HIBBERT, P.A., by and through his counsel of record, ROBERT C. McBRIDE, ESQ., and MARIE ELLERTON, ESQ., of the law firm of MANDELBAUM, ELLERTON, & McBRIDE hereby moves this Court for entry of an order for partial summary judgment regarding Plaintiffs' Vulnerable Person **Abuse** Claim pursuant to NRS 41.1395.

This motion is made and based on the Memorandum of Points and Authorities attached hereto, the papers and pleadings on file herein, and the arguments counsel makes at the time of the hearing on this matter.

DATED this 23rd day of January, 2014.

MANDELBAUM, ELLERTON & McBRIDE

By:

ROBERT C. McBRIDE, ESQ.

Nevada Bar No.: 007082

MARIE ELLERTON, ESQ.

Nevada Bar No. 004581

2012 Hamilton Lane

Las Vegas, Nevada 89106

Attorneys for Defendant

ALFREDO HIBBERT, P.A.

NOTICE OF MOTION

TO: ALL PARTIES AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that Defendant will bring the foregoing Motion on for hearing on the 25 day of February 2014, at the hour of 9:00 a.m., or as soon thereafter as the matter can be heard before the above-entitled Court, in Dept. No. XXX.

DATED this 23rd day of January, 2014.

MANDELBAUM, ELLERTON & McBRIDE

By:

ROBERT C. McBRIDE, ESQ.

Nevada Bar No.: 007082

MARIE ELLERTON, ESQ.

Nevada Bar No. 004581

2012 Hamilton Lane

Las Vegas, Nevada 89106

Attorneys for Defendant

ALFREDO HIBBERT, P.A.

AFFIDAVIT OF COUNSEL PURSUANT TO LOCAL RULE 2.47

I, MARIE ELLERTON, ESQ. being first duly sworn, deposes and states as follows:

1. I am an attorney licensed to practice law in the State of Nevada and am a Partner with MANDELBAUM, ELLERTON & McBRIDE, counsel for Defendant Alfredo Hibbert, P.A. This Affidavit is made and based upon my personal knowledge and I am competent to testify to the matters contained herein.

2. On January 9, 2014, the parties commenced a discussion, by email, regarding Motions in Limine. I offered to send to Plaintiffs' counsel, Shandor Badaruddin, Esq., exemplars of the standard Motions I file in order for him to evaluate and determine which, if any, he could agree to so as to avoid the need to file each and every one.

3. On January 13, 2014,1 did send by email those exemplars for Mr. Badaruddin's review and consideration. *(See* email attached as **Exhibit "A").** I requested that Mr. Badaruddin contact me to discuss which motions, if any, he would be willing to enter into a stipulation. In that email, I asked Mr. Badaruddin if he planned to maintain Plaintiffs' claims regarding the vulnerable person **abuse**, pursuant to NRS 41.1395, and his punitive damages claim.

4. On January 16, 2014, I received an email from Mr. Badaruddin in which he set forth that he is unwilling to agree to any of the proposed Motions in Limine. Mr. Badaruddin also stated that he will not abandon either the claims under NRS 41.1395 or the punitive damages claims. *(See* email attached as **Exhibit "B").**

5. Therefore, despite good-faith efforts to confer, counsel for the parties have been unable to resolve this matter satisfactorily and Court intervention is necessary. This Motion is brought in good faith and not for purposes of delay.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Marie Ellerton, Esq.

MEMORANDUM OF POINTS AND AUTHORITIES

L INTRODUCTION.

This is a professional negligence/medical malpractice/wrongful death case related to the care and treatment Defendants provided to Charles Thomas Cornell, Jr. during his stay at Desert Lane Care Center from March 3, 2010 through June 7, 2010, including discharge planning and ultimately the placement after discharge from Desert Lane Care Center, In particular, Plaintiffs allege that Mr. Cornell, who was diagnosed with Type I Diabetes Mellitus/Juvenile Diabetes at the age of fourteen (14), was incapable of caring for himself, including that he could not manage his diabetes, administer his insulin or check his blood sugars.

Plaintiffs allege, *inter alia*, causes of action for negligence, professional negligence and for damages pursuant to NRS 41.1395. Plaintiffs' allegations include that the Defendants failed to properly monitor and assess the decedent, including but not limited to his blood sugars; failed to prevent neglect of the decedent; failed to make certain that the decedent was able to carry out activities of daily living; failed to make certain that upon discharge decedent would have safe and appropriate living conditions; failed to make certain that the decedent had access to and the ability to pay for the medications he required to sustain his life; failed to make certain that he was able to self administrator his medications; failed to secure adequate home health care for the decedent; failed to prepare the decedent for discharge and self management of his diabetes; failed to provide adequate teaching and discharge instructions; improperly cleared decedent for discharge; and failed to advise and/or involve decedent's family members in his care, treatment and planning for discharge.

All of Plaintiffs' allegations are grounded in claims of professional negligence/medical malpractice. Although Plaintiffs allege that the care that was provided to the decedent was improper, inappropriate and negligent, none of the allegations state that Defendants failed to provide care and services. Despite this, Plaintiffs are trying to turn this straightforward medical malpractice action into a case of **abuse** of a vulnerable person pursuant to NRS 41.1395 and they are seeking double damages on that basis.

The reason that Plaintiffs allege the claim under NRS 41.1395 is to do an end-run around the will of the people of Nevada related to the state wide initiative petition wherein the citizens voted to limit the amount of awards for non-economic damages and determining that such awards must not exceed $350,000. Plaintiffs do not wish to be treated like all other professional negligence/medical malpractice plaintiffs because the provisions of NRS 41A include the limitation on non-economic damages and Plaintiffs want more. As such, Plaintiffs are willing to allege, without supporting facts, that the decedent was a vulnerable person and the Defendants willingly inflicted pain and unjustifiably deprived the decedent of various necessities, thereby invoking a statute that was not intended to be used in straight forward medical malpractice case. *See* Complaint, ¶s 175 -184.

II. FACTUAL BACKGROUND.

It is undisputed and the medical records support that Charles Thomas Cornell, Jr., whose date of birth is XX/XX/1971, had a complex medical and surgical history related to complications of Type I Diabetes Mellitus which was diagnosed when he was around fourteen. The medical records from various entities document a history of dyslipidemia, arteriosclerotic cardiovascular disease, hypertension and depression. In 2003, Mr. Cornell suffered a cerebrovascular accident (stroke). In June of 2005, he developed new onset of renal failure. In November of 2005, Mr. Cornell underwent open heart surgery with a three vessel coronary artery bypass graft. In February of 2007, a live donor related kidney transplant was performed with Mr. Cornell's sister donating one of her kidneys. Then in March of 2008, Mr. Cornell had a pancreas transplant. This later failed.

During a November 17, 2008 admission to Antelope Valley Hospital in Lancaster, California, Mr. Cornell suffered a cardiac arrest and respiratory failure and required intubation and ventilator support. On November 29, 2008, he was transferred to UCLA where, among other things, a permanent pacemaker was placed.

The records demonstrate that Mr. Cornell experienced additional cardiac events in January of 2009. He was hospitalized at Antelope Valley Hospital with chest pain from January 11th through January 17th, 2009, and again from January 18th through January 21st, 2009. On January 20, 2009, a cardiac catheterization revealed significant two-vessel coronary artery disease with occluded saphenous vein grafts to the left coronary system and the right coronary artery, but widely patent left internal mammary artery to left anterior descending artery.

Sometime in May of 2009, Mr. Cornell moved to Yuma, Arizona. By July of 2009, he was in Lake Havasu City, Arizona where his mother had moved to manage the CVS pharmacy.

Over the course of the next several months, Mr. Cornell made a number of visits to the Emergency Department (ED) at Havasu Regional Medical Center. In September of 2009, Mr, Cornell had a renal biopsy followed by an ultrasound of the kidneys. Then in late September 2009, he was hospitalized at Good Samaritan Hospital in Phoenix for seventeen (17) days due to renal failure and neutropenia.

Mr. Cornell moved back to Lake Havasu in December of 2009. He visited the ED on December 29, 2009 for complaints of diarrhea, vomiting and abdominal pain.

On January 6, 2010, Mr. Cornell was taken by the Bullhead City Fire Department to the ED at Western Arizona Regional Medical Center in Bullhead City, with complaints of two days of weakness and nausea and vomiting. He was noted to be dehydrated and his blood sugar was 348. He was stabilized and discharged.

On January 8, 2010, bystanders at the mens shelter called 911. When Fire Department personnel arrived, they were told that Mr. Cornell had been sick for three days, and had been treated and released from the ED the day before. When they checked him at 2000 they were unable to awaken him so they called 911. The EMS found Mr. Cornell unconscious with withdrawal to pain only and that the dexstick read high. They were unable to obtain IV access due to vascular shut down. Mr. Cornell was transported to the ED where his vital signs were documented as follows: temperature 98,3, pulse 203, respirations 36, and blood pressure 73/37. His condition deteriorated and at midnight Mr. Cornell had a cardiac arrest. He was intubated. ACLS protocol was initiated and was successful.

On January 9, 2010, Mr. Cornell was transferred by Care Flight Air Medical to University Medical Center of Southern Nevada (UMC) in Las Vegas. The hospital course at UMC was complicated by upper GI bleed, acute stroke, acute kidney injury and bacteremia. On February 1, 2010, he was transferred to HealthSouth Valley View Rehabilitation Hospital where he stayed through February 15, 2010. He was then transferred to Silver Ridge Health Care Center,

On February 23, 2010, Mr. Cornell was transferred from Silver Ridge HealthCare Center to Southern Hills Hospital due to his complaint of generalized abdominal pain, nausea, fever and lethargy. He underwent numerous consultations including obtaining opinions related to risks for surgery. It was noted that he had an abscess of right lower quadrant cecal region, and question of appendix perforated. In addition, he developed rectal bleeding which lead to hypotension and obtundence and he required intubation and ventilator support. The gastroenterologist who saw him felt that Mr. Cornell had had a vascular bleed into the colon secondary to a fistulous communication between a pseudoaneurysm in the right side of the colon which represented an acute life-threatening event that required immediate vascular surgery. The surgery was performed on February 24, 2010.

An infectious disease specialist saw Mr. Cornell for possible septic shock on February 26, 2010. On the same day, he was seen by an endocrinologist for hyperglycemia, and uncontrolled diabetes mellitus type 1. The endocrinologist noted that Mr. Cornell had had diabetes since he was 14 years old and with it had all of the known complications, microvascular and microvascular complications of diabetes; diabetic retinopathy with laser surgery on both eyes; diabetic neuropathy and history of 2 strokes, one in 2006 and one last year with some weakness on the right side; renal failure and renal transplant in 2007; and in 2008 he had pancreatic transplant which failed in August of 2009 so he was restarted on insulin. With IV insulin and TPN his glucose was in the 100 to 150 range. The plan was to continue IV insulin and he would switch it to subcutaneous when he started eating. The goal was to keep the glucose at 100 and avoid hypoglycemia.

On March 2, 2010, a Discharge Summary was dictated wherein the physician indicated he was uncomfortable with the patient's mental status and ambulatory instability so he may need to go to rehabilitation. He went on to say that the patient would be given prescriptions; however, in case Silver Ridge did not take him back: the medications are then listed and there is no completion of that thought.

Mr. Cornell did not return to Silver Ridge. Instead on March 3, 2010 he was transferred to Desert Lane Care Center.

According to the nurses' notes, Alfredo Hibbert, PA was notified of Mr. Cornell's admission at around 8:00 p.m. on March 3, 2010. The History and Physical dictated on March 4, 2010 by Hassanali Sewani, M.D. lists Stephen Tam, M.D. as the attending physician. Mr. Cornell's past medical history was set out. The plan was to continue Mr. Cornell's previous medication, physical therapy, occupational therapy and to complete the antibiotic course.

A Consultation was obtained with Farzin Farhang-Nejad, M.D. for evaluation for rehabilitation on March 10, 2010. Dr. Farhang-Nejad noted that Mr. Cornell said that he had been completely independent before, but at the time he had no home and was working with the social worker. He indicated that the patient's medications were Zofran, Prilosec, Lantus insulin, Restoril, Zocor, Effexor, Lorazepam and Flagyl. Included in the assessment is inability to perform activities of daily living. Dr. Farhang-Nejad indicated that he reviewed the PT and OT notes and agreed with the plans. He stated that the patient was benefitting from both and he recommended treatment 5 times a week for at least 3 to 5 weeks, including self care activities of daily living, gait training, strengthening of the upper and lower extremities, as well as the quads and gluteal areas, and fall precautions.

On April 8, 2010 Mr. Cornell was seen by psychiatrist Uzma Zafar, M.D. for evaluation of continued depression. Dr. Zafar notes that Mr. Cornell is an unfortunate 38 year old who was transferred from Silver Ridge Nursing Facility and was at Desert Lane Care Center for continuing care. Dr. Zafar listed the medical history and noted that Mr. Cornell was currently on Effexor 37.5 and Seroquel 50 mg. Dr. Zafar was unclear when these medications were started, but thought it may have been at Silver Ridge a couple of months earlier. He noted that Mr. Cornell had a lot of stressors at the time. As of the night before, he started thinking about his father who died July 1, 2007, and his ex-wife who left him last year after four years of marriage because of conflicts related to his medical problems and selfishness. The divorce was official in 2009.

Mr. Cornell indicated that he lived with his mother in Phoenix for a while, but this did not work out due to a conflicting relationship with her. Social work was trying to get him to go to a nursing home in Phoenix. He wanted to be near his mother, but he was recently told that his mother did not want him in Phoenix. Therefore, he felt abandoned and neglected. He has a sister in California with whom he has some contact. He is single, not working and has no children. He feels lost and depressed.

He believes that neither the Effexor or Seroquel are helping. He has problems sleeping and with energy and concentration. He has been having crying spells and feels anhedonic. He denied thoughts of harm to self or others or of abnormal perceptions. He related that he goes through periods of euphoria and high energy. During those times, he sleeps well. He feels like talking fast, as his mind thinks fast, but he does not get very distractable and denies any reckless behavior during those moments. He said it is difficult to identify the spells as high energy euphoric spells, that they are very few and last for 5 minutes to a day and then he gets back to his normal self. He is more worried about his depression and says those spells are definitely better than depression. It is unclear if he had had the spells for a number of years or if they just started a couple of months ago.

Although Mr. Cornell had just awakened, was tired and did not fully participate in mental status exam, he was cooperative. He was oriented as to time, place and person, but was somewhat disheveled. He knew the date, month, year and the name of the facility. He could name five U.S. Presidents and knew the current president. His affect was blunted and his eye contact was poor to intermittent. His speech was sometimes vague, and he appeared a bit confused or perhaps sedated. He had no delusions, phobias, or obsessions. His insight and judgment were fair.

Mr. Cornell's past psychiatric history was significant for his mother having insisted that he see a psychiatrist in Lake Havasu in July of 2009. At that time, he was verbally **abusive** and threatening toward her but was not physically **abusive**. She wanted him to get help. The psychiatrist put him on Geodon 40 mg. daily. He took it for two months, but said it did not help. Mr. Cornell denied any inpatient psychiatric hospitalizations or history of suicide attempts.

Dr. Zafar's assessment was of depression secondary to general medical conditions, rule out bipolar affective disorder, not otherwise specified. The plan was to increase Effexor XR to 50 mg. daily for seven days and then to 75 mg. daily in the morning. In addition the Seroquel would be increased to 75 mg. at bedtime for ongoing issues with sleep, as well as mood stabilization.

It is undisputed that Mr. Cornell and his mother had a rocky relationship which ultimately resulted in Ms. Cornell obtaining a restraining order that precluded her son from contacting her.

Mr. Cornell also seen by W. Marks/Dr. Holland with Southwest Cares, Psychological/Behavioral Health for depression, anxiety and insomnia on March 19, 26, April 2, 10, 23, 30, May 7, 10, 21 and 28, 2010. On June 7, 2010 he was seen by Dr. K. Segua who indicated treatment modalities listed are cognitive behavioral psychotherapy, supportive psychotherapy, reality-oriented psychotherapy and reinforcing appropriate behavior. Symptoms and risk factors were as follows: anxiety, agitation, noncompliance, verbal aggression, fears - specifically discharge from facility, adjustment difficulties associated with illness, other - specifically boundaries. Dr. Segua noted that all had improved. The treatment plan was that the patient was being discharged in 24 hours.

Throughout his stay at Desert Lane Care Center, Mr. Cornell was followed by Dr. Tarn and Mr. Hibbert as well as various physicians from Kidney Specialists of Southern Nevada, including Cristy Robertson, M.D., Venugopal Botla, M.D., Jay Chu, M.D., Lawrence Lehrner, M.D. and Ramchand Ranai, M.D.

Discharge planning by the Social Worker began at the time of admission on March 3, 2010. The Initial Social Service History indicates that Mr. Cornell had lived in a group home in Bullhead City and that he had no support system in Las Vegas. Both the comprehensive care plan and the social service history set out that he wanted to go back to Phoenix and go into a group home.

The Social Service Progress Notes have an entry on March 8, 2010 related to a telephone conversation with Mr. Cornell's mother, Sherry Cornell, who stated that he lost his father in 2007 and began an internet relationship with a woman in Russia so his wife divorced him in 2009. The mother indicated that while Mr. Cornell was living with her he became agitated and she feared for her safety. She said that she felt that he had had psychiatric issues for a long time. The Social Worker reported the information to the nurse so that she could get an order for a psychiatric evaluation and counseling, which was done.

The Social Worker spoke to Sherry Cornell again on March 15, 2010. At that time, Ms. Cornell indicated that she would like Mr. Cornell to come to Phoenix, but neither she or his sister could take him in. She stated that she did not believe that he was able to make his own decisions, so they talked about a public guardian, safe discharge and Mr. Cornell's goal to get a room for rent. Ms. Cornell reported that he had a rep payer who has financial POA.

The Social Worker documented on April 12, 2010 that she had been attempting to assist Mr. Cornell to find a group home in Phoenix. The record reflects that she jumped through multiple hoops trying to get him placed and got the royal run around. She spoke to the people at Access Arizona who said they would pay for his transfer transport, but they could not help with placement. The Social Worker did an internet search and called a number of facilities all of which denied him due to his age, not having drug and alcohol **abuse** issues. One of the facilities provided a hotline number which the Social Worker called, but it only had information for Access Arizona. She followed all leads and left a number of messages, but got nowhere. She reported this to Mr. Cornell who said that he was okay with discharg to a group home or independent living in Las Vegas. Thereafter she called Eileen Expino, the liaison who did group homes, for evaluation of Mr. Cornell.

On April 14, 2010, the Social Worker spoke to Ms. Cornell about Mr. Cornell's discharge. Ms. Cornell indicated that her son told her that the Social Worker told him that he would be discharged to a Studio. The Social Worker informed Ms. Cornell that was not the case, that they had talked about a group home. The Social Worker asked her about his finances and she reported there was a person from social security in control of his money and she would call back with the phone number. The Social Worker later received a call from Lorie Ramirez who told her that Mr. Cornell would have to go through Magellan to get into a group home and gave her the numbers for Thomas Rd and Highland. She was able to reach Highland and they told her he would have to go through intake at 800-564-5465. She called the number and after holding for twenty (20) minutes hung up and indicated she would try again.

The Social Worker called Magellan, again, on April 16, 2010. The representative promptly told her that he could not aid her in placing Mr. Cornell as his mental health diagnosis is not the primary. He directed her back to Access Arizona who reported again that they cannot place him and they would forward her number to the case manager. On April 19, 2010, the Social Worker got a call back from Phoenix Health plan. They told her that Mr. Cornell had BC/BS and she should contact them. Thereafter, on April 21, 2010, the Social Worker spoke to Mike Fisher at social security who was Mr. Cornell's rep payee. He related that Mr. Cornell got $674.00 monthly, no one has guardianship and he could not help with placement.

On April 23, 2010, the Social Worker called Banner Hospital in Arizona to try to get some help with placement for Mr. Cornell. She was told that they could not give her any advice. She then left a message at St. Joseph's Hospital, but did not get a return call.

On May 7, 2010, the Social Worker called Mr. Cornell's representative to request that they call the liaison for possible group home placement and possible discharge next week. The next entry is on June 4, 2010 and sets out that she was able to locate a room for rent in an independent home from Pat Evans and Abe Lincoln, who also own group homes. Mr. Cornell agreed to this, toured the room and liked it. Pat assured her that someone will check on him daily and manage his medications and provide PVA care. Abe already spoke to the rep payer for payment. Anticipated discharge Monday.

The Social Worker spoke to Mr. Hibbert on June 7, 2010. Mr. Hibbert indicated that he would discharge Mr. Cornell that day. HHC was ordered through Excell and the orders were sent. Abe was to transport Mr. Cornell to his rental. Mr. Hibbert would follow as an outpatient. The Social Worker wrote that there were no other issues or concerns. She spoke to Pat and Abe about the discharge plan including that he would have HHC with Excell per Mr. Hibbert's order and they would be in contact within 24 hours. Pat assured the Social Worker that someone would monitor Mr. Cornell and his medications and she would make follow up appointments for him.

The Summary of Discharge indicates the “Reason for Discharge,” as “Obtained self care.” It also sets out under “Nursing: Course of Treatment,” that the patient underwent PT/OT/ST, medication monitoring and psych eval. Under “Drug Therapy,” there is a reference to the discharge to home instructions. The Discharge Summary/Home Going Instruction record included a

list of fourteen (14) medications including dose, route, time and precautions. Mr. Hibbert wrote prescriptions for the medications listed, which did not include long acting insulin. Susan Acang, R.N., who went over the discharge instructions with the patient testified that he was given the Novolog Flexpen to take with him.

The records from CVS Pharmacy confirm that the prescriptions were presented to be processed and filled. Mr. Cornell was discharged from Desert Lane Care Center on June 7,2010. He was placed in a doublewide modular home located at 4611 Royal Ridge Lane, Las Vegas, Nevada. Edward Latchey, an 81 year old man was living in this home. Pat Evans was the landlord. She and her husband lived in another doublewide in the same park.

The Social Worker wrote a note on June 9, 2010 in which she stated that she received an after hours call from Ms. Cornell. She was upset and said that he was not discharged with some medications or prescriptions, in particular his insulin. The Social Worker called the DON who then checked with the nurse who reported that she had been aware of this on discharge and called Mr. Hibbert who said that he would call in the prescriptions. The nurse gave Pat Mr. Hibbert's number for follow-up. The Social Worker called Pat when she got in on June 9, 2010 as she had not answered the night before when she called after getting the call from Ms. Cornell. Pat told the Social Worker that she had seen Mr. Cornell the night before at 6:00 p.m. At that time he was alert. She asked if he wanted to go to the hospital or call 911. He refused. The Social Worker instructed Pat to call 911 if there was an issue. Pat said that she was on her way to see Mr. Cornell and she would let her know if there was a problem. Pat also told the Social Worker that HHC had not yet called, so she would follow-up.

As noted above, it is undisputed that Mr. Cornell had Type I Diabetes Mellitus since he was a teenager, and he developed many complications of the disease. In addition, it is undisputed that Mr. Cornell had emotional issues. However, none of his physicians, including his psychiatrist deemed that his physical or mental conditions substantially limited one or more of his major life activities. The medical records demonstrate that he had obtained self care at the time of discharge from Desert Lane Care Center. Even if that were not true, again, this is a medical malpractice case and Plaintiffs should not be allowed to pursue their claim under NRS 41.1395.

III. LEGAL ARGUMENT

A, STANDARD FOR SUMMARY JUDGMENT

The standard for granting a motion for entry of summary judgment was set forth by the Supreme Court of Nevada in *Wood v. Safeway, Inc.*, 121 Nev. 724, 731-732, 121 P.2d 1026, 1031 (2005). Therein, the Court stated:
Summary Judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists. As such, the moving party is entitled to judgment as a matter of law.

While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to "do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). The nonmoving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him," *Bulbman, Inc. v. Nevada Bel*, 108 Nev. 105, 110, 825 P.2d 588 (1992). The nonmoving party "'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture."' (*Quoting Collins v. Union Fed Savings & Loan*, 99 Nev. 283, 302, 662 P.2d 621 (1983).

In the instant case, there is no genuine issue of material fact as to Plaintiffs' claims under NRS 41.1395. As set forth herein, Plaintiffs have failed to bring forth the requisite evidence to support their claims pursuant to NRS 41.1395. Therefore, Defendant seeks an Order granting this Motion for Partial Summary Judgment on the grounds that the facts and evidence produced demonstrate that Plaintiffs cannot meet the burden of proof to establish any claims under NRS 41.1395.

B. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM FOR ABUSE OF A VULNERABLE PERSON.

On its face, Plaintiffs' Complaint sounds in medical malpractice and is plead as a cause for professional negligence, and not **abuse** of a vulnerable person. The alleged facts are of negligent medical care, not a failure to provide care. In addition, there is well established law that prevents Plaintiffs from bringing an **abuse** of a vulnerable person claim along with a medical malpractice/professional negligence claim where identical facts form the basis for both. If there was not such law, a plaintiff could make an end-run around statutory damages caps and almost every medical malpractice case would be brought as an **abuse** of a vulnerable person or **elder abuse** claim.

1. Plaintiffs Plead Professional Negligence/Medical Malpractice, Not Abuse of a Vulnerable Person.

Plaintiffs allege professional negligence/ medical malpractice and **abuse** of a vulnerable person claims based on the same facts. They claim that they are entitled to recovery under both. The criteria and elements for these claims differ, and are actually mutually exclusive. Pursuant to NRS 41A.015, "Professional negligence is a negligent act or omission to act by a provider of health care in rendering professional services." NRS 41A.015. "Medical malpractice is the failure of a physician, hospital or employee of a hospital, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstance." NRS 41A.009,

In contrast, NRS 41.1395 sets out in pertinent part:

4. For purposes of this section:
(a) "**Abuse**" means willful and unjustified:

(1) Infliction of pain, injury or mental anguish; or

(2) **Deprivation of food, shelter, clothing or services which are necessary to maintain the physical or mental health** or an older person or a vulnerable person.

(b) "Exploitation" means any act taken by a person who has the trust and confidence of an older person or a vulnerable person or any use of the power of attorney or guardianship of an older person or a vulnerable person to:

(1) Obtain control, through deception, intimidation or undue influence, over the assets or property of the older person or vulnerable person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of that person's money, assets or property.

(2) Convert money, assets or property of the older person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of that person's money, assets or property.

As used in this paragraph, "undue influence" does not include the normal influence that one member of a family has over another.

(c) "Neglect" means the **failure** of a person who has assumed legal responsibility or a contractual obligation for caring for an older person or a vulnerable person, or who has voluntarily assumed responsibility for such a person's care, **to provide food, shelter, clothing or services** within the scope of the person's responsibility or obligation, **which are necessary to maintain the physical or mental health or the older person or vulnerable person.** For the purposes of this paragraph, a person voluntarily assumes responsibility to provide care for an older or vulnerable person only to the extent that the person has expressly acknowledged the person's responsibility to provide such care.

[Emphasis added.]

Professional negligence is a claim that the acts that were performed were negligent. Medical malpractice is a claim that in rendering services, the physician failed to use reasonable care, skill or knowledge that is generally used in similar situations. The crux of a claim for **abuse** of a vulnerable person is the outright failure to provide care. Simply stated, Plaintiffs cannot claim that care was provided but it was inadequate (professional negligence/medical malpractice), and then claim that the inadequate care was an outright failure to provide any care (neglect or **abuse** of vulnerable person).

The Supreme Court of Nevada has not yet ruled on the issue of overlap between medical malpractice and **abuse** of a vulnerable person. However, the U.S. District Court for the District of Nevada and California Courts have.

The U.S. District Court for Nevada recently dealt with these claims brought under state law. *Brown v. Mt. Grant General Hosp.*, 2013 WL 4523488 is an action stemming from alleged mistreatment of Eugene Brown, an **elderly** black man who was hospitalized for treatment of various medical conditions including pneumonia. During the hospital stay, Mr. Brown developed bedsores which were intentionally concealed. On August 28, 2012, Defendants removed the case from state court. Thereafter on January 9, 2013, the court granted Defendants' Motion to Dismiss. This was followed on January 22, 2013 by Plaintiffs filing a Second Amended Complaint bringing two (2) claims under 42 U.S.C. 1983 for violation of substantive due process and equal protection under the Fourteenth Amendment, along with state law claims for negligence and **elder abuse**. Subsequently, Defendants filed their Motion to Dismiss all claims.

The court granted the Motion as to the claim for **elder abuse** and denied it as to the claim for negligence. In doing so, the Court stated, “In order to predict how the Nevada courts would resolve this conflict, this court resorts to Nevada's rules of statutory interpretation.” The court went on to say that the “principles of interpretation suggest that plaintiffs may not allege an **elder abuse** claim under the present circumstances.” It noted that “the **elder abuse** statute was not intended as a remedy for torts that sound in medical malpractice.” In addition, the court set out the following:
As revealed by NRS 41.1395's legislative history, Nevada's Attorney General proposed the **elder abuse** statute in order to incentivize private attorney generals to enforce criminal prohibitions against **elder abuse**. The Attorney General explained, “The burden of proof required in a civil action is not as high as that in a criminal trial, so it is hoped that this will help victims to recover for their losses.” *Minutes of the Nev. State Legislature: Hearing on Senate Bill No. 80 Before the Senate Comm. On Judiciary*, Ex. D, 1997 Leg., 69th Sess. (Feb 12, 1997). The double damages recovery and an additional attorneys' fee provision were designed to encourage private attorneys “to prosecute [**elder abuse**] cases when criminal prosecutors cannot.” Id. Therefore, the **elder abuse** statute's history reveals that it was initially concerned with criminal conduct - conduct whose mens rea element usually exceeds mere negligence. This is also reflected in the statute's concentration on intentional conduct: the statute prohibits “willful and unjustified” **abuse**, “exploitation,” and “neglect” in the face of an expressly assumed duty. See NRS 41.1395. The mens rea element of a medical malpractice claim - “failure... to use the reasonable care, skill, or knowledge ordinarily used under similar circumstances,” NRS 41A.009 - sits uneasily with 41.1395's focus on intentional misconduct.

The court further discussed the plain language of NRS 41.1395 and its legislative history and stated that they “suggest that the statute targets the relationship between long-term caretakers and their charges,” which contradicts “the type of relationships that exists between hospitals and their patients.” The court pointed out that during the hearings regarding this statute, “several legislators addressed the statute's potential impact on ‘nursing homes,’ ‘managed care facilities,’ ‘long term care facilities,’ ‘group homes,’ caretaking family members, even homeless shelters, yet no legislator mentioned hospitals or clinics.” It went on to say, “And while hospitals go unmentioned in the **elder abuse** statute, they are explicitly acknowledged in the medical malpractice statutes. *See* NRS 41A.009.”

Importantly, the U.S. District Court for Nevada stated:

Moreover, the Nevada Supreme Court has signaled a disapproval of artful pleading for the purpose of evading the medical malpractice limitations. For example, the Court concluded that medical malpractice claims extend to "both intentional and negligence-based" actions. *Fierle*, 219 P.2d at 913 n.8. This means that a plaintiff cannot escape the malpractice statutes' damages or timeliness limitations by pleading an intentional tort battery, say- instead of negligence. In fact, the limitations statute, NRS 41A.097, nods to the practice of including intentional torts within medical malpractice claims. This statute includes limitations for "injury to or the wrongful death of a person... from professional services rendered *without consent*." NRS 41A.097 (emphasis added). The language of "consent" intones the elements of battery. *See Bronneke v. Rutherford*, 120 Nev. 230, 89 P.3d 40, 43 (Nev. 2004). ("[B]y performing the neck manipulation without first obtaining Bronneke's consent, Dr. Rutherford committed a battery.") If the Nevada Supreme Court casts a jaundiced eye on the artful pleading of intentional torts, it is likely to view the artful pleading of **elder abuse** similarly. In the end, it seems, Nevada courts look to "the nature of the grievance to determine the character of the action, not the form of the pleadings." *Egan v. Chambers*, 299 P.3d 364, 366 n. 2 (Nev. 2013)(citing *State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev, 183, 495 P.2d 359, 361 (1972)),

The facility to which Mr. Cornell was transferred upon discharge from Southern Hills Hospital and Medical Center, Desert Lane Care Center, does have nursing home and long term care components. It also has a rehabilitation component, which is the area to which Mr. Cornell was admitted. There were concerns related to his mental status and ambulation instability and it was determined that he needed rehabilitation. Mr. Cornell was not admitted to Desert Lane Care Center for nursing home care or long term care. In addition, the moving Defendant Alfredo Hibbert, P.A.-C, like hospitals, is acknowledged in both the definition of medical malpractice, NRS 41A.009 and professional negligence, NRS 41A.015. NRS 41A.009 states "Medical malpractice means the failure of a physician., in rendering services, to sue the reasonable care, skill or knowledge ordinarily used under similar circumstances." NRS 41A.013 defines physician as "a person licensed pursuant to chapter 630 or 633 of NRS." Professional negligence involves "a negligent act or omission to act by a provider of health." NRS 41A.015. The definition for "provider of health" pursuant to NRS 41A.017 includes those licenses under NRS 630 and 633. Mr. Hibbert is licensed under NRS 630 and is therefore subject to the provisions of NRS 41A for claims of medical malpractice and professional negligence.

Plaintiffs should not be allowed to bring a claim for **abuse** of a vulnerable person under NRS 41.1395 when all of their claims sound in professional negligence/medical malpractice. All of their claims arise from the same nexus of facts.

The result reached by the U.S. District Court of Nevada in *Brown,* is consistent with those from California Courts. See *Carter v. Prime Healthcare Paradise Valley, LLC,* 198 Cal. App. 4th 396, 410 (2011), In *Carter* plaintiff-survivors appealed dismissal based on their **elder abuse** claim being insufficiently plead. *Id.* It was alleged that the decedent developed bedsores after surgery. *Id.* at 401. The plaintiffs alleged the decedent was 'continually neglected, was routinely not dried," was left in his wheelchair alone, and was not provided adequate medication. *Id.* The court stated, "**elder abuse** was distinct from professional negligence and involved egregious withholding of medical care, rather than simple or gross negligence." *Id.* The court affirmed dismissal, and reiterated that a plaintiff must plead conduct which "rises to the level of egregiousness sufficient to support an **elder abuse** cause of action." *Id.* at 410.

The decision in *Carter* followed an earlier ruling by the California Supreme Court that set out that the **elder abuse** act "refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of **elderly** or dependent adults..."' *See Covenant Care, Inc. v. Superior Court,* 32 Cal. 4th 771, 783 (2004) (quoting *Delaney v. Baker,* 20 Cal 4th 23, 33 (1999)).

Plaintiffs herein like the decedent in Carter alleged they were treated and care was provided. In our case, Plaintiffs allege that the Defendants were negligent and that they breached the standard of care. Plaintiffs allege that "Defendants owed a duty to exercise the level of care, skill and knowledge that would ordinarily be used by reasonably skilled nursing home administrators, medical doctors, physicians assistants. and other healthcare providers, under the same or similar circumstances." Complaint, ¶93. In addition, Plaintiffs allege that "Defendants knew, or in the exercise of reasonable care should have known, that the providing of healthcare and treatment was of such a nature that if not provided properly or adequately, was likely to injure the

person to whom it was improperly or inadequately given." Complaint ¶ 92. Plaintiffs further allege that "Defendants breached their duty owed... by departing from the prevailing standard of care." Complaint ¶s 127 & 135.

Plaintiffs' Tenth Claim for Relief for Damages Pursuant to NRS 41.1395, sets out the diagnoses upon which they base their allegation that Charles Thomas Cornell, Jr. was a vulnerable person. However, the allegations offer nothing more than a cut-and-paste of conclusory language from the statute. Plaintiffs allege that "Defendants knew or had reason to know that Charles Thomas Cornell, Jr. was a vulnerable person." Complaint ¶ 178. That, "Defendants, willfully and unjustifiable inflicted pain, injury or mental anguish on Plaintiffs. Complaint ¶ 179. That "Defendants willfully and unjustifiably deprived Charles Thomas Cornell, Jr. of food, shelter, clothing, and/or service, which were necessary to maintain the physical or mental health of decedent." Complaint ¶ 180. That "Defendants assumed a legal responsibility and/or a contractual obligation for caring for Charles Thomas Cornell, Jr., and to provid food, shelter, clothing, and/or services, which were necessary to maintain the physical or mental health..." Complaint ¶ 181, That "Defendants voluntarily assumed responsibility for Charles Thomas Cornell, Jr. 's care, and to provide food, shelter, clothing, and/or services, which were necessary to maintain the physical or mental health..." Complaint ¶ 182. That "Charles Thomas Cornell, Jr. suffered a personal injury and death that was caused by **abuse** or neglect by Defendants." Complaint ¶ 183. And that, "Defendants, as the persons who caused the injury, death and loss are liable to Charles Thomas, Jr. for (2) two times the actual damages incurred by Charles Thomas Cornell, Jr. pursuant to NRS 41.1395(1), Defendants acted with recklessness, oppression, fraud, and/or malice, and are therefore liable to Plaintiffs for their attorney's fees and costs pursuant to NRS 41.1395(2)" Complaint ¶ 184. Notwithstanding these sweeping conclusions, Plaintiffs' factual allegations do no plead a failure to provide care. Plaintiffs' conclusions that Defendants failed to provide care do not corroborate their own allegations that care was provided, but was improper or inadequate.

Moreover, although Plaintiffs cut-and-pasted the above statutory language, they failed to include the language from NRS 41,1395(2) which states that they must "establish by a preponderance of evidence that a person who is liable for damages pursuant to this section acted with recklessness, oppression, fraud or malice." Plaintiffs' Complaint lacks any factual allegations that any of the Defendants acted with recklessness, oppression, fraud or malice.

Because Nevada and California have parallel medical malpractice damage caps, and parallel **elder** **abuse**/vulnerable person **abuse** states, this Court should consider the California law as instructive and persuasive authority in this matter. *See* Cal Welf. & Inst. Code 15657 ("**elder** **abuse** exists "[w]here it is proven. that defendant is liable for physical **abuse** or neglect, and that the defendant has been guilty of recklessness, oppression, fraud or malice in the commission of **abuse**...").

Based on the California cases, by the holding by the U.S. District Court for Nevada, Plaintiffs' claim for **abuse** of a vulnerable person cannot survive because on its face the Complaint and medical records demonstrate that treatment was provided, even if it was allegedly below the standard of care. At best, Plaintiffs have stated a claim for medical malpractice/professional negligence against the Defendants.

IV. CONCLUSION

Based on the foregoing, Defendant Alfredo Hibbert, P.A. respectfully moves this Court for an order granting summary judgment regarding Plaintiffs' **abuse** of vulnerable person pursuant to NRS 41.1395, and for any other relief it deems just and proper.

DATED this 23*rd* day of January, 2014.

MANDELBAUM, ELLERTON & McBRIDE

By:

ROBERT C. McBRIDE, ESQ.

Nevada Bar No.: 007082

MARIE ELLERTON, ESQ.

Nevada Bar No. 004581

2012 Hamilton Lane

Las Vegas, Nevada 89106

Attorneys for Defendant

ALFREDO HIBBERT, P.A.

End of Document