GIOVANNI O. RUGAMAS, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ABBI SILVER, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 62251

July 3, 2013 305 P.3d 887

Original petition for a writ of mandamus or prohibition challenging a district court order denying a pretrial petition for a writ of habeas corpus based on alleged deficiencies in the grand jury proceedings.

Defendant, who was awaiting trial on an indictment charging him with one count of sexual assault of a minor under the age of 14 years and one count of lewdness with a child under the age of 14 years, filed a pretrial petition for a writ of habeas corpus, challenging the grand jury proceedings on several grounds, including that the indictment was based on hearsay in violation of Nevada law. The district court denied the petition. Defendant filed a petition for a writ of mandamus or prohibition, challenging the district court's order denying defendant's pretrial petition for a writ of habeas corpus. The supreme court, SAITTA, J., held that: (1) the supreme court would exercise its discretion and consider the merits of defendant's petition for a writ of mandamus; (2) as a matter of apparent first impression, statutory hearsay exception for statements by child under the age of 10 describing any act of sexual conduct or physical abuse does not apply to grand jury proceedings; (3) witnesses' testimony about minor victim's out-of-court statements regarding defendant's alleged sexual conduct was not admissible at the grand jury proceeding under statutory hearsay exception; and (4) indictment was fatally deficient, and therefore, the district court manifestly abused its discretion by denying defendant's habeas petition.

Petition granted.

[Rehearing denied September 26, 2013]

[En banc reconsideration denied January 24, 2014]

Philip J. Kohn, Public Defender, and *Jennifer L. Schwartz*, Deputy Public Defender, Clark County, for Petitioner.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Real Party in Interest.

1. MANDAMUS.

   Because the district court had jurisdiction to consider defendant's pretrial petition for a writ of habeas corpus based on alleged deficiencies in the grand jury proceedings and defendant's petition did not challenge the district court's jurisdiction to proceed, prohibition was not an appropriate avenue for extraordinary relief; instead, defendant's original petition better suited the counterpart to prohibition, the writ of mandamus. NRS 34.700.

2. MANDAMUS.

   The supreme court would exercise its discretion and consider the merits of defendant's petition for writ of mandamus, challenging district court order denying defendant's pretrial petition for a writ of habeas corpus based on alleged deficiencies in the grand jury proceedings; if defendant was convicted, he could appeal from the judgment of conviction and seek review of the district court's pretrial order as an intermediate order, but that remedy was not adequate because conviction would render any error in grand jury proceeding harmless, and defendant's petition raised important issue of law that needed clarification, namely applicability to grand jury proceedings of statute providing that statements about any act of sexual conduct made by child who is less than 10 years old are admissible if court finds sufficient guarantees of trustworthiness. NRS 51.385, 177.015(3), 177.045.

3. MANDAMUS.

   Writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse or arbitrary or capricious exercise of discretion. NRS 34.160.

4. COURTS.

   The decision to entertain an extraordinary writ petition lies within the supreme court's discretion, and in exercising that discretion, the court must consider whether judicial economy and sound judicial administration militate for or against issuing the writ.

5. COURTS.

   Where the circumstances establish urgency or strong necessity, or an important issue of law requires clarification and public policy is served by the supreme court's exercise of its original jurisdiction, the supreme court may exercise its discretion to consider a petition for extraordinary relief.

6. CRIMINAL LAW; GRAND JURY.

   A witness's prior inconsistent statements are not hearsay, and are admissible as substantive evidence, even in grand jury proceedings, because they are by definition not hearsay. NRS 51.035(2)(a).

7. GRAND JURY.

   Although minor sexual assault victim testified at the grand jury hearing, she was not subject to cross-examination concerning prior inconsistent statements, and thus, the statements were not excluded from the definition of hearsay. NRS 51.035(2)(a).

8. WITNESSES.

   As a general proposition, a witness's inconsistent statements may call the witness's veracity into question, thus impeaching the witness's credibility.

9. WITNESSES.

   Inconsistent statements may be used as impeachment evidence. NRS 50.075, 50.135.

10. WITNESSES.
When used solely for the limited purpose of impeachment, a witness's inconsistent statements are not hearsay because they are not being offered for the truth of the matter asserted in the statements. NRS 51.035.

11. CRIMINAL LAW.
Evidence that is offered for the truth of the matter asserted is being used as substantive evidence, for purpose of determining whether it is hearsay.

12. CRIMINAL LAW.
Witness's prior inconsistent statements may be used as substantive evidence only if they meet the requirements of statute, providing that statement is not hearsay if declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is inconsistent with the declarant's testimony; otherwise, such statement may be used solely for the limited purpose of impeachment. NRS 51.035(2)(a).

13. CRIMINAL LAW.
Minor sexual assault victim's out-of-court statements were hearsay where offered primarily (if not entirely) for the truth of the matter asserted in the statements, namely to prove that defendant touched the victim's vaginal area over and under her clothing. NRS 51.035(2)(a).

14. INFANTS.
Hearsay exception for statements by a child under the age of 10 describing any act of sexual conduct or physical abuse is markedly different from other statutory hearsay exceptions, and, unlike most other statutory hearsay exceptions, this exception attaches specific conditions to the admission of evidence that necessitate a hearing and findings by the district court before the evidence is admissible. NRS 51.385.

15. GRAND JURY.
Statutory hearsay exception for statements by child under the age of 10 describing any act of sexual conduct or physical abuse if the child testifies or is unavailable or unable to testify and the district court finds that there are sufficient guarantees that statements are trustworthy does not apply to grand jury proceedings; statute contemplates admission of evidence in criminal proceeding before a court, and grand jury hearing is not the same as criminal proceeding conducted before a court. NRS 51.385(1), 172.135(2).

16. STATUTES.
When a statute is facially clear, the court will give effect to the statute's plain meaning and not go beyond the plain language to determine the Legislature's intent.

17. GRAND JURY.
As a general matter, the grand jury is an arm of the court, and the court that impanels the grand jury also supervises its proceedings, but nothing in the statutes, the Nevada Constitution, or the supreme court's jurisprudence suggests that the district court's supervisory authority extends to ruling on evidentiary matters or presiding over the grand jury proceedings in the manner that a judge presides over a trial. NRS 172.097.

18. GRAND JURY; INDICTMENT AND INFORMATION.
The focus of the grand jury is to determine whether the evidence presented establishes probable cause, and thus, introducing evidence that is unrelated to proving the elements of an alleged offense, but necessary to develop a record for an after-the-fact challenge to the admissibility of that evidence that may never be pursued, is not only a distraction to the grand jury, but is irrelevant to its task.

19. GRAND JURY.
    Witnesses' testimony about minor victim's out-of-court statements regarding defendant's sexual conduct was not admissible at the grand jury proceeding under statutory hearsay exception for statements by child under the age of 10 describing any act of sexual conduct or physical abuse because this hearsay exception did not apply to grand jury proceedings. NRS 51.385(1), 172.135(2).
20. INDICTMENT AND INFORMATION.
    The grand jury's probable-cause determination may be based on slight, even marginal evidence.
21. INDICTMENT AND INFORMATION.
    The prosecution must show before the grand jury enough evidence to support a reasonable inference that the defendant committed the crime charged.
22. INDICTMENT AND INFORMATION.
    The indictment, charging defendant with sexual assault and lewdness involving a child who was under 10 years of age, was fatally deficient; aside from the victim's hearsay statements, no other evidence introduced at the grand jury hearing provided sufficient description of defendant's alleged sexual conduct to satisfy the elements of the charged offenses.

Before GIBBONS, DOUGLAS and SAITTA, JJ.

OPINION

By the Court, SAITTA, J.:

The State sought an indictment against petitioner Giovanni O. Rugamas on charges of sexual assault and lewdness involving a child who was under 10 years of age. During the grand jury proceedings, the State presented testimony about out-of-court statements made by the child-victim describing the alleged sexual conduct. With some exceptions, an out-of-court statement offered to prove the truth of the matter asserted is ''hearsay.'' NRS 51.035. Under Nevada law, a grand jury cannot receive hearsay. NRS 172.135(2).

In this original writ proceeding, we consider whether the child-victim's out-of-court statements were properly received by the grand jury on either of two grounds: as non-hearsay because they were inconsistent with the victim's grand jury testimony or as admissible hearsay under NRS 51.385, which provides that statements about any act of sexual conduct made by a child who was less than 10 years old are admissible ''in a criminal proceeding'' if a court finds sufficient guarantees of trustworthiness. We conclude that the statements were not properly before the grand jury. Because the victim was not subject to cross-examination concerning the out-of-court statements, those statements were not excluded from the definition of hearsay under NRS 51.035(2)(a). Although hearsay that falls within a statutory exception set forth in NRS Chapter 51 may be considered by a grand jury, *Gordon v. Eighth*

Judicial Dist. Court, 112 Nev. 216, 223, 913 P.2d 240, 245 (1996), we conclude that the exception in NRS 51.385 for trustworthy statements by a child-victim of sexual assault does not apply to grand jury proceedings. Because the statements were hearsay and did not fall within an exception that makes hearsay admissible, the grand jury could not consider the statements. Absent the hearsay evidence, there was not sufficient legal evidence to support a finding of probable cause and the indictment cannot stand. We therefore grant the petition.

FACTS AND PROCEDURAL HISTORY

Rugamas is awaiting trial on an indictment charging him with one count of sexual assault of a minor under the age of 14 years and one count of lewdness with a child under the age of 14 years. *See* NRS 200.366(3)(c); NRS 201.230(1). At the grand jury hearing, the State presented the testimony of four witnesses: the alleged victim (A.C.), her sister (Y.V.), her mother (Elsa), and a forensic interviewer with the Southern Nevada Children's Assessment Center (Faiza Ebrahim).

The State presented evidence that Rugamas sometimes took care of the victim and her sisters, and that on one such occasion, he locked himself and the victim in a bedroom and touched her vaginal area both over and under her clothing. Unfortunately, A.C., who was six years old at the time of the hearing, was unable to recall significant details of the alleged sexual conduct other than Rugamas locking her in a bedroom while she and her sisters were in his care. She also did not remember telling the other witnesses that Rugamas sexually abused her.

Y.V. witnessed part of the incident but not any sexual conduct. She testified that she saw Rugamas put a blanket over A.C.'s head, take her to a bedroom, and shut the door and that she heard A.C. crying and unsuccessfully tried to open the locked bedroom door. Although Y.V. looked under the bedroom door, she could not see into the room. In addition to her observations, Y.V. testified to a statement made by the victim. Y.V. testified that sometime after the bedroom incident, A.C. told her that Rugamas had touched her and she pointed to her ''private.''

Elsa did not witness any of the conduct. She testified to statements that Y.V. and A.C. made to her. During a discussion with her daughters about inappropriate touching, Y.V. told her that Rugamas put A.C. in a room with him and Y.V. heard A.C. cry, but Y.V. could not access the room. When Elsa asked A.C. where Rugamas touched her, A.C. held up two fingers and pointed toward her vaginal area.

Ebrahim testified about her interview with A.C. and statements that A.C. made during the interview. A.C. told Ebrahim that Rugamas spanked her bottom with a belt and touched her vaginal area with his hand under her clothing and that ''it hurt.'' When asked where it hurt, A.C. indicated that it hurt inside her ''private.'' A.C. told Ebrahim that Rugamas also touched her vaginal area on top of her clothes. A.C. told Ebrahim that the incident occurred in a bedroom, she cried, and Rugamas told her not to tell anyone. At the conclusion of the testimony, the grand jury returned a true bill.

Rugamas filed a pretrial petition for a writ of habeas corpus challenging the grand jury proceedings on several grounds, including that the indictment was based on hearsay in violation of Nevada law. The State responded, asserting that the subject evidence was admissible under NRS 51.385. Rugamas countered, arguing that NRS 51.385 does not apply to grand jury proceedings because the statute conditions admissibility of the evidence upon a court making a determination that the evidence contains guarantees of trustworthiness. The district court denied the petition after a hearing. In its written order, the district court concluded that the victim's statements were not hearsay because they were prior inconsistent statements, and if they were hearsay, they were admissible under NRS 51.385. This original petition for extraordinary relief followed.

DISCUSSION

Rugamas argues that the district court manifestly abused its discretion by denying his pretrial habeas petition because the grand jury was presented with nothing but inadmissible hearsay evidence and therefore the indictment was deficient. In particular, he argues that the testimony of Y.V., Elsa, and Ebrahim could not be admitted under NRS 51.385 until a court conducted a hearing and determined the trustworthiness of A.C.'s statements, and, because that was not done here, the challenged evidence remained inadmissible at the grand jury hearing. As to the district court's conclusion that the evidence was admissible as prior inconsistent statements, Rugamas argues that the district court's decision was wrong because he had no opportunity to cross-examine A.C. as required by NRS 51.035(2)(a).[1]

[1]Rugamas also argues that the grand jury proceedings were deficient because the prosecutor failed to notify him of the time and date of the grand jury hearing as required by NRS 172.241 and did not present exculpatory evidence at the hearing as required by NRS 172.145(2). Because we grant Rugamas' petition on another basis, we need not consider those challenges.

Availability of writ relief

[Headnotes 1, 2]

Rugamas seeks a writ of prohibition or mandamus. A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court. NRS 34.320. Because the district court had jurisdiction to consider Rugamas' pretrial petition for a writ of habeas corpus by virtue of NRS 34.700 and Rugamas' petition did not challenge the district court's jurisdiction to proceed, prohibition is not an appropriate avenue for extraordinary relief.

[Headnote 3]

Rugamas' original petition better suits the counterpart to prohibition, the writ of mandamus. A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, NRS 34.160, or to control a manifest abuse or arbitrary or capricious exercise of discretion, *see Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). The writ will not issue, however, if a petitioner has a plain, speedy, and adequate remedy in the ordinary course of the law. NRS 34.170. Here, Rugamas has another remedy: if he is convicted, he could appeal from the judgment of conviction, *see* NRS 177.015(3), and seek review of the district court's pretrial order as an intermediate order, NRS 177.045. *See generally Lisle v. State*, 114 Nev. 221, 224, 954 P.2d 744, 746 (1998). But that remedy is not adequate because a conviction would render any error in the grand jury proceeding harmless. *See id.* at 224-25, 954 P.2d at 746-47.

[Headnotes 4, 5]

Ultimately, the decision to entertain an extraordinary writ petition lies within our discretion. In exercising that discretion, we must ''consider[ ] whether judicial economy and sound judicial administration militate for or against issuing the writ.'' *Redeker v. Eighth Judicial Dist. Court*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006), *limited on other grounds by Hildalgo v. Eighth Judicial Dist. Court*, 124 Nev. 330, 341, 184 P.3d 369, 377 (2008). ''Where the circumstances establish urgency or strong necessity, or an important issue of law requires clarification and public policy is served by this court's exercise of its original jurisdiction, this court may exercise its discretion to consider a petition for extraordinary relief.'' *Schuster v. Eighth Judicial Dist. Court*, 123 Nev. 187, 190, 160 P.3d 873, 875 (2007). Rugamas' petition raises an important issue of law that needs clarification: the applicability of

NRS 51.385 to grand jury proceedings. Although we generally refrain from reviewing pretrial challenges to the sufficiency of an indictment by way of a writ petition, *see Kussman v. Eighth Judicial Dist. Court*, 96 Nev. 544, 545-46, 612 P.2d 679, 680 (1980), we have considered petitions when the case ''involves only a purely legal issue,'' *Ostman v. Eighth Judicial Dist. Court*, 107 Nev. 563, 565, 816 P.2d 458, 460 (1991). This is such a case. We therefore elect to exercise our discretion and consider the merits of the petition.

Hearsay and grand jury proceedings

The Nevada Legislature has chosen to preclude a grand jury from considering hearsay evidence. Under Nevada law, a ''grand jury can receive none but legal evidence . . . to the exclusion of hearsay or secondary evidence.'' NRS 172.135(2). The threshold question thus is whether the victim's out-of-court statements were hearsay for purposes of NRS 172.135(2).

We have observed that the ''definition of hearsay as used in NRS 172.135(2) is the same as that found in NRS 51.035.'' *Gordon v. Eighth Judicial Dist. Court*, 112 Nev. 216, 223, 913 P.2d 240, 245 (1996). NRS 51.035 defines hearsay as an out-of-court statement offered to prove the truth of the matter asserted. Excluded from that definition, however, are certain statements made by a person who testifies at the proceeding and is subject to cross-examination about the statements and certain statements made or adopted by a party-opponent or made by a party-opponent's agent or coconspirator. NRS 51.035(2), (3). Here, the district court determined that the victim's statements were not hearsay because they were inconsistent with her grand jury testimony.

[Headnotes 6, 7]

When a witness's out-of-court statements are inconsistent with her testimony, those statements are not hearsay if the witness ''testifies at the . . . hearing and is subject to cross-examination concerning the statement.'' NRS 51.035(2)(a). If these requirements are met, the statements are admissible as substantive evidence, *Miranda v. State*, 101 Nev. 562, 567, 707 P.2d 1121, 1124 (1985), *overruled on other grounds as recognized in Bejarano v. State*, 122 Nev. 1066, 1076 n.34, 146 P.3d 265, 272 n.34 (2006), even in grand jury proceedings, because they are by definition not hearsay. At least one of the statutory requirements was not met here. Although the victim testified at the grand jury hearing, she was not subject to cross-examination concerning the statements. The statements therefore were not excluded from the definition of

hearsay under NRS 51.035(2)(a). The district court's application of the law in this respect is clearly erroneous.[2]

[Headnotes 8-13]

As a secondary basis for its determination that the statements were not hearsay, the district court also observed that the statements were ''impeachment evidence of the victim.'' This is true as a general proposition—a witness's inconsistent statements may call the witness's veracity into question, thus impeaching the witness's credibility. Inconsistent statements may be used as impeachment evidence consistent with NRS 50.075 (cited in the district court's order) and NRS 50.135. *See Miranda*, 101 Nev. at 567, 707 P.2d at 1124. When used solely for the limited purpose of impeachment, inconsistent statements are not hearsay because they are not being offered for the truth of the matter asserted in the statements. *See* NRS 51.035. But here the statements were used primarily (if not entirely) for the truth of the matter asserted in the statements—the statements were offered to prove that Rugamas touched the victim's vaginal area over and under her clothing; there was no other evidence offered to prove that conduct. Evidence that is offered for the truth of the matter asserted is being used as substantive evidence. *See Black's Law Dictionary* 640 (9th ed. 2009) (defining ''substantive evidence'' as that ''offered to help establish a fact in issue, as opposed to evidence directed to impeach or to support a witness's credibility''). Inconsistent statements may be used as substantive evidence only if they meet the requirements of NRS 51.035(2)(a); otherwise, they may be used solely for the limited purpose of impeachment.[3] *See* 30B Graham, *supra*, § 7011, at 123-24 (referring to parallel provisions in federal evidence rules). The district court's application of the law in this respect is clearly erroneous.

NRS 51.385 and grand jury proceedings

Our conclusion that the statements were hearsay is not dispositive of the petition because the statutory exclusion of hearsay in

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[2]Although A.C.'s statements to Y.V. and Elsa about where Rugamas touched her were nonverbal (she pointed toward her vaginal area), her nonverbal conduct was intended as an assertion that Rugamas touched her private area. Those nonverbal assertions constituted hearsay. *See* NRS 51.045(2); *see also* 30B Michael H. Graham, Federal Practice & Procedure § 7002, at 24-25 (interim ed. 2011) (''Nodding, pointing, and the sign language of the hearing impaired are as plainly assertions as are spoken words.'').

[3]Because the statements were not used for the limited purpose of impeachment, we need not address whether the testimony about the statements was extrinsic evidence of the victim's prior inconsistent statements that would have been inadmissible under NRS 50.135(2) because Rugamas had no opportunity to cross-examine the victim about the statements.

grand jury proceedings ''is subject to the hearsay exceptions'' set forth in NRS Chapter 51. *Gordon*, 112 Nev. at 223, 913 P.2d at 245; *see also Phillips v. Sheriff*, 93 Nev. 309, 312, 565 P.2d 330, 332 (1977) (concluding that statements that fit hearsay exception for dying declarations under NRS 51.335 may be considered by grand jury). The district court determined that the statements were admissible under the hearsay exception set forth in NRS 51.385(1). That statute allows the admission ''in a criminal proceeding'' of statements by a child under the age of 10 describing any act of sexual conduct or physical abuse if the child testifies at the proceeding or is unavailable or unable to testify and ''[t]he court finds, in a hearing outside the presence of the jury,'' that there are sufficient guarantees that the statements are trustworthy. In making the trustworthiness determination, the court must consider several factors, including whether: ''(a) The [child's] statement was spontaneous; (b) The child was subjected to repetitive questioning; (c) The child had a motive to fabricate; (d) The child used terminology unexpected of a child of similar age; and (e) The child was in a stable mental state.'' NRS 51.385(2).

[Headnotes 14, 15]

The hearsay exception set forth in NRS 51.385 is markedly different from other statutory hearsay exceptions. Unlike most other statutory hearsay exceptions, NRS 51.385 attaches specific conditions to the admission of evidence that necessitate a hearing and findings by the court before the evidence is admissible. *Lytle v. State*, 107 Nev. 589, 591, 816 P.2d 1082, 1083 (1991), *overruled on other grounds by Braunstein v. State*, 118 Nev. 68, 77, 40 P.3d 413, 420 (2002). We have described the statute as providing a setting in which ''reliability may be more vigorously contested and more accurately discerned.'' *Bockting v. State*, 109 Nev. 103, 109, 847 P.2d 1364, 1368 (1993). The language in the statute and the nature of grand jury proceedings lead us to conclude that this statutory hearsay exception does not apply to grand jury proceedings.

[Headnotes 16, 17]

In deciding whether NRS 51.385 applies to grand jury proceedings, we first look to the plain language of the statute. ''When a statute is facially clear, this court will give effect to the statute's plain meaning and not go beyond the plain language to determine the Legislature's intent.'' *Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 707 (2009); *Speer v. State*, 116 Nev. 677, 679, 5 P.3d 1063, 1064 (2000) (''' 'Generally, when the words in a statute are clear on their face, they should be given their plain meaning unless such a reading violates the spirit of the act.' '' (quoting *Anthony Lee R. v. State*, 113 Nev. 1406, 1414, 952

P.2d 1, 6 (1997))). The plain language of the statute contemplates admission of evidence in a *criminal proceeding before a court*. We conclude that a grand jury hearing is not the same as a criminal proceeding conducted before a court. As a general matter, the grand jury is an arm of the court and the court that impanels the grand jury also supervises its proceedings, *see* NRS 172.097, but nothing in our statutes, the Nevada Constitution, or this court's jurisprudence suggests that the district court's supervisory authority extends to ruling on evidentiary matters or presiding over the grand jury proceedings in the manner that a judge presides over a trial. *See In re Report of Washoe Cnty. Grand Jury*, 95 Nev. 121, 126-27, 590 P.2d 622, 626 (1979) (observing that ''the court presides at the impanellment of the grand jury (Art. 6, § 5, Nev. Const.; NRS 6.110-.140), receives presentments and indictments (Art. 6, § 5, Nev. Const.; NRS 172.255; NRS 172.285), determines when a grand jury shall be impanelled (NRS 6.110, NRS 6.130), charges the grand jury as to its authorities and responsibilities (NRS 172.095), . . . determines when a grand jury is to be discharged, recessed (NRS 6.145), or a juror excused (NRS 172.275),'' and ''has the limited power to review reports of grand juries within its jurisdiction prior to publication''). Instead, ''[a]s a practical matter . . . it is the district attorney who is continually interacting with the grand jurors.'' Legislative Commission of the Legislative Counsel Bureau, *Study of the Law, Rules and Practices Relating to the Grand Jury in Nevada*, Bulletin No. 85-17, at 8 (Nev. 1984). The district attorney ''inform[s] the grand jurors of the specific elements of any public offense which they may consider as the basis of the indictment,'' NRS 172.095(2), and presents evidence to the grand jury supporting its allegations against the target, after which the grand jury determines whether the allegations are supported by probable cause. And while a target may exercise his statutory right to testify at the grand jury proceeding, provided that he complies with NRS 172.241(2)(b), he may not observe or otherwise participate in the proceeding. Similarly, a target's attorney may be present during the target's testimony, but counsel may not directly address the grand jurors or participate in the proceedings. *See* NRS 172.235; NRS 172.239. Thus, whereas NRS 51.385 contemplates notice to the defendant, a ruling by a court as a precondition to admissibility, and a vigorous contest regarding the reliability of the child-victim's statements, the structure of the grand jury proceeding allows for none of these safeguards.

[Headnotes 18, 19]

The State suggests that the safeguards contemplated by NRS 51.385 will not be obviated because the defendant can raise the evidentiary issue after the grand jury proceeding by filing a pretrial

petition for a writ of habeas corpus in the district court. *See generally* NRS 34.360; NRS 34.500; NRS 34.700; NRS 34.710. We reject that argument for three reasons. First, the plain language of the statute does not support after-the-fact review, particularly considering how grand juries work, as we have explained above. Second, the focus of the grand jury is to determine whether the evidence presented establishes probable cause. Introducing evidence that is unrelated to proving the elements of an alleged offense but necessary to develop a record for an after-the-fact challenge to the admissibility of that evidence that may never be pursued is not only a distraction to the grand jury but is irrelevant to its task. And finally, an after-the-fact determination places the burden on the defendant both to challenge the evidence and to establish that it was improperly received by the grand jury when NRS 51.385 normally would put the burden on the State to give pretrial notice of its intent to offer the statements and to establish that the statements are trustworthy. *See Felix v. State*, 109 Nev. 151, 181, 849 P.2d 220, 240-41 (1993) (indicating that district court erred by placing burden of challenging reliability of victim's statement under NRS 51.385 on defense), *superseded on other grounds by statute as stated in Evans v. State*, 117 Nev. 609, 625, 28 P.3d 498, 509-10 (2001). Although we have allowed for harmless-error review on appeal when the trial court failed to conduct a trustworthiness hearing under NRS 51.385, *Braunstein*, 118 Nev. at 77, 40 P.3d at 420, the after-the-fact review contemplated by the State is not the same. In the harmless-error context on appeal, the defendant had an opportunity before and at trial to ensure that the district court conducted the trustworthiness hearing before admitting the evidence. The same is not true in the grand jury context. And in the harmless-error context on appeal, we have explained that automatic reversal does not serve a useful purpose, particularly where the child testifies at trial and is subject to cross-examination. *Id.* at 77-78, 40 P.3d at 420. Again, the same does not hold true in the grand jury context. Considering the plain language and requirements of NRS 51.385, as well as the structure of grand jury proceedings, we conclude that NRS 51.385 does not apply to evidence presented to a grand jury. Therefore, the testimony of Y.V., Elsa, and Ebrahim about the victim's out-of-court statements regarding Rugamas' sexual conduct was not admissible at the grand jury proceeding under NRS 51.385. The district court's application of the law in this respect is clearly erroneous.

[Headnotes 20-22]

Having concluded that the victim's out-of-court statements describing Rugamas' alleged sexual conduct were hearsay and could not be admitted at the grand jury proceeding under the hearsay exception set forth in NRS 51.385, we must determine whether

'' 'there is the slightest sufficient legal evidence and best in degree appearing in the record' '' on which we may sustain the grand jury's probable-cause determination. *Avery v. State*, 122 Nev. 278, 285, 129 P.3d 664, 669 (2006) (quoting *Robertson v. State*, 84 Nev. 559, 561-62, 445 P.2d 352, 353 (1968)). The grand jury's probable-cause determination ''may be based on slight, even 'marginal' evidence.'' *Sheriff v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (quoting *Perkins v. Sheriff*, 92 Nev. 180, 181, 547 P.2d 312, 312 (1976)). In other words, the prosecution must merely show '' 'enough evidence to support a reasonable inference' that the defendant committed the crime charged.'' *Sheriff v. Burcham*, 124 Nev. 1247, 1258, 198 P.3d 326, 333 (2008) (quoting *Hodes*, 96 Nev. at 186, 606 P.2d at 180). Aside from the victim's hearsay statements, no other evidence introduced at the grand jury hearing provided sufficient description of Rugamas' alleged sexual conduct to satisfy the elements of the charged offenses. Left with insufficient evidence to support the probable-cause determination, we are compelled to conclude that the indictment is fatally deficient, and therefore the district court manifestly abused its discretion by denying Rugamas' habeas petition. *See State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (defining manifest abuse of discretion as clearly erroneous interpretation or application of a law or rule). Therefore, we grant Rugamas' petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying Rugamas' petition for a writ of habeas corpus and enter an order consistent with this opinion.

GIBBONS and DOUGLAS, JJ., concur.

NEVADA POWER COMPANY, A NEVADA CORPORATION, APPELLANT, *v.* 3 KIDS, LLC, A NEVADA LIMITED LIABILITY COMPANY, RESPONDENT.

No. 56881

July 3, 2013 302 P.3d 1155

Appeal from a district court judgment on a jury verdict in an eminent domain action. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Public electric utility sought to exercise power of eminent domain in order to exercise two easements on property owner's property for installation of high-voltage transmission lines. Property owner rejected offer of compensation. The district court entered judgment on jury verdict determining fair market value of con-

demned property. Utility appealed. The supreme court, GIBBONS, J., held that: (1) jury was permitted to consider restrictions imposed by county setback when determining fair market value, (2) erroneous jury instruction was harmless error, (3) expert witness's failure to disclose certain data did not preclude admission of testimony, and (4) utility's failure to timely disclose rebuttal evidence precluded use of evidence.

Affirmed.

Ballard Spahr LLP and *Stanley W. Parry* and *Timothy R. Mulliner*, Las Vegas; *Reisman Sorokac* and *Heidi J. Parry Stern*, Las Vegas, for Appellant.

Cotton, Driggs, Walch, Holley, Woloson & Thompson and *Stacy D. Harrop* and *Gregory J. Walch*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   The supreme court reviews a district court's approval of a jury instruction for abuse of discretion or judicial error.
2. APPEAL AND ERROR.
   The supreme court reviews de novo whether a jury instruction is a correct statement of the law.
3. APPEAL AND ERROR.
   Even if a jury instruction misstates the law, it only warrants reversal if it causes prejudice substantially affecting the party's rights, and but for the error, a different result might have been reached.
4. EMINENT DOMAIN.
   Jury was permitted to consider governmental restrictions on portion of property to be condemned when determining the fair market value of that portion of the property in eminent domain proceeding in which public electric utility sought to condemn portion of larger parcel, and therefore, jury was permitted to consider restrictions imposed on property by county setback; the trier of fact was permitted to consider evidence of land-use restrictions that would have influenced a prudent purchaser when purchasing the condemned property, and situation did not involve a restriction that caused the jury to disregard the highest and best use of the whole parcel by valuing the property at a lower use in order to avoid triggering the setback.
5. EMINENT DOMAIN.
   As a restriction on land use, an existing setback is generally a proper matter for the jury to consider in an eminent domain proceeding.
6. EMINENT DOMAIN.
   Erroneous jury instruction requiring jury to disregard restrictions imposed on property by county setback when determining fair market value of property was harmless error in eminent domain proceeding concerning public electric utility, when other jury instruction provided correctly stated that law and alleviated any prejudice to utility, and jury's fair market value determination evidenced that jury considered setback when valuing property.
7. APPEAL AND ERROR.
   The supreme court will not overturn a jury's verdict if the verdict is supported by substantial evidence, unless, considering all the evidence, the verdict was clearly wrong.

8. PRETRIAL PROCEDURE.
   Expert witness's failure to disclose certain backup data from five property sales used to support her calculation of the proper price per square foot for property to be condemned for purposes of fair market value determination went to the weight of the expert's testimony, not its admissibility, and therefore, failure to disclose data did not preclude admission of evidence in eminent domain proceeding involving public electric utility; weaknesses were appropriate topics for cross-examination, and utility had a wide range of unused tools available to address any issues with the report before trial, including motions to compel production of documents, motions in limine, development of a competing paired sales analysis, and vigorous cross-examination. NRCP 16.1(a)(2)(B).
9. PRETRIAL PROCEDURE.
   Public electric utility's failure to disclose rebuttal evidence before trial precluded use of evidence to rebut expert witness's fair market value calculation in eminent domain proceeding involving public electric utility, where utility first produced the evidence at issue during the trial. NRCP 16.1(a)(3).

Before the Court EN BANC.[1]

OPINION

By the Court, GIBBONS, J.:

In this opinion, we review a jury instruction regarding the determination of fair market value of condemned property, a portion of which is located within a government setback, for the purpose of ascertaining just compensation. Although we conclude that the jury instruction at issue provided an overbroad reading of our decision in *City of North Las Vegas v. Robinson*, 122 Nev. 527, 134 P.3d 705 (2006), we conclude that no prejudice was established because a separate jury instruction remedied the error. Additionally, we consider whether the district court abused its discretion by allowing testimony provided by respondent 3 Kids, LLC's expert. We conclude that the district court did not abuse its discretion by allowing the expert to testify regarding her paired sales analysis. Therefore, we affirm the district court's judgment.

FACTS AND PROCEDURAL HISTORY

3 Kids purchased a 3-acre parcel west of the Las Vegas Strip (the property) for $8.65 million. The property was zoned for industrial use, but 3 Kids believed it could be re-zoned for more intensive development. The northernmost 20 feet of the property is in a county setback. The only developments a landowner may perform in the setback relate to landscaping and parking. Nevada

[1]THE HONORABLE KRISTINA PICKERING, Chief Justice, voluntarily recused herself from participation in the decision of this matter.

Power already had an existing 10-foot-wide utility easement within the setback.

In 2008, appellant Nevada Power Co. informed 3 Kids that it was going to exercise two easements on the property for installation of high-voltage transmission lines: one 5-foot-wide easement on the north side of the property located within the setback (the Harmon easement) and a 35-foot easement on the east side of the property (the Eastern easement). Nevada Power offered 3 Kids $750,000 for the easements, but 3 Kids rejected the offer and the issue of just compensation went to trial. At trial, 3 Kids argued that Nevada Power owed $2,106,000 in just compensation based on a theory that holding the property for a speculative rise in market value was its highest and best use. 3 Kids' expert, Tami Campa, valued the property at $85 per square foot and concluded Nevada Power was taking 90% of the rights to the land within the easements, except for the area the pole occupied (which was 100%). Disagreement ensued over the value of the Harmon easement, since it was within a setback and 3 Kids' use of the property was limited to landscaping and parking. Campa did not consider the Harmon easement's location within the setback because buyers pay an average price per square foot. Campa used a paired sales analysis to determine that the value of the remainder of the property was impaired as a result of the installation of the high-voltage transmission lines.[2]

Nevada Power's experts disagreed with Campa and concluded that the amount of just compensation due was only $556,000, based on an industrial development highest and best use. Nevada Power's expert determined that Nevada Power was taking 10% of the rights to the land within the Harmon easement since it was within a setback and determined that Nevada Power was taking 75% of the rights of the land within the Eastern easement. Nevada Power's expert valued the property at $65 per square foot and valued the easements at only $45 per square foot. This reflected the 10% decrease on the Harmon easement and the 75% decrease on the Eastern easement. Nevada Power's expert also opined that no severance damages existed as a result of the installation of the high-voltage transmission lines. Severance damages are damages awarded to compensate for the difference between the value of the remainder property before and after the taking.

During the reading of the jury instructions, Nevada Power objected to Jury Instruction No. 35, which instructed the jury to disregard the setback in its valuation of the property, on the ground

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[2]A paired sales analysis estimates the value of the subject property based on previous sales of comparable properties. A paired sales analysis can also be used to isolate a particular variable—in this case, power lines—to determine the impact of that variable on property values.

that 3 Kids' use of the area within the setback was limited to parking and landscaping. 3 Kids responded that this court's holding in *Robinson* was broad enough to encompass the proposed instruction. The district court agreed with 3 Kids and included the instruction.

After deliberation, the jury awarded 3 Kids $1.7 million in just compensation. The jury found by special verdict that $823,000 of the award represented compensation for the value of the easements taken and that $894,000 of the award was for severance damages. Nevada Power now appeals.

DISCUSSION

Jury Instruction No. 35 incorrectly stated the holding of Robinson, but this error did not affect Nevada Power's substantive rights

[Headnotes 1-3]

We review a district court's approval of a jury instruction for abuse of discretion or judicial error. *FGA, Inc. v. Giglio*, 128 Nev. 271, 280, 278 P.3d 490, 496 (2012). We review de novo whether an instruction is a correct statement of the law. *Cook v. Sunrise Hosp. & Med. Ctr., L.L.C.*, 124 Nev. 997, 1003, 194 P.3d 1214, 1217 (2008). Even if a jury instruction misstates the law, it only warrants reversal if it causes prejudice substantially affecting the party's rights, and ''but for the error, a different result might have been reached.'' *Id.* at 1005-06, 194 P.3d at 1219.

[Headnote 4]

Jury Instruction No. 35 read:

> In determining the fair market value of the land in which the easement is sought, you are required to value the property as a whole, and not put a lesser value on the portion of the property to be condemned based upon any governmental restrictions that apply solely to that portion.

Nevada Power argues that this instruction runs afoul of this court's holding in *City of North Las Vegas v. Robinson*, 122 Nev. 527, 134 P.3d 705 (2006). We agree.

In *Robinson*, the City of North Las Vegas sought to condemn a portion of a larger parcel. *Id.* at 529, 134 P.3d at 706. Absent a taking, that portion was subject to a dedication requirement to the City if the land was commercially developed. *Id.* Both parties agreed that the highest and best use of the property was commercial, but the City's expert valued the property based on uses that would not trigger a dedication (open space, fencing, directional signage, and the right to remove trespassers), given the fact that a commercial valuation would have rendered the condemned portion valueless by triggering the dedication requirement. *Id.* at 530, 134

P.3d at 707. The district court gave an instruction that directed the jury to ''determine the value of the condemned parcel in the before condition based upon only those uses to which the property can be put without obtaining government approvals that would trigger the dedication.'' *Id*. at 529, 134 P.3d at 706. This court held that the instruction was inconsistent with just compensation requirements in Nevada because it ''caused the jury to ignore the highest and best use of the entire parcel and to improperly sever the condemned portion from the whole parcel.'' *Id*. at 531, 134 P.3d at 707; *see Cnty. of Clark v. Alper*, 100 Nev. 382, 386-87, 685 P.2d 943, 946 (1984) (''`Just compensation' requires that the market value of the property should be determined by reference to the highest and best use for which the land is available and for which it is plainly adaptable.'').

[Headnote 5]

Here, the first portion of Jury Instruction No. 35, which instructed the jury to value the property as a whole, is consistent with our holding in *Robinson*. But the second part, which instructed the jury not to ''put a lesser value on the portion of the property to be condemned based upon any governmental restrictions that apply solely to that portion,'' is inconsistent with our language in *Robinson*. In *Robinson*, we stated that the trier of fact is permitted to consider ''evidence of land-use restrictions that would influence a prudent purchaser when purchasing the condemned property.'' *Id*. at 532, 134 P.3d at 708. In certain situations, evidence of land-use restrictions may not be considered, such as where it causes the jury to disregard the highest and best use of the whole parcel. *Id*. at 532-33, 134 P.3d at 708-09 (citing *Alper*, 100 Nev. at 389-90, 685 P.2d at 947-49). As a restriction on land use, an existing setback is generally a proper matter for the jury to consider. *See Alper*, 100 Nev. at 387, 685 P.2d at 946 (''As a restriction on land use, an existing zoning ordinance is generally regarded as a proper matter for the jury's consideration.''). This appeal does not present a situation like that in *Robinson* where the restriction caused the jury to disregard the highest and best use of the whole parcel by valuing the property at a lower use in order to avoid triggering the setback. Despite this fact, Jury Instruction No. 35 instructs the trier of fact to disregard the setback in a situation that did not cause them to disregard the highest and best use of the whole parcel. Therefore, we conclude that this portion of the instruction was erroneous.

[Headnote 6]

This error only warrants reversal if it caused prejudice that substantially affected Nevada Power's rights. *See Cook*, 124 Nev. at 1005-06, 194 P.3d at 1219 (holding that reversal of a district

court's judgment is warranted only where an error in the statement of law in a jury instruction is prejudicial). Jury Instruction No. 19, which was also read to the jury, stated, in pertinent part:

> If the land subject to the easement will still have some market value after the taking of the easement and the construction and improvement in the manner proposed, Nevada Power is required to pay on the decrease in market value that results from the easement.
>
> Thus, in determining the compensation to be awarded for taking the easement, you must first determine the fair market value of the land in which the easement is sought and then determine the value of the same land as it will be subject to the easement and the construction of the proposed improvement. The difference between these amounts will be the value of the easement.

Because Jury Instruction 19 correctly applies this court's reasoning in *Robinson*, the instruction alleviated any prejudice to Nevada Power caused by the erroneous language in Jury Instruction No. 35. *Id.*

[Headnote 7]

Additionally, the jury's verdict was supported by substantial evidence, and ''[t]his court will not overturn a jury's verdict if the verdict is supported by substantial evidence unless, [considering] all the evidence . . . , the verdict was clearly wrong.'' *Clark Cnty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 384, 213 P.3d 496, 503 (2009) (internal quotation omitted). The jury's conclusion that the easement was worth $823,290 was nearly $400,000 lower than 3 Kids' calculation, but about $267,000 more than Nevada Power's valuation, indicating that the jury did not completely disregard the setback. The jury also valued the property as a whole between 3 Kids' estimate of $85 per square foot and Nevada Power's estimate of $65 per square foot, both for purposes of the calculation of damages based on Nevada Power's taking of the easement and for determining the proper severance damages. Given that these numbers were within the range provided by the experts, we cannot say that the verdict was clearly wrong. We thus conclude that substantial evidence supports the jury's verdict. *Clark Cnty. Sch. Dist.*, 125 Nev. at 384, 213 P.3d at 503.

We suggest the following instruction, or something similar, in cases where a jury is tasked with determining just compensation for a piece of property burdened by a land-use restriction where the jury does not need to disregard the highest and best use of the land:

> In determining the fair market value of the land in which the easement is sought, you are required to value the land as a whole based on its highest and best use and look to the high-

> est price which the property would bring in an open market under the conditions of a fair sale. To determine the highest price, you must not focus solely on the condemned portion, but you may consider evidence of land-use restrictions that would influence a prudent purchaser when purchasing the condemned property.

The district court did not abuse its discretion by allowing 3 Kids' expert's testimony

[Headnote 8]

Nevada Power also argues that the district court abused its discretion by allowing 3 Kids' expert, Tami Campa, to testify about her paired sales analysis when she did not disclose certain backup data from five property sales used to support her calculation of the proper price per square foot for 3 Kids' parcel. Nevada Power also asserts that the district court should have allowed it to present maps and reports to rebut Campa's testimony. We disagree.

We review a district court's decision to admit expert testimony for a clear abuse of discretion. *In re Mosley*, 120 Nev. 908, 921, 102 P.3d 555, 564 (2004). NRCP 16.1(a)(2)(B) requires an expert's report to ''contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data and other information considered by the witness in forming the opinions.'' While Campa's analysis of the five sales in question was less thorough than other areas of her 160-page report, we conclude that these weaknesses went to the weight of the evidence and not its admissibility. *See Williams v. Eighth Judicial Dist. Court*, 127 Nev. 518, 530-31, 262 P.3d 360, 368 (2011) (noting that concerns about the reliability of expert testimony went to weight, not admissibility). These weaknesses were appropriate topics for cross-examination. Nevada Power had a wide range of unused tools available to address any issues with the report before trial, including motions to compel production of documents, motions in limine, development of a competing paired sales analysis, and vigorous cross-examination. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) (''Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.''). Therefore, we conclude the district court did not abuse its discretion in permitting Campa's testimony. *Mosley*, 120 Nev. at 921, 102 P.3d at 564.

[Headnote 9]

Nevada Power raises additional issues relating to Campa's testimony. First, Nevada Power argues that the district court should have allowed it to present maps and reports during rebuttal based on the APN numbers Campa provided during 3 Kids' case-in-chief. Due to Campa's imprecise identification of the parcels

she used in her paired sales analysis, Nevada Power guessed which sales she used when developing their own expert report. However, once the APNs were disclosed at trial, Nevada Power realized some of its assumptions were incorrect and attempted to provide rebuttal information based on the actual parcels that Campa used. We conclude that the district court acted within its discretion by refusing to allow Nevada Power to introduce information in rebuttal that was not disclosed prior to trial. NRCP 16.1(a)(3); *M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008) (stating that this court ''review[s] a district court's decision to admit or exclude evidence for abuse of discretion, and . . . will not interfere with the district court's exercise of its discretion absent a showing of palpable abuse''); *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005) (holding that the trial court has broad discretion to determine the admissibility of evidence). NRCP 16.1(a)(3) requires that rebuttal evidence be provided to other parties at least 30 days before trial, and Nevada Power first produced the maps and report at issue during trial.

Nevada Power also argues that Campa's testimony violated NRS 50.285 because her paired sales analysis lacked verifiable and reliable data relating to the five property sales. NRS 50.285 does not define the type of documentation or data on which experts may rely, however, and does not support Nevada Power's argument. We further conclude that the district court properly denied Nevada Power's request to play a portion of Campa's video deposition at trial as Nevada Power's counsel agreed that he could examine the witness live instead. *See Clark Cnty. v. State*, 65 Nev. 490, 506, 199 P.2d 137, 144 (1948) (''[A] party on appeal cannot assume an attitude . . . inconsistent with . . . that taken at the hearing below.'').

CONCLUSION

We conclude that the district court erred by giving Jury Instruction No. 35, but this error did not prejudice Nevada Power in light of Jury Instruction No. 19. We also conclude that the district court did not abuse its discretion by allowing 3 Kids' expert's testimony and by excluding Nevada Power's rebuttal evidence. We have considered the parties' remaining arguments and conclude that they are without merit. Accordingly, we affirm the district court's judgment.

HARDESTY, PARRAGUIRRE, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

BRYAN CLAY, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JAMES M. BIXLER, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 61986

July 11, 2013 305 P.3d 898

Original petition for a writ of mandamus or prohibition challenging an order of the district court denying a pretrial petition for a writ of habeas corpus.

Following the return of the indictment charging him with child abuse and neglect, defendant filed a pretrial petition for a writ of habeas corpus challenging the indictment. The supreme court, DOUGLAS, J., held that: (1) child abuse and neglect statute requires the State to prove that ''abuse or neglect,'' as statutorily defined, occurred regardless of the theory under which the offense is prosecuted; (2) statutory definition of ''physical injury'' was technical and did not reflect a layperson's common understanding of the term, and thus, it was incumbent upon the prosecutor to provide the statutory definition of this element to grand jury; (3) the State's failure to instruct the grand jury on statutory definition of ''physical injury'' likely caused the grand jury to return indictment on child abuse and neglect, based on a nonaccidental physical injury, based on less than probable cause.

Petition granted in part.

Patti, Sgro & Lewis and *Anthony P. Sgro*, Las Vegas; *Christopher R. Oram*, Las Vegas, for Petitioner.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Jonathan E. VanBoskerck*, Chief Deputy District Attorney, Clark County, for Real Party in Interest.

1. MANDAMUS.

   Writ of mandamus may issue to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion. NRS 34.160.

2. MANDAMUS.

   The supreme court would exercise its discretion to consider defendant's writ of mandamus challenging order of the district court denying his pretrial petition for writ of habeas corpus, alleging that State failed to comply with statute providing that, before seeking indictment, the district attorney shall inform grand jurors of the specific elements of any public offense, when State did not instruct jury on the definition of ''physical in-

jury'' in child abuse and neglect case; violation of this statute could be reviewed on direct appeal from a final judgment of conviction, but that remedy might not be adequate because any error in grand-jury proceeding was likely to be harmless after conviction, and petition raised important legal questions as to information of which the prosecution had to inform the grand jurors. NRS 172.095(2).

3. MANDAMUS.

Mandamus is an extraordinary remedy, and accordingly, it is within the discretion of the supreme court to determine if a petition will be considered, and in exercising that discretion, the court must consider whether judicial economy and sound judicial administration militate for or against issuing the writ.

4. COURTS.

Where the circumstances establish urgency or strong necessity, or an important issue of law requires clarification and public policy is served by the supreme court's exercise of its original jurisdiction, the court may exercise its discretion to consider a petition for extraordinary relief.

5. APPEAL AND ERROR.

The supreme court reviews questions of statutory interpretation de novo.

6. STATUTES.

When interpreting a statutory provision, the court looks first to the plain language of the statute.

7. STATUTES.

When interpreting a statute, the court avoids statutory interpretation that renders language meaningless or superfluous, and if the statute's language is clear and unambiguous, the court will enforce the statute as written.

8. ADMINISTRATIVE LAW AND PROCEDURE; STATUTES.

The supreme court will interpret a rule or statute in harmony with other rules and statutes.

9. INFANTS.

The law criminalizes five different kinds of child abuse or neglect: (1) nonaccidental physical injury, (2) nonaccidental mental injury, (3) sexual abuse, (4) sexual exploitation, and (5) negligent treatment or maltreatment. NRS 200.508(1).

10. INFANTS.

Nevada's child abuse and neglect statute requires the State to prove that ''abuse or neglect,'' as statutorily defined, occurred regardless of the theory under which the offense is prosecuted. NRS 200.508(1), (4)(a).

11. GRAND JURY.

Criminal statute, providing that before seeking an indictment the district attorney shall inform the grand jurors of the specific elements of any public offense that they may consider as the basis of the indictment or indictments, is intended to add an element of fairness to grand-jury proceedings by providing instruction in complex cases so that laypersons with no background in the law will know what to look for from the witnesses appearing before them. NRS 172.095(2).

12. GRAND JURY.

When presented with alleged violation of criminal statute, providing that before seeking an indictment the district attorney shall inform the grand jurors of the specific elements of any public offense that they may consider as the basis of the indictment or indictments, the district courts should focus on the effect that misleading or omitted instructions on the

elements of the offense had on the integrity of the grand-jury proceedings. NRS 172.095(2).

13. Indictment and Information.

If the definition of an element of an offense is not technical and reflects a layperson's common understanding of the term, then the prosecutor's failure to instruct the grand jurors on the statutory definition of this element does not warrant dismissal under the statute, providing that before seeking an indictment the district attorney shall inform the grand jurors of the specific elements of any public offense that they may consider as the basis of the indictment or indictments. NRS 172.095(2).

14. Grand Jury.

When the alleged ''abuse or neglect'' is based on a nonaccidental physical injury, the district attorney must inform the grand jurors of the statutory definition of ''physical injury'' because that definition is more limited than the meaning that a layperson would attribute to the term. NRS 172.095(2), 200.508(1), (4)(d).

15. Grand Jury.

The statutory definition of ''physical injury'' was technical and did not reflect a layperson's common understanding of the term ''physical injury,'' because the statutory definition of ''physical injury'' was more limited than a layperson's common understanding of the term, and given the difference between the statutory and common definition of ''physical injury,'' it was incumbent upon the prosecutor to provide the statutory definition of this element to the grand jury in child abuse and neglect case based on a nonaccidental physical injury. NRS 172.095(2), 200.508(1), (4)(d).

16. Indictment and Information.

A grand jury needs only slight or marginal evidence to return an indictment.

17. Indictment and Information.

Because a properly instructed grand jury could have found slight or marginal evidence of impairment of any bodily function or organ of the body based on defendant's 16-year-old pregnant girlfriend's testimony that she had difficulty breathing when she was telling police officers about the second altercation with defendant, the State's failure to inform the grand jurors about the statutory definition of ''physical injury'' did not cause the grand jury to return an indictment on less than probable cause for child abuse and neglect. NRS 172.095(2), 200.508(1), (4)(d).

18. Indictment and Information.

The State's failure to instruct the grand jury on statutory definition of ''physical injury'' likely caused the grand jury to return indictment on child abuse and neglect, based on a nonaccidental physical injury, based on less than probable cause, and this violation of the statute, providing that, before seeking indictment, the district attorney shall inform grand jurors of specific elements of any public offense that they may consider as basis of indictment, required dismissal of that count; only proof supporting this count was defendant's pregnant, 16-year-old girlfriend's testimony that defendant slapped her across the face, the girlfriend did not testify to nature or extent of any physical injury as result of slap, and applying common understanding of term ''physical injury,'' the grand jury could have concluded that there was slight or marginal evidence of damage or harm done to the girlfriend, but the supreme court was not convinced that it likely would have concluded that there was slight or marginal evidence of permanent or temporary disfigurement. NRS 172.095(2), 200.508(1), (4)(d).

Before GIBBONS, PARRAGUIRRE and DOUGLAS, JJ.

OPINION

By the Court, DOUGLAS, J.:

Nevada law requires a district attorney to ''inform the grand jurors of the specific elements of any public offense which they may consider as the basis of the indictment.'' NRS 172.095(2). In this original writ proceeding, we consider whether the district attorney violates this requirement when he or she seeks an indictment for child abuse or neglect under NRS 200.508(1) based on a nonaccidental physical injury but fails to inform the grand jurors of the definition of ''physical injury'' set forth in NRS 200.508(4)(d). We conclude that regardless of the theory pursued under NRS 200.508(1), ''abuse or neglect'' is an element of the offense and that when the alleged ''abuse or neglect'' is based on a nonaccidental physical injury, the district attorney must inform the grand jurors of the statutory definition of ''physical injury'' because that definition is more limited than the meaning that a layperson would attribute to the term. Because the failure to inform the grand jurors of the statutory definition of ''physical injury'' likely caused the grand jury to return an indictment on less than probable cause for one of the two counts of child abuse, we grant the petition as to that count.

FACTS AND PROCEDURAL HISTORY

Petitioner Bryan Clay was indicted by a grand jury for two counts of child abuse and neglect in violation of NRS 200.508(1), for slapping and hitting his 16-year-old girlfriend on February 14, 2012 (count one), and March 15, 2012 (count three). The only witness to testify before the grand jury about the events that transpired in February and March was Clay's girlfriend, E.F.

E.F. was pregnant with Clay's child. The first charged incident of abuse occurred two days after she told him about the pregnancy. Clay slapped her across the face during an argument. The second charged incident occurred the following month. After the couple attended a prenatal appointment, E.F. told Clay that she did not want to be with him anymore, and Clay told her that if she left him, he would kill himself. As E.F. walked away, Clay walked up behind her, grabbed her by the neck with one hand, choked her, and threw her into a gate. When E.F. continued to ignore him, he started hitting her with a closed fist in her face, legs, arms, stomach, and back. E.F. fell to the ground and covered her stomach with her hands. Clay then grabbed her by the hair and shoved her face into the concrete. Clay tried to move E.F.'s hands from her

stomach and told her that if he could not have her and his child, then he did not want anyone else to have them either. When a woman came over to tell him to stop, Clay took E.F.'s purse and left. By the time E.F. got home, the police had already arrived. E.F. testified that she attempted to tell the police what happened, but she still could not breathe. An ambulance took E.F. to the hospital, but she did not stay. There was no testimony about the nature of E.F.'s injuries resulting from either of the altercations.

Following the return of the indictment, Clay filed a pretrial petition for a writ of habeas corpus challenging the indictment on two grounds. First, he argued that there was insufficient evidence to support a finding of probable cause as to the two counts of child abuse and neglect because there was no evidence of a nonaccidental physical or mental injury and therefore the State failed to prove that abuse or neglect occurred. Second, he argued that the State failed to comply with the requirements of NRS 172.095(2) by not instructing the jury on the definition of ''physical injury'' as used in the applicable child-abuse-and-neglect statute. In its response, the State argued that the ''showing of physical or mental injury is not a requirement'' of the child-abuse-and-neglect statute; rather, the mere possibility of physical or mental injury is sufficient. The State did not respond to Clay's NRS 172.095(2) argument. The district court orally denied the petition with little analysis or explanation other than observing that the child-abuse-and-neglect statute ''is a very liberally-written statute, and probably for good reason'' and summarily agreeing with the State's argument. Like the State, the district court did not discuss the merits of Clay's NRS 172.095(2) argument. Clay then filed this original petition for a writ of mandamus or prohibition challenging the district court's decision.

DISCUSSION

[Headnotes 1, 2]

A writ of mandamus may issue to compel the performance of an act that the law requires ''as a duty resulting from an office, trust or station,'' NRS 34.160, or to control an arbitrary or capricious exercise of discretion, *see Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).[1] The writ will not issue, however, if the petitioner has a plain, speedy, and adequate remedy in the ordinary course of the law. *See* NRS 34.170. Here, Clay has another remedy because a violation of

[1]We focus on Clay's request for a writ of mandamus as he has not asserted a claim that challenges the district court's jurisdiction. *See* NRS 34.320 (providing that a writ of prohibition is available to halt proceedings occurring in excess of a court's jurisdiction).

NRS 172.095(2) can be reviewed on direct appeal from a final judgment of conviction. *See* NRS 177.045. Nonetheless, that remedy may not be adequate because any error in the grand-jury proceeding is likely to be harmless after a conviction. *Lisle v. State*, 114 Nev. 221, 224-25, 954 P.2d 744, 746-47 (1998). We therefore have recognized that ''[a] writ of mandamus is an appropriate remedy for [violations of grand-jury procedures].'' *Lisle v. State*, 113 Nev. 540, 551, 937 P.2d 473, 480 (1997), *clarified on rehearing*, 114 Nev. 221, 954 P.2d 744 (1998).

[Headnotes 3, 4]

Mandamus, however, is an extraordinary remedy. Accordingly, it is within the discretion of this court to determine if a petition will be considered. *See Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982); *see also State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983). In exercising that discretion, we must ''consider[ ] whether judicial economy and sound judicial administration militate for or against issuing the writ.'' *Redeker v. Eighth Judicial Dist. Court*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006), *limited on other grounds by Hidalgo v. Eighth Judicial Dist. Court*, 124 Nev. 330, 341, 184 P.3d 369, 377 (2008). ''Where the circumstances establish urgency or strong necessity, or an important issue of law requires clarification and public policy is served by this court's exercise of its original jurisdiction, this court may exercise its discretion to consider a petition for extraordinary relief.'' *Schuster v. Eighth Judicial Dist. Court*, 123 Nev. 187, 190, 160 P.3d 873, 875 (2007).

Applying these considerations, we exercise our discretion to consider the petition as to the alleged violation of NRS 172.095(2).[2] On that issue, the petition raises important legal questions as to what the prosecution must inform the grand jurors of under NRS 172.095(2) when the grand jury is considering whether to indict a person for a violation of NRS 200.508(1).

This court has held as a general proposition that ''it is not mandatory for the prosecuting attorney to instruct the grand jury on the law.'' *Hyler v. Sheriff, Clark Cnty.*, 93 Nev. 561, 564, 571

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[2]To the extent that Clay's petition is framed as a challenge to the district court's conclusion that there was slight or marginal evidence supporting the grand jury's indictment, we decline to exercise our discretion to consider the petition. *See Kussman v. Eighth Judicial Dist. Court,* 96 Nev. 544, 546, 612 P.2d 679, 680 (1980) (explaining that judicial economy and sound administration of justice generally militate against the use of mandamus to review pretrial probable-cause determinations). In this opinion, we address the evidence presented and the probable-cause determination only in the context of deciding whether the failure to comply with NRS 172.095(2) undermined the integrity of the grand-jury proceeding.

P.2d 114, 116 (1977) (citing *Phillips v. Sheriff, Clark Cnty.*, 93 Nev. 309, 311-12, 565 P.2d 330, 331-32 (1977)). Although the general proposition still holds true, *see Schuster*, 123 Nev. at 192, 160 P.3d at 876-77 (rejecting argument that prosecutor must instruct grand jury on legal significance of exculpatory evidence), there is a limited instance in which the prosecuting attorney *is* required to inform the grand jury as to the law. Almost a decade after our early pronouncement of the general proposition in *Hyler*, the Nevada Legislature enacted NRS 172.095(2). 1985 Nev. Stat., ch. 367, § 6, at 1029. This statute requires the prosecutor to ''inform the grand jurors of the specific elements of any public offense which they may consider as the basis of the indictment'' before seeking an indictment. To determine whether the prosecution failed to comply with NRS 172.095(2) by not informing the grand jurors as to the statutory definition of ''physical injury,'' we must first determine whether ''physical injury'' is an element of the charged offenses under NRS 200.508(1), which involves statutory interpretation.

[Headnotes 5-8]

''We review questions of statutory interpretation de novo.'' *Bigpond v. State*, 128 Nev. 108, 114, 270 P.3d 1244, 1248 (2012). When interpreting a statutory provision, this court looks first to the plain language of the statute. *Id.* ''This court avoids statutory interpretation that renders language meaningless or superfluous and if the statute's language is clear and unambiguous, this court will enforce the statute as written.'' *In re George J.*, 128 Nev. 345, 349, 279 P.3d 187, 190 (2012) (internal quotation marks and alterations omitted). ''Likewise, this court will interpret a rule or statute in harmony with other rules and statutes.'' *Id.* (internal quotation marks omitted).

Interpretation of NRS 200.508(1)

[Headnote 9]

Applying these rules of statutory interpretation, we necessarily start with the statutory language. NRS 200.508(1) provides in relevant part that

> [a] person who willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect [is guilty of a felony].

NRS 200.508(1) thus sets forth alternative means of committing the offense. The first requires the State to prove that (1) a person willfully caused (2) a child who is less than 18 years of age (3) to

suffer unjustifiable physical pain or mental suffering (4) as a result of abuse or neglect. The second requires the State to prove that (1) a person willfully caused (2) a child who is less than 18 years of age (3) to be placed in a situation where the child may suffer physical pain or mental suffering (4) as the result of abuse or neglect. The fourth element of both alternatives, ''abuse or neglect,'' is specifically defined by NRS 200.508(4)(a). Based on NRS 200.508(4)(a) and the statutes referenced therein, NRS 200.508(1) criminalizes five different kinds of abuse or neglect: (1) nonaccidental physical injury, (2) nonaccidental mental injury, (3) sexual abuse, (4) sexual exploitation, and (5) negligent treatment or maltreatment. The first type of abuse or neglect—nonaccidental physical injury—is implicated in this case.[3] ''Physical injury'' is defined in NRS 200.508(4)(d) as ''[p]ermanent or temporary disfigurement'' or ''[i]mpairment of any bodily function or organ of the body.''

Clay asserts that NRS 200.508(1) requires the State to prove that ''abuse or neglect'' occurred regardless of which alternative is charged; thus, in this case, the State had to prove ''physical injury.'' Relying on the second means of violating NRS 200.508(1), the State argues that it only had to prove that Clay caused the victim to be placed in a situation where she may suffer physical pain or mental suffering, and therefore, it did not have to prove that ''physical injury'' occurred.

The State's argument does not take account of the ''result of abuse or neglect'' language in both provisions under NRS 200.508(1). A plain reading of NRS 200.508(1) leads to the conclusion that the State must prove that ''abuse or neglect'' occurred under both means of violating the statute.[4] We find support for this conclusion in the Legislature's use of the same language—may suffer physical pain or mental suffering as the result of abuse

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[3]The grand jury was informed that ''child abuse'' is a nonaccidental physical injury to a child, and the allegations in the indictment focus on this kind of abuse.

[4]This conclusion is also supported by the statute's legislative history. As originally codified, NRS 200.508 punished a parent or guardian for causing or permitting eight different types of harm. *See* 1971 Nev. Stat., ch. 398, § 1, at 772-73. Notably, this version only required one of the eight types of harm to be the ''result of abuse or neglect.'' In 1977, the Legislature overhauled NRS 200.508, requiring for the first time that all of the types of harm listed in NRS 200.508 be the ''result of abuse or neglect'' as defined by statute. *See* 1977 Nev. Stat., ch. 383, § 4, at 738. In that revision, the Legislature replaced ''causes . . . such a child to be placed in such situation that its life or limb *may* be in danger or its health *likely* to be injured'' with ''causes . . . a child to be placed in a situation where the child may suffer physical pain or mental suffering as *the result* of abuse or neglect.'' *Id.* (Emphases added.) After this revision, the statute required one of the defined acts of abuse or neglect to occur regardless of which theory of liability the State pursued.

or neglect—in subsection 2 of the same statute. NRS 200.508(2) punishes a person who is responsible for a child's safety or welfare and ''allows'' or ''permits'' a child ''to be placed in a situation where the child *may suffer physical pain or mental suffering as the result of abuse or neglect*.'' (Emphasis added.) When the Legislature bifurcated the child-abuse-and-neglect statute in 1985 to distinguish between persons who cause abuse or neglect and those who passively permit abuse or neglect, *see generally Ramirez v. State*, 126 Nev. 203, 209, 235 P.3d 619, 623 (2010), it added the word ''allow,'' 1985 Nev. Stat., ch. 455, § 88, at 1399-1400, and included a definition of ''allow'' that assumes that abuse or neglect has occurred, *see* NRS 200.508(4)(b) (''Allow' means to do nothing to prevent or stop the abuse or neglect of a child in circumstances where the person knows or has reason to know the child *is* abused or neglected.'' (emphasis added)). That definition of ''allow'' supports the conclusion that the language at issue still requires the State to prove that ''abuse or neglect'' occurred regardless of the theory on which an offense under subsection 1 is prosecuted.

It is this ''abuse or neglect'' element that in some cases will result in the State presenting evidence that shows actual physical pain or mental suffering even though it is proceeding under the second theory in NRS 200.508(1). The best example is where, as here, the alleged ''abuse or neglect'' is based on a nonaccidental physical injury. *See* NRS 200.508(4)(a). In that situation, the State must prove that the victim suffered ''[p]ermanent or temporary disfigurement'' or ''[i]mpairment of any bodily function or organ of the body.'' NRS 200.508(4)(d). Evidence that meets this definition of physical injury oftentimes will also demonstrate that the victim suffered physical pain or mental suffering. But that is a by-product of the particular type of ''abuse or neglect.'' The fact that this type of ''abuse or neglect'' often carries with it proof of actual physical pain or mental suffering that otherwise is not required under the second theory in subsection 1 does not allow us to ignore the plain language of NRS 200.508(1), which requires ''abuse or neglect'' under both theories.

The State suggests that an interpretation that would always require it to prove physical pain or mental suffering would reduce the second theory in NRS 200.508(1) to mere surplusage because it would add nothing to the first theory. We agree. Our interpretation of the statute, however, does not have that effect. The second theory retains significance because, in contrast to ''abuse or neglect'' based on physical injury, other types of ''abuse or neglect'' under NRS 200.508(4)(a) do not necessarily result in actual physical pain or mental suffering. Although those types of abuse or neglect could not lead to conviction under the first theory in NRS

200.508(1) if they did not result in physical pain or mental suffering, they can support a charge under the second theory so long as the child *may* suffer physical pain or mental suffering as a result of the abuse or neglect. A good example is abuse or neglect based on negligent treatment or maltreatment of a child. ''[N]egligent treatment or maltreatment of a child'' occurs if a child is ''without proper care, control and supervision.'' NRS 432B.140, *listed in* NRS 200.508(4)(a). The definition of this kind of abuse or neglect encompasses conduct that does not necessarily result in actual physical pain or mental suffering. If there is no physical pain or mental suffering as a result of the negligent treatment or maltreatment, then the defendant cannot be charged under the first theory of liability in NRS 200.508(1). But criminal liability will still attach in that scenario under the second theory in subsection 1 if the defendant placed the child in a situation where the child *may* suffer physical pain or mental suffering as the result of the negligent treatment or maltreatment. For this reason, we see no merit in the State's argument that an ''intoxicated driver [could] raise a 'no harm, no foul' defense'' to a charge under NRS 200.508(1) when he places his child in a car and then drives without an accident. A child who is placed in a car by an intoxicated driver is without proper care, control, or supervision under circumstances which indicate that the child's health or welfare is threatened with harm. *See* NRS 200.508(4)(a); NRS 432B.140. The driver thus has placed the child in a situation where the child may suffer physical pain or mental suffering as a result. Our interpretation of the statute gives meaning to both provisions.

[Headnote 10]

We conclude that NRS 200.508(1) unambiguously requires the State to prove that ''abuse or neglect,'' as defined by NRS 200.508(4)(a), occurred regardless of the theory under which the offense is prosecuted. Because the State alleged that the nonaccidental physical injury kind of abuse and neglect occurred, ''physical injury'' was an element of the offense for which the State sought an indictment. We turn then to whether the district attorney was required to instruct the grand jurors on the statutory definition of ''physical injury.''

Application of NRS 172.095(2)

NRS 172.095(2) provides that ''[b]efore seeking an indictment, . . . the district attorney shall inform the grand jurors of the specific elements of any public offense which they may consider as the basis of the indictment.'' Clay argues that the State was required by NRS 172.095(2) to inform the grand jurors that ''physical injury'' is defined by the child-abuse-and-neglect statute as ''permanent or temporary disfigurement'' or ''impairment of any

bodily function or organ of the body.'' The State argues that it complied with the statute because it provided instructions to the jury, and it asked the grand jury if it had any questions about those instructions. We conclude that the State neglected its duty under the statute.

We have not addressed the requirements of NRS 172.095(2) in any significant detail since its enactment. Nevada is among several jurisdictions that require the prosecutor to instruct the grand jury on the elements of the crime, *see, e.g.*, *People v. Calbud, Inc.*, 402 N.E.2d 1140, 1144 (N.Y. 1980), and cases from those jurisdictions provide some guidance as to the scope of the prosecutor's duty to instruct the grand jurors here in Nevada. In New York, the test is whether ''the integrity of [the grand jury] has been impaired,'' meaning that misleading or incomplete instructions likely caused the grand jury to return an indictment on less than probable cause. *Id*. (explaining that ''it may fairly be said that the integrity of [the grand jury] has been impaired'' ''[w]hen the District Attorney's instructions to the Grand Jury are so incomplete or misleading as to substantially undermine [its] essential function''); *People v. Ramos*, 637 N.Y.S.2d 93, 93 (App. Div. 1996) (dismissing indictment because grand jury determination ''hinged upon the definition'' of a term and ''the prosecutor's instructions to the Grand Jury . . . did not provide it 'with enough information to enable it intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime' '' (quoting *Calbud, Inc.*, 402 N.E.2d at 1143)); *cf. People v. Gnass*, 125 Cal. Rptr. 2d 225, 252, 254, 258 (Ct. App. 2002) (withholding of certain instructions in a manner that may mislead the grand jury about an element of the crime is error and should result in dismissal where the error is likely to have caused the grand jury to return an indictment on less than probable cause).

[Headnotes 11, 12]

This focus on the integrity of the grand-jury proceedings is consistent with the Nevada Legislature's concerns in adopting NRS 172.095(2). The statute was part of a series of bills adopting various provisions of the American Bar Association's principles of grand jury reform. *See* Hearing on S.B. 107 Before the Senate Judiciary Comm., 63d Leg. (Nev., March 4, 1985) (statement of subcommittee member Senator Sue Wagner). The statute is based on the principle that ''[t]he grand jury shall be informed as to the elements of the crimes considered by it,'' *ABA Grand Jury Policy and Model Act*, Grand Jury Principles, Principle 27, at 5 (2d ed. 1982), and was intended to add an element of fairness to grand-jury proceedings by providing instruction in complex cases so that laypersons with no background in the law would know what to

look for from the witnesses appearing before them, *id*. at 12 (commentary to Principle 27); *see also* Hearing on S.B. 107 Before the Senate Judiciary Comm., 63d Leg. (Nev., March 6, 1985) (statement of Principal Deputy, Legislative Counsel, Kim Morgan and Senator Sue Wagner) (''[I]t was the intent of the subcommittee to clarify the elements of a crime to the grand jurors . . . a layman reading a statute probably cannot pick out each specific element . . . if you were not familiar with the law, the elements would be hard to understand.''). Consistent with those legislative concerns underlying the statute, we agree that the focus should be on the effect that misleading or omitted instructions on the elements of the offense had on the integrity of the grand-jury proceedings.

[Headnote 13]

Here, the grand jury was instructed that '' '[c]hild abuse' means physical injury of a non-accidental nature to a child under the age of 18 years. If a person willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain as a result of abuse, that person has committed child abuse.'' The grand jury was not informed of the statutory definition of the term ''physical injury''—permanent or temporary disfigurement or impairment of any bodily function or organ of the body. If that definition is not technical and reflects a layperson's common understanding of the term, then the State is correct that the prosecutor's failure to instruct the grand jurors on the statutory definition of this element does not warrant dismissal. *Cf. People v. Woodring*, 850 N.Y.S.2d 809, 812 (App. Div. 2008) (affirming the denial of motion to dismiss where statutory definition of the term was ''not technical and reflects a lay person's common understanding of the term''). We cannot, however, conclude that the statutory definition reflects a layperson's common understanding of the term ''physical injury.''

[Headnotes 14, 15]

The statutory definition of ''physical injury'' set forth in NRS 200.508(4)(d) is more limited than a layperson's common understanding of the term. ''[I]njury'' is commonly defined as ''[d]amage or harm done to . . . a person'' or ''a particular form of hurt, damage, or loss.'' *The American Heritage Dictionary of the English Language* 930 (3d ed. 1996); *see also Merriam-Webster's Collegiate Dictionary* 644 (11th ed. 2003) (''[a]n act that damages or hurts'' or ''hurt, damage, or loss sustained''). The statutory definition is more specific and narrow than the common definition. The definition in NRS 200.508(4)(d) also is narrower than the definition used elsewhere in Nevada statutes. *E.g.*, NRS 432B.090 (including six additional definitions for the term ''physical injury,'' including ''[a] cut, laceration, puncture or bite''). We

are convinced that the statutory definition in NRS 200.508(4)(d) is technical and does not reflect a layperson's common understanding of the term ''physical injury.''

Despite the difference between the common understanding of the term ''physical injury'' and its statutory definition under the child-abuse-and-neglect statute, the State argues that the charges should not be dismissed because the prosecutor provided instructions to the grand jury and asked the grand jurors if they had any questions about those instructions. Relying on *Gordon v. Eighth Judicial District Court*, 112 Nev. 216, 913 P.2d 240 (1996), the State argues that this was sufficient to comply with the statute. In *Gordon*, we held that the district attorney complied with NRS 172.095(2) even though he did not provide the grand jurors with an elements instruction because the district attorney read the charges to the grand jury, explained how they interrelated in layperson's terms, and asked the grand jurors if they had any questions. 112 Nev. at 225, 913 P.2d at 246. Here, neither the proposed indictment nor the instructions provided the statutory definition of ''physical injury,'' and there was no discussion or explanation of this definition or any of the other elements of the child-abuse-and-neglect statute in layperson's terms. Accordingly, *Gordon* does not control our decision in this case.

Given the difference between the statutory and common definition of ''physical injury,'' it was incumbent upon the prosecutor to provide the statutory definition of this element consistent with NRS 172.095(2). Because the prosecutor failed to provide the grand jurors with that definition, we must determine whether this error is likely to have caused the jury to return an indictment on less than probable cause. We turn then to the evidence presented in support of the indictment.

[Headnotes 16, 17]

Although there was strong evidence to support a charge of domestic battery for the second altercation, *see* NRS 200.481; NRS 33.018, there was little evidence presented to the grand jury about the type of injury suffered by Clay's girlfriend. A grand jury, however, needs only slight or marginal evidence to return an indictment. *Sheriff, Washoe Cnty. v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (''The finding of probable cause may be based on slight, even marginal evidence, because it does not involve a determination of the guilt or innocence of an accused.'' (internal quotation marks and citation omitted)). Because a properly instructed grand jury could have found slight or marginal evidence of ''[i]mpairment of any bodily function or organ of the body,'' NRS 200.508(4)(d)(2), based on E.F.'s testimony that she had difficulty breathing when she was telling police officers about the second altercation, we cannot say that the State's failure to inform the

grand jurors about the definition of ''physical injury'' caused the grand jury to return an indictment on less than probable cause for this count (count three).

[Headnote 18]

The same cannot be said for the other child-abuse-and-neglect count. The only evidence supporting the first count of abuse and neglect was E.F.'s testimony that Clay slapped her across the face. E.F. did not testify to the nature or extent of any ''physical injury'' as a result of the slap. Applying a common understanding of the term ''physical injury,'' the grand jury could have concluded that there was slight or marginal evidence of damage or harm done to E.F. But given the limited testimony, we are not convinced that it likely would have concluded that there was slight or marginal evidence of ''[p]ermanent or temporary disfigurement'' or ''[i]mpairment of any bodily function or organ of the body.'' NRS 200.508(4)(d). Because the failure to instruct the grand jury on the statutory definition of ''physical injury'' likely caused the grand jury to return an indictment on count one based on less than probable cause, the violation of NRS 172.095(2) requires dismissal of that count.

The district court's failure to recognize these errors may not have amounted to a manifest abuse of discretion with respect to count three, but its failure to address the State's violation of NRS 172.095(2) and decision to accept the State's erroneous interpretation of the child-abuse-and-neglect statute with respect to count one was a manifest abuse of its discretion that adversely affected Clay's right to a grand jury determination based upon probable cause. *See State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (defining manifest abuse of discretion as clearly erroneous interpretation or application of a law or rule). We therefore grant Clay's petition for extraordinary relief, in part, and direct the clerk of this court to issue a writ of mandamus instructing the district court to dismiss count one of the indictment without prejudice.

GIBBONS and PARRAGUIRRE, JJ., concur.

PENNY BIELAR, APPELLANT, *v.* WASHOE HEALTH SYSTEMS, INC., A NEVADA CORPORATION; AND WASHOE MEDICAL CENTER, INC., A NEVADA CORPORATION, RESPONDENTS.

No. 57924

July 11, 2013 306 P.3d 360

Appeal from a district court judgment in a contract action. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Patient brought action against hospital disputing the amount of medical charges she incurred for treatment she received at hospital. The district court granted summary judgment in favor of hospital. Patient appealed. The supreme court, HARDESTY, J., held that: (1) conditions of admission and inpatient payment arrangements did not preclude recovery of damages by the patient, (2) eligibility for 30-percent statutory discount was determined at time medical services were provided, (3) settlement agreement did not disqualify the patient from eligibility for statutory discount, and (4) hospital's medical charges were not unreasonable.

Affirmed in part, reversed in part, and remanded.

Durney & Brennan, Ltd., and *Peter D. Durney*, Reno, for Appellant.

Lewis & Roca, LLP, and *David C. McElhinney, Scott S. Hoffman*, and *S. Paul Edwards*, Reno, for Respondents.

1. HEALTH.

   The conditions of admission (COA) and inpatient payment arrangement (IPA), agreed to by the patient, did not preclude the patient from recovering damages from hospital in action against hospital disputing amount of medical charges pursuant to statutory discount for uninsured patients, where, although agreements evidenced the patient's intention to pay hospital for charges incurred for treatment received at hospital from any settlement proceeds received from third-party tortfeasor that allegedly caused injuries that required the treatment, when the patient executed the COA and the IPA, the parties recognized that the patient may have been eligible for the 30-percent statutory discount, and the patient granted liens to hospital agreeing to compensate hospital for the ''reasonable value'' of hospital charges from any settlement proceeds the patient derived from her personal injury claim. NRS 108.590.

2. APPEAL AND ERROR.

   Contract interpretation is subject to a de novo standard of review.

3. CONTRACTS.

   A basic rule of contract interpretation is that every word must be given effect if at all possible.

4. CONTRACTS.
   A court should not interpret a contract so as to make meaningless its provisions.
5. HEALTH.
   The patient's eligibility for statutory program, which required hospitals to reduce charges by 30 percent for inpatients who (a) lacked insurance or other contractual provision for the payment of the charge by a third party, (b) were not eligible for public medical payment assistance, and (c) arranged within 30 days of discharge to pay the hospital bill, was determined at commencement of hospital services, and therefore a later settlement agreement for payment of such services with third-party tortfeasor who allegedly caused injuries to the patient did not disqualify the patient from eligibility for statutory discount; plain language of the statute stated in present-tense language the eligibility requirements. NRS 439B.260(1) (2010).
6. HEALTH.
   Settlement agreement with third-party tortfeasor who allegedly caused the injuries that required the patient to obtain medical treatment from hospital did not constitute ''other contractual provision for the payment of the charge by a third-party'' so as to disqualify patient from eligibility for statutory 30-percent discount on medical charges from hospital for uninsured patients; settlement agreement's provision for medical expenses was broader than, and different from, a contractual provision directly for the payment of hospital charges, and statute was subsequently amended to clarify that disqualification only applied if the patient had a health insurance policy or an agreement with an insurer, a health benefit plan, or a public agency that provided the patient with health coverage. NRS 439B.260(1)(a) (2010).
7. HEALTH.
   Hospital's charges for medical services and goods rendered were not unreasonable so as to entitle the patient to award of damages in action disputing amount of charges, where, although charges had been deemed excessive, there was no evidence to demonstrate that the charges were significantly higher than what the patient would have been charged at another hospital in the region, or that the patient would have been charged a significantly reduced rate at another hospital.
8. APPEAL AND ERROR.
   The supreme court reviews the district court's order granting a motion for judgment as a matter of law de novo. NRCP 50(a)(1).
9. TRIAL.
   The district court may grant a motion for judgment as a matter of law if the opposing party has failed to prove a sufficient issue for the jury, so that his or her claim cannot be maintained under the controlling law. NRCP 50(a)(1).
10. TRIAL.
    In deciding whether to grant a motion for judgment as a matter of law, the district court must view the evidence and all inferences in favor of the nonmoving party. NRCP 50(a)(1).
11. TRIAL.
    To overcome a motion for judgment as a matter of law, the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party. NRCP 50(a)(1).

Before PICKERING, C.J., HARDESTY and SAITTA, JJ.

OPINION

By the Court, HARDESTY, J.:

Under NRS 439B.260(1), hospitals generally must reduce charges by 30 percent to inpatients who lack insurance ''or other contractual provision for the payment of the charge by a third party,'' are not eligible for public medical payment assistance, and arrange within 30 days of discharge to pay the hospital bill.[1] The predominant issue for determination in this appeal is whether a settlement agreement with a third-party tortfeasor who allegedly caused the injuries necessitating the medical services is another ''contractual provision for the payment of the charge by a third party'' rendering the inpatient ineligible for the 30-percent statutory discount. Because we conclude that a patient's eligibility is determined at the commencement of hospital services, a later settlement agreement with a third party for the payment of such services does not disqualify the patient for the statutory discount.

FACTS AND PROCEDURAL HISTORY

Appellant Penny Bielar was involved in an automobile accident in 2002, and she received treatment for her injuries at respondent Washoe Medical Center, Inc., in April 2003, May 2003, and February 2005. For her treatment in April and May 2003, Bielar signed the hospital's Conditions of Admission and/or Treatment at Washoe Medical Center (COA) form. By the terms of the COA, Bielar granted a statutory lien to Washoe Medical on any settlement proceeds she obtained from the tortfeasor under NRS 108.590 ''to the extent of the value of medical/[h]ospital *services* rendered.'' (Emphasis added.) She also signed an Inpatient Payment Arrangements (IPA) form, agreeing to ''pay the balance in full as result of lien (in the settlement).'' The IPA also stated that Bielar may ''qualify for the 30% discount under NRS 439B.260,'' if she made payment arrangements within 30 days of discharge and held no insurance benefits.

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[1]The pre-2011 version of NRS 439B.260(1) provided:

> A major hospital shall reduce or discount the total billed charge by at least 30 percent for hospital services provided to an inpatient who:
>
> (a) Has no insurance or other contractual provision for the payment of the charge by a third party;
>
> (b) Is not eligible for coverage by a state or federal program of public assistance that would provide for the payment of the charge; and
>
> (c) Makes reasonable arrangements within 30 days after discharge to pay his hospital bill.

In 2011, the Nevada Legislature amended subsection (a) to read: ''Has no policy of health insurance or other contractual agreement with a third party that provides health coverage for the charge.'' 2011 Nev. Stat., ch. 274, § 2, at 1523.

In January 2005, Bielar signed a second COA form for additional inpatient treatment she was to receive in February 2005, granting Washoe Medical a second statutory lien. It is undisputed that Bielar had no health insurance at the time of her treatments and was ineligible for coverage under any state or federal programs. At trial, Bielar testified that it was her intent to pay the hospital bills with the money she received from the settlement proceeds recovered from her personal injury claim.

Bielar sued the trucking company that allegedly caused her accident; the company's insurer was Great West Casualty Company. In May 2003 and March 2005, respondents Washoe Health Systems, Inc., and Washoe Medical[2] filed in the action two separate notices of NRS 108.590 liens[3] against Bielar and Great West for Bielar's medical expenses incurred at Washoe Medical. The 2003 lien amounted to approximately $32,000, and the 2005 lien amounted to approximately $94,000.

In May 2005, Bielar settled her case against the trucking company. Great West agreed to pay Bielar $1.3 million, and in exchange, Bielar ''agree[d] to indemnify and hold harmless [Great West] from any and all liens by healthcare providers, . . . known or unknown due to the [accident].'' According to Great West, the settlement payment ''was to include all elements of damages'' and Bielar's counsel ''was going to resolve the liens.'' Great West also understood that ''$500,000 of that sum was for past, present, and future medicals.'' Great West sent Bielar's counsel a lump-sum check for $1.3 million.

Subsequently, Washoe Medical sued Great West for satisfaction of the 2003 and 2005 liens. And, because Bielar had a contractual obligation to indemnify Great West, she tendered to Washoe Medical all money that it asserted was due on the liens.

Bielar then filed a complaint against Washoe Medical, disputing the amount of medical charges she incurred for treatment she received at the hospital. She asserted eight claims sounding in contract and tort. Her underlying arguments were twofold: first, she claimed that Washoe Medical failed to reduce their charges by 30 percent as required by NRS 439B.260(1); and second, she claimed that Washoe Medical charged her an unreasonable amount for the

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[2]We will refer to Washoe Health Systems, Inc., and Washoe Medical Center, Inc., collectively as Washoe Medical unless otherwise necessary.

[3]NRS 108.590(1) states, in pertinent part, that if a

> person receives hospitalization on account of any injury, and . . . claims damages from the person responsible for causing the injury, the hospital has a lien upon any sum awarded the injured person . . . by a settlement . . . *to the extent of the amount due the hospital for the reasonable value of the hospitalization rendered before the date of . . . settlement*.

(Emphasis added.)

goods and services she received and/or improperly charged her for goods and services she did not receive.

Both parties eventually filed motions for summary judgment. Bielar sought a ruling from the district court that she qualified for a discount of the charges under NRS 439B.260. Washoe Medical contended that Bielar lacked standing to bring her lawsuit because the settlement agreement qualified as a ''contractual provision for the payment of the charge by a third party'' under NRS 439B.260(1)(a). Washoe Medical further argued that Bielar was ineligible for the discount under NRS 439B.260(1) because the two liens attached only to the settlement proceeds paid by Great West and Bielar failed to satisfy NRS 439B.260(1)(c) by making reasonable arrangements within 30 days after discharge to satisfy her hospital bill.

The district court denied Bielar's motion and granted Washoe Medical's motion, holding that the settlement agreement was a ''contractual provision for the payment of the charge by a third party'' within the meaning of NRS 439B.260(1)(a). It further held that Bielar lacked standing to bring her lawsuit, reasoning that she was not damaged by Washoe Medical's refusal to discount the liens because the debt attached to the settlement proceeds paid by Great West and, thus, the settlement proceeds used to satisfy that debt belonged to Great West. Bielar appealed this order.

This court entered an order reversing the district court's order. *See Bielar v. Washoe Health Sys., Inc.*, Docket No. 50859 (Order of Reversal and Remand, June 23, 2009). This court held that Bielar had standing to assert her NRS 439B.260(1) discount claim as she presented sufficient facts to establish a logical nexus between her and her claim and an interest in its adjudication. Additionally, this court remanded the matter for further proceedings after determining that undeveloped issues remained concerning ''the reasonableness of the hospital lien amount''; ''whether [Great West] and Bielar intended the gross settlement amount to pay the entire non-discounted hospital lien''; and ''whether Bielar's assignment of any potential tort recovery affects the statutory discount.'' In a subsequent order, this court clarified that the undeveloped issues ''address the statutory interpretation issue on appeal'' and stated that on remand ''the district court should determine how these issues affect Bielar's claim to the NRS 439B.260 discount.'' *Id.* (Order Denying Rehearing and Clarifying Order, September 2, 2009).

On remand, Bielar argued that the COA's assignment clause was unconscionable as a matter of law and did not affect the statutory discount. She also argued that her eligibility for the statutory discount was unaffected by the settlement agreement because she was uninsured at the time of the rendition of her treatments. Washoe Medical maintained that the COA affected Bielar's ability

to request the statutory discount and that she was not entitled to the statutory discount based on the settlement agreement.

In July 2010, the district court entered an order on remand. Although it declined to address Bielar's contention that the COA's assignment clause was unconscionable, the district court did conclude that the execution of the assignment clause did not deprive Bielar of eligibility for the statutory discount. Moreover, it held that whether the parties intended for the settlement proceeds to pay the full lien amount had no material effect regarding the application of NRS 439B.260. Finally, it held that the reasonableness of the lien amount was irrelevant to its determination of Bielar's eligibility for the statutory discount. However, the district court once again reasoned that Bielar was ineligible for the statutory 30-percent discount because her settlement agreement constituted an ''other contractual provision for the payment of the charge by a third party'' under NRS 439B.260(1)(a). It also found that Bielar was ''clearly entitled to challenge the reasonableness of the lien amount under NRS 108.590.'' Accordingly, the district court dismissed Bielar's claims for the statutory discount and proceeded to trial on the remaining accounting claim challenging the general reasonableness of the lien amount.

A jury trial was held on Bielar's accounting claim, during which she presented two witnesses. Dr. Gerard Anderson, a healthcare finance expert, testified that Medicare payments plus 25 percent represents the ceiling of hospital billing reasonableness. He also testified that Washoe Medical realized a 185-percent profit margin on Bielar's total bill, whereas the overall profit margin for the hospital industry is about 5 percent. Finally, he testified that hospitals do not disclose their master billing files to the public, so a person cannot determine the reasonableness of a medical charge by comparing the price for goods and services offered at different hospitals. Additionally, Paula Polek, a billing auditor, testified that Bielar was overcharged approximately $3,800.[4]

At the conclusion of Bielar's case-in-chief, Washoe Medical moved for judgment as a matter of law pursuant to NRCP 50(a)(1). The district court granted the motion and subsequently entered an order in February 2011. It found that the evidence presented at trial demonstrated that Bielar intended for the settlement proceeds to pay the full amount of the medical liens and that the COA ''was valid and binding.'' Further, the court found that since Great West earmarked $500,000 in special damages for Bielar's past and future medical expenses, Great West paid Washoe Medical's liens directly. Based on its findings, the district court reasoned that ''decreasing [Bielar's] medical special damages would not serve to

[4]It appears that Washoe Medical conceded the error during trial and later adjusted its billing statements accordingly.

increase her general damages. Thus, as a matter of law [Bielar could not] show that she [was] entitled to the damages she s[ought] and no recovery may be awarded to her.'' The court also found that Bielar did not present sufficient evidence to show that the amounts billed by the hospital were unreasonable. Bielar appeals, challenging both the July 2010 and the February 2011 district court orders.

DISCUSSION

Because we conclude that Bielar had a right to recover from Washoe Medical under the COA, the IPA, and the lien statute, we must determine whether Bielar was eligible for the billing discount under NRS 439B.260(1). We conclude that the phrase ''other contractual provision for the payment of the charge by a third party'' does not include a later settlement agreement with a third-party tortfeasor, and we thus reverse the district court's finding that Bielar was ineligible for the statutory discount. However, we reject Bielar's contention that the district court erred by granting Washoe Medical's NRCP 50(a)(1) motion. Bielar failed, with one exception, to proffer sufficient evidence at trial to prove that the specific amounts Washoe Medical charged for medical services and goods were unreasonable.

The district court erred by ruling that Bielar could not recover damages from Washoe Medical

[Headnote 1]

The district court concluded that Bielar was not entitled to recover damages because she intended to pay the full amount of Washoe Medical's claim from the settlement proceeds received from Great West, and decreasing Bielar's medical damages would not increase her general damages under the settlement agreement. We disagree.

[Headnotes 2-4]

''Contract interpretation is subject to a de novo standard of review.'' *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). ''A basic rule of contract interpretation is that '[e]very word must be given effect if at all possible.' '' *Musser v. Bank of Am.*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998) (alteration in original) (quoting *Royal Indem. Co. v. Special Serv. Supply Co.*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966)). '' 'A court should not interpret a contract so as to make meaningless its provisions.' '' *Id.* (quoting *Phillips v. Mercer*, 94 Nev. 279, 282, 579 P.2d 174, 176 (1978)).

Our examination of the language of the contracts at issue here shows that under the IPA, Bielar agreed to pay Washoe Medical's liens from any settlement proceeds she recovered from her personal injury claim against the trucking company and Great West.

By executing the COA, Bielar granted statutory liens to Washoe Medical for the ''reasonable value'' of the medical services rendered by Washoe Medical pursuant to NRS 108.590.

Thus, when Bielar executed the COAs and the IPAs, the parties recognized she may be eligible for the 30-percent statutory discount, and Bielar granted liens to Washoe Medical agreeing to compensate the hospital for the ''reasonable value'' of the hospital charges from any settlement proceeds she derived from her personal injury claim. In fact, Bielar confirmed her intention at trial.

We conclude that the district court failed to consider the express provisions of those agreements and NRS 108.590 when it concluded that Bielar intended to pay the full amount of Washoe Medical's claim from the proceeds obtained under the settlement agreement with Great West. Although Bielar did enter into a settlement agreement with Great West in which she agreed to indemnify Great West ''from any and all liens by healthcare providers,'' the agreements she reached with Washoe Medical governed her obligation to pay Washoe Medical's claim and any reduction in medical expenses was irrelevant to the settlement agreement with Great West. Thus, we conclude that by the express terms of the COA and the IPA, Bielar was entitled to seek the 30-percent statutory discount allowed under NRS 439B.260(1) and to exercise her right to challenge the reasonable value of the hospital charges pursuant to NRS 108.590.

The district court erred by ruling that Bielar was ineligible for the billing discount under NRS 439B.260(1)

[Headnote 5]

We next consider whether Bielar qualified for the statutory discount under NRS 439B.260(1). Bielar argues that the district court erred by ruling in its July 2010 order that she was ineligible for NRS 439B.260(1)'s discount based upon the settlement agreement she entered into with the trucking company and Great West.[5] Specifically, Bielar asserts that she satisfied subsection (a) of NRS 439B.260(1) because the settlement agreement does not qualify as an ''other contractual provision for the payment of the charge by a third party,'' the lack of which is required to obtain the statutory

[5]Bielar also argues that the district court violated the law-of-the-case doctrine in its July 2010 order. *See Hsu v. Cnty. of Clark*, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007) (stating that the law-of-the-case doctrine requires that ''the law or ruling of a first appeal must be followed in all subsequent proceedings, both in the lower court and on any later appeal''); *Gonski v. Second Judicial Dist. Court*, 126 Nev. 551, 557, 245 P.3d 1164, 1168 (2010) (''[Q]uestions purely of law are reviewed de novo.''). We conclude that the district court's rulings on remand were not inconsistent with our order reversing and remanding Bielar's earlier appeal; thus, the district court did not violate the law-of-the-case doctrine in its July 2010 order.

discount. Washoe Medical, however, insists that Bielar's settlement agreement with Great West renders Bielar ineligible to receive the discount.

The IPA agreement Bielar executed with Washoe Medical specifically provided Bielar a right to the 30-percent discount as long as the statutory requirements of NRS 439B.260 were met. Determining whether a patient is eligible for NRS 439B.260(1)'s billing discount when he or she receives hospital services and later enters into a settlement agreement with a third party that includes an amount for such services requires this court to interpret the statute. ''Statutory construction is a question of law, which this court reviews de novo.'' *Kay v. Nunez*, 122 Nev. 1100, 1104, 146 P.3d 801, 804 (2006). In interpreting statutes, we examine the statute's language and context to determine whether it has a plain and unambiguous meaning. *Gold Ridge Partners v. Sierra Pac. Power Co.*, 128 Nev. 495, 500, 285 P.3d 1059, 1062-63 (2012). If the text of a statute is unambiguous, we need not look beyond it. *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004).

Before 2011, NRS 439B.260(1) provided that major hospitals must provide a 30-percent discount for inpatient services when the patient (a) ''[h]as no insurance or other contractual provision for the payment of the charge by a third party,'' (b) is not eligible for a government public assistance program that would cover such charge, and (c) reasonably arranges to pay the bill within 30 days after discharge. Thus, as a noninsured patient who received hospital services when this version of the statute was in effect, Bielar was disqualified under subsection (a) only if her settlement agreement constituted a ''contractual provision for the payment of the charge by a third-party.''

We conclude that Bielar qualifies for the statutory discount for two reasons. First, the plain language of the statute states in present-tense language that major hospitals must provide the 30-percent discount for charges to ''an inpatient who . . . [*h*]*as* no insurance or other contractual provision for the payment of the charge by a third party.'' NRS 439B.260(1) (emphasis added). *See United States v. Wilson*, 503 U.S. 329, 333 (1992) (indicating that verb tense is significant in construing statutes). Thus, a patient's eligibility for the 30-percent discount is determined at the time of the rendition of the hospital services and a later agreement with a third-party tortfeasor for claims arising out of such services cannot be included in the phrase ''[h]as . . . other contractual provision for the payment of the charge by a third party.''

[Headnote 6]

Second, because a settlement agreement is a contract, *see May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005), the

question that follows is whether a term in a settlement agreement requiring a defendant's insurer to pay the injured party's medical expenses in settlement of an ongoing action constitutes a provision ''for the payment of the charge.'' The purpose of a settlement agreement is typically to exchange money for a release of claims. *See* 53 Am. Jur. *Trials* 1 §§ 28, 262 (1995). By filing a claim, one seeks damages ''as compensation for loss or injury.'' *Black's Law Dictionary* 281-82, 445 (9th ed. 2009) (defining, respectively, ''claim'' as a ''demand for money'' and ''damages'' as ''[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury''). Thus, while a settlement agreement may be a contract, and the money exchanged under a term of the settlement agreement might include amounts for medical expenses as part of the requested or agreed-upon damages, the purpose of such a term is not to pay hospital bill charges, but rather to compensate a plaintiff or potential plaintiff for loss or injury in order to obtain a release of claims. In that regard, a settlement agreement is more akin to a judgment than a contract to pay hospital bills. *See* 53 Am. Jur. *Trials* 1 § 41 (1995) (''A valid compromise agreement has many of the attributes of a judgment.''). Indeed, neither a settlement agreement nor a judgment is necessarily dependent upon the hospital charges, but rather, both are more generally set in an amount to compensate the plaintiff or potential plaintiff for alleged injuries and will typically encompass amounts for several types of damages, including reimbursement for past and future medical expenses. Thus, a settlement agreement's provision for medical expenses is broader than, and different from, a contractual provision directly for the payment of hospital charges.

The legislative history of NRS 439B.260(1)(a) confirms that that provision was intended to apply to anybody receiving inpatient services who is not insured under a health insurance policy or similar device. *See, e.g.*, Senate Journal, 66th Leg., at 1356 (Nev., June 17, 1991) (''[T]here's a rollback of 30 percent for all of those people who have no insurance coverage or no state coverage.'' (Senator Rawson)); *id.* at 1361 (''In order to get this [30-percent] reduction, you must (a) have no insurance.'' (Senator Cook)). Insurance is generally a contract by which an insurer indemnifies the insured against risk of loss, and the insured is the specific person covered by the insurance policy. *Black's Law Dictionary* 870, 879 (9th ed. 2009) (defining, respectively, ''insurance'' and ''insured''); 43 Am. Jur. 2d. *Insurance* § 1 (2003). Receiving insurance proceeds from a third-party liability policy under a settlement agreement does not render the recipient insured.

Further, the 2011 amendments to NRS 439B.260 and the commentary surrounding them support the conclusion that the discount is owed to any patient not covered under a health insurance or similar policy. NRS 439B.260 now provides, in relevant part, that

> 1. A major hospital shall reduce or discount the total billed charge by at least 30 percent for hospital services provided to an inpatient who:
>
> (a) Has no policy of health insurance or other contractual agreement with a third party that provides health coverage for the charge;
>
> . . . .
>
> 5. As used in this section, ''third party'' means:
>
> (a) An insurer, as that term is defined in NRS 679B.540;
>
> (b) A health benefit plan, as that term is defined in NRS 689A.540, for employees which provides coverage for services and care at a hospital;
>
> (c) A participating public agency, as that term is defined in NRS 287.04052, and any other local governmental agency of the State of Nevada which provides a system of health insurance for the benefit of its officers and employees, and the dependents of officers and employees, pursuant to chapter 287 of NRS; or
>
> (d) Any other insurer or organization providing health coverage or benefits in accordance with state or federal law.
>
> The term does not include an insurer that provides coverage under a policy of casualty or property insurance.

Thus, under the revised version of the statute, a person is only disqualified under subsection (a) if she has a health insurance policy or an agreement with an insurer, a health benefit plan, or a public agency that provides her with health coverage. A settlement agreement with a third party's casualty insurance company to pay damages in order to obtain a release of a claim plainly would not constitute a health insurance policy or an agreement to provide health coverage. Moreover, these amendments were enacted to specifically negate any argument that receiving proceeds from a third-party tortfeasor's insurance policy could disqualify a patient from receiving the discount.[6]

''Where a legislature amends a former statute, or clarifies a doubtful meaning by subsequent legislation, such amendment or subsequent legislation is strong evidence of the legislative intent behind the first statute.'' 2B Norman J. Singer & J.D. Shambie

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[6]In the legislative history of the amendments, the commentary emphasizes that the statutory discount is intended to apply to all uninsured persons and that any right to payment resulting from an accident does not disqualify the patient from the statutory discount. *See* Hearing on S.B. 300 Before the Assembly Health and Human Services Comm., 76th Leg. (Nev., May 16, 2011) (explaining that the bill was intended to clarify the existing statute to prevent hospitals from refusing to discount the bills of a patient based on an expectation that the patient might someday obtain payment from the automobile insurance of a third-party tortfeasor).

Singer, *Sutherland Statutory Construction* § 49:10, at 129 (7th ed. 2012); *see also Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 157, 179 P.3d 542, 554-55 (2008) (stating that when the Legislature clarifies a statute ''through subsequent legislation, we may consider the subsequent legislation persuasive evidence of what the Legislature originally intended''). We conclude that the amendments to NRS 439B.260 were intended to clarify that the statute does not apply in instances such as this, where a hospital claims that a settlement agreement entitling the plaintiff to insurance proceeds as compensation for her injuries disqualifies her from receiving the 30-percent statutory discount.

Bielar sued the trucking company for damages arising from her personal injury claims. Bielar's settlement agreement was entered into ''to provide for certain payments in full settlement and discharge of all claims,'' and it recited that the amounts paid ''constitute damages on account of personal physical injuries.'' Conversely, the settlement agreement did not provide for Great West to pay specific hospital charges or to generally provide Bielar with health coverage. Accordingly, we conclude that this was not a contract for the payment of Bielar's hospital charges within the meaning of NRS 439B.260(1), and Bielar was eligible for the statute's discount. Because we conclude that Bielar was eligible for the statutory discount, we now turn to whether the district court erred by granting Washoe Medical's NRCP 50(a)(1) motion at the conclusion of Bielar's presentation of evidence at trial.

The district court did not err by granting Washoe Medical's NRCP 50(a)(1) motion

[Headnote 7]

At the conclusion of Bielar's case-in-chief, Washoe Medical moved for judgment as a matter of law pursuant to NRCP 50(a)(1), which the district court granted. Bielar argues that the district court erroneously relied upon improper findings to conclude that her accounting claim was meritless.

[Headnotes 8-11]

This court reviews the district court's order granting an NRCP 50(a) motion de novo. *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 425 (2007). ''Under NRCP 50(a)(1), the district court may grant a motion for judgment as a matter of law if the opposing party has failed to prove a sufficient issue for the jury, so that his claim cannot be maintained under the controlling law.'' *Id.* at 222, 163 P.3d at 424 (internal quotations omitted). ''In . . . deciding whether to grant a motion for judgment as a matter of law,

the district court must view the evidence and all inferences in favor of the nonmoving party.'' *Id*. To overcome a motion brought pursuant to NRCP 50(a), ''the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party.'' *Id*. at 222-23, 163 P.3d at 424.

The district court found that even if the hospital's charges were excessive, Bielar failed to demonstrate that the charges were unreasonable. We agree. Bielar's medical expert, Dr. George Anderson, testified as to what the hospital's profit margin should be and the reasonableness of hospital charges in general. But, Dr. Anderson did not offer any testimony as to whether the specific amounts Washoe Medical charged for medical services and goods rendered to Bielar were reasonable. There is no other evidence in the record—from Dr. Anderson or another source—to demonstrate that those charges were significantly higher than, or that Bielar would have been charged a significantly reduced rate from, another hospital situated within the region or in Nevada.

Viewing the evidence presented at trial and all inferences in the light most favorable to Bielar, we conclude that she failed to sufficiently prove the unreasonableness of Washoe Medical's charges for medical services and goods rendered such that the jury could have found in her favor. *See Foster v. Dingwall*, 126 Nev. 56, 59, 227 P.3d 1042, 1050-51 (2010) (indicating that a plaintiff must demonstrate damages to prevail on an accounting claim). Accordingly, we conclude that the district court properly granted Washoe Medical's NRCP 50(a)(1) motion.[7] However, because Washoe Medical conceded at trial that it overbilled Bielar $3,801.23, we conclude that Bielar is entitled to recover that amount.

CONCLUSION

For the foregoing reasons, we reverse that portion of the district court's July 2010 order holding that Bielar assigned her rights to Great West and that she was ineligible for the billing discount under NRS 439B.260(1)(a), and we remand this matter for further proceedings consistent with this opinion. However, because we

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[7]The district court also found that Bielar presented insufficient evidence showing that the amounts Washoe Medical actually billed Bielar were unreasonable. Bielar argues, for the first time in her reply brief, that this finding was also in error. We decline to consider this argument. *See Francis v. Wynn Las Vegas, L.L.C.*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011) (citing *Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198-99 (2005)) (''[A]rguments raised for the first time in an appellant's reply brief need not be considered.''). Bielar also argues that the district court misapplied NRS Chapter 108 in deciding to grant Washoe Medical's NRCP 50(a)(1) motion; however, we conclude that this argument is meritless because the district court did not grant the motion based upon those grounds.

conclude that Bielar failed to sufficiently prove the unreasonableness of Washoe Medical's charges for medical services and goods rendered, we affirm the district court's February 2011 order granting Washoe Medical's NRCP 50(a)(1) motion, with the exception that Bielar is entitled to recover the $3,801.23 Washoe Medical conceded at trial that it overbilled Bielar.[8]

PICKERING, C.J., and SAITTA, J., concur.

AUDIE G. LEVENTHAL, APPELLANT, *v.*
BLACK & LOBELLO, RESPONDENT.

No. 58055

AUDIE G. LEVENTHAL, APPELLANT, *v.*
BLACK & LOBELLO, RESPONDENT.

No. 59671

July 11, 2013 305 P.3d 907

Consolidated appeals from an award of attorney fees on a charging lien and from a post-judgment order denying NRCP 60(b) relief. Eighth Judicial District Court, Family Court Division, Clark County; Robert Teuton, Judge.

After law firm represented client in divorce proceeding, firm filed motion to adjudicate and enforce a charging lien. The district court granted motion and entered a personal judgment against client. Client appealed. The supreme court, PICKERING, C.J., held

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[8]In the concluding paragraph of her opening brief, Bielar requests that if this matter is remanded, that it be reassigned to another district court judge because Judge Flanagan's refusal to follow this court's directives and his improper granting of Washoe Medical's NRCP 50(a)(1) motion ''exhibit[ed] a 'probability of bias,' which . . . implicates due process considerations.'' We reject this request. Although we have concluded that the district court improperly granted Washoe Medical's motion, the record reflects that Judge Flanagan's decisions were unbiased, well-reasoned, and thorough. Thus, Bielar has failed to demonstrate any partiality or impropriety on the part of Judge Flanagan, or show that her due process rights were violated. *See* NCJC Canon 1, Rule 1.2 (''A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.''); *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (''It is axiomatic that [a] fair trial in a fair tribunal is a basic requirement of due process. As the Court has recognized, however, most matters relating to judicial disqualification [do] not rise to a constitutional level.'' (alterations in original) (citation and internal quotations omitted)).

that law firm could not enforce charging lien perfected eight months after entry of final judgment in divorce proceeding.

Reversed.

Robinson & Wood and *Keith D. Kaufman*, Las Vegas, for Appellant.

Black & LoBello and *Michele Touby LoBello*, Las Vegas, for Respondent.

1. Attorney and Client.
   An attorney has a passive or retaining lien against files or property held by the attorney for the client.
2. Attorney and Client.
   A ''charging lien'' is a unique method of protecting attorneys and allows an attorney, on motion in the case in which the attorney rendered the services, to obtain and enforce a lien for fees due for services rendered in the case. NRS 18.015.
3. Attorney and Client.
   The statutory requirements for perfecting a charging lien must be met for a court to adjudicate and enforce a charging lien. NRS 18.015.
4. Appeal and Error.
   The proper construction of a statute is a question of law reviewed de novo.
5. Attorney and Client.
   There was no prospect of post-perfection recovery from post-judgment custody dispute, and therefore law firm's failure to perfect charging lien until eight months after entry of final judgment in divorce proceeding precluded enforcement of lien, where, although firm represented client in post-judgment dispute over child support, a child-custody agreement wherein client retained his share of custody and the associated benefits did not demonstrate any affirmative claim to, or recovery of, money or property; rather, firm preserved client's previously established joint custody rights against his ex-wife's attempt to revise them, and custody settlement did not modify the property distribution in the divorce decree or otherwise bring that property back into dispute. NRS 18.015.
6. Attorney and Client.
   A charging lien cannot attach to the benefit gained for the client by securing a dismissal; it attaches to the tangible fruits of the attorney's services. NRS 18.015.
7. Attorney and Client.
   The tangible ''fruit'' of an attorney's services to which a charging lien can attach is generally money, property, or other actual proceeds gained by means of the claims asserted for the client in the litigation. NRS 18.015.
8. Attorney and Client.
   A charging lien attaches to a judgment, verdict, or decree entered, or to money or property recovered, after the statutory notice of the lien is served. NRS 18.015(3).

Before Pickering, C.J., Hardesty and Saitta, JJ.

OPINION

By the Court, PICKERING, C.J.:

This is an appeal from an order adjudicating a law firm's charging lien for fees against its former client under NRS 18.015. The firm did not serve the statutory notices required to perfect its lien until the case was over. Under NRS 18.015(3), a charging lien only attaches to a ''verdict, judgment or decree entered and to . . . money or property which is recovered on account of the suit or other action, *from the time of service of the notices required by this section*.'' (Emphasis added.) Since the decree became final months before the lien was perfected—and no prospect of post-perfection recovery appeared—the lien should not have been adjudicated under NRS 18.015(4).

I.

After his wife, Jacqueline, sued appellant Audie Leventhal for divorce, he hired respondent Black & LoBello (LoBello) to represent him. Leventhal's answer to Jacqueline's complaint included a counterclaim seeking to enforce a prenuptial agreement that protected his separate property. In May 2010, a final decree of divorce was entered based on a stipulated marital settlement agreement. Under the stipulated decree, Leventhal retained most of his separate property and was awarded joint custody of his son.

Some months later, Jacqueline and Leventhal returned to court with a post-decree dispute over child custody. Still representing Leventhal, LoBello argued that the post-decree proceeding was so far removed from the original divorce proceeding that it was ''really a new action initiated by Jacqueline's most recent Motion.'' In January 2011, Leventhal and Jacqueline managed to resolve their custodial differences by stipulation. From what appears in the record, the post-decree dispute centered on child custody; its stipulated resolution left Leventhal with joint custody and did not produce any new recovery of money or property.

Leventhal paid LoBello for the firm's work through entry of the final decree. He did not pay LoBello, though, for the fees charged to litigate the post-decree dispute. Eventually, LoBello filed a motion to withdraw as counsel, along with a notice of, and a motion to adjudicate and enforce, a charging lien for unpaid attorney fees. By then, the divorce decree had been final for months, the decree's property-distribution terms had been implemented, and even the post-decree child-custody dispute had been resolved by filed stipulation. As LoBello later acknowledged, with the case effectively over, ''[o]bviously, [Leventhal] could not recover anything further.''

Even so, the district court granted LoBello's post-decree motion to adjudicate and enforce a charging lien. It entered personal judgment for LoBello and against Leventhal for $89,852.69. Leventhal appeals, and we reverse.[1]

II.

A.

[Headnote 1]

Nevada attorneys have all the usual tools available to creditors to recover payment of their fees. For example, a law firm can sue its client and obtain a money judgment for fees due, thereby acquiring, if recorded, a judgment lien against the client's property. NRS 17.150(2). An attorney also has a passive or retaining lien against files or property held by the attorney for the client. *See Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 532, 216 P.3d 779, 782 (2009). Finally, in an appropriate case, an attorney may assert a charging lien against the client's claim or recovery under NRS 18.015. *Id.*; *see* NRS 18.015(5) (''Collection of attorney's fees by a [charging] lien under this section may be utilized with, after or independently of any other method of collection.'').[2]

[Headnote 2]

A charging lien is ''a unique method of protecting attorneys.'' *Sowder v. Sowder*, 977 P.2d 1034, 1037 (N.M. Ct. App. 1999). Such a lien allows an attorney, on motion in the case in which the attorney rendered the services, to obtain and enforce a lien for fees due for services rendered in the case. *See Argentena*, 125 Nev. at 532, 216 P.3d at 782. A charging lien ''is not dependent on possession, as in the case of the general or retaining lien. It is based on natural equity—the client should not be allowed to appropriate the whole of the judgment without paying for the services of the attorney who obtained it.'' 23 *Williston on Contracts* § 62:11 (4th ed. 2002).

[Headnotes 3, 4]

The four requirements of NRS 18.015 must be met for a court to adjudicate and enforce a charging lien. *See Schlang v. Key Airlines, Inc.*, 158 F.R.D. 666, 669 (D. Nev. 1994) (indicating that,

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[1]Leventhal also appeals the district court's denial of his later NRCP 60(b) motion to set aside the judgment. Since we conclude that the district court erred in adjudicating the lien, we do not reach the NRCP 60(b) issue.

[2]The 2013 Legislature amended NRS 18.015. 2013 Nev. Stat., ch. 79, § 1, at 271; S.B. 140, 77th Leg. (Nev. 2013). This appeal is governed by the pre-amendment version of NRS 18.015. *See* NRS 18.015 (2012).

in Nevada, a charging lien is a creature of statute). First, there must be a ''claim, demand or cause of action, . . . which has been placed in the attorney's hands by a client for suit or collection, or upon which a suit or other action has been instituted.'' NRS 18.015(1); *see Argentena*, 125 Nev. at 534, 216 P.3d at 783 (stating that where the client ''did not seek or obtain any affirmative recovery in the underlying action, . . . there [is] no basis for a charging lien''). The lien is in the amount of the agreed-upon fee or, if none has been agreed upon, a reasonable amount for the services rendered ''on account of the suit, claim, demand or action.'' NRS 18.015(1).[3] Second, the attorney must perfect the lien by serving ''notice in writing, in person or by certified mail, return receipt requested, upon his or her client and upon the party against whom the client has a cause of action, claiming the lien and stating the interest which the attorney has in any cause of action.'' NRS 18.015(2).[4] Third, the statute sets a timing requirement: Once perfected, the ''lien attaches to any verdict, judgment or decree entered and to any money or property which is recovered on account of the suit or other action, from the time of service of the notices required by this section.'' NRS 18.015(3). Fourth, the attorney must timely file and properly serve a motion to adjudicate the lien. NRS 18.015(4). It is the interpretation of the third requirement that is at issue here. The proper construction of NRS 18.015 is a question of law that we review de novo. *Argentena*, 125 Nev. at 531, 216 P.3d at 782.

B.

[Headnote 5]

LoBello argues that the favorable outcomes in the property and child custody settlements both present recovery to which the lien could attach and that, alternatively, a lien can attach even where no tangible value is procured. In LoBello's view, *Argentena* incorrectly precludes charging liens in cases that do not produce an affirmative recovery. LoBello further argues that *Argentena* unconstitutionally disfavors attorneys who seek to defend or retain rights rather than procure property. LoBello both misunderstands the nature of charging liens and ignores the attorney's ability to pursue client fees via other means available to creditors.

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[3]At the outset of the representation, Leventhal signed LoBello's contract stating that if Leventhal failed to pay LoBello's fees, LoBello would have a lien on all funds recovered through the case and all paperwork produced.

[4]Leventhal disputes the adequacy of LoBello's service of the notice of lien; also, it does not appear LoBello served Jacqueline, as the firm should have under NRS 18.015(2). We do not reach these issues because they are not necessary to our decision.

[Headnotes 6, 7]

Fundamentally, NRS 18.015(3) requires a client to assert an affirmative claim to relief, from which some affirmative recovery can result. A charging lien cannot attach to the benefit gained for the client by securing a dismissal; it attaches to ''the tangible fruits'' of the attorney's services. *Glickman v. Scherer*, 566 So. 2d 574, 575 (Fla. Dist. Ct. App. 1990); *see also Argentena*, 125 Nev. at 534, 216 P.3d at 783-84; *Sowder*, 977 P.2d at 1037. This ''fruit'' is generally money, property, or other actual proceeds gained by means of the claims asserted for the client in the litigation.[5] *See Glickman*, 566 So. 2d at 575; *see ABA/BNA Lawyers' Manual on Professional Conduct*, at 41:2114 (2002) (discussing the types of property needed for a charging lien to attach); *see also Mitchell v. Coleman*, 868 So. 2d 639, 642 (Fla. Dist. Ct. App. 2004).

Argentena is controlling precedent. There, the parties settled a personal injury action, and all claims against Argentena were dismissed. 125 Nev. at 530, 216 P.3d at 781. Argentena's counsel moved to adjudicate its charging lien, but the only result obtained in that case was that the claims against Argentena were dismissed; Argentena did not assert any counterclaims or obtain an affirmative recovery. *Id.* Although Argentena unquestionably benefited from the dismissal, there was no recovery to which a charging lien could attach. *Id.* at 534, 216 P.3d at 784.

Attempting to distinguish *Argentena*, LoBello argues that Leventhal did obtain an affirmative recovery in the underlying case, namely the property retained in the divorce through the property settlement and the ''financial benefits associated with . . . child custody,'' including tax benefits and value in avoiding increased child support.

As to the child-custody benefits, LoBello fails to identify any tangible recovery derived from the resolution of this issue that is appropriately subject to a charging lien. A child-custody agreement

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[5]*Argentena* acknowledged that a charging lien is historically an in rem proceeding, which requires money or property over which the court has jurisdiction in order to adjudicate a charging lien. To the extent that *Argentena* suggests that in rem jurisdiction gives rise to subject matter jurisdiction, we clarify that they are distinct and both are required in order for a district court to adjudicate a charging lien. Other courts without statutory authorization to adjudicate a charging lien in the client's litigation have nevertheless done so because the court has the inherent power to supervise and regulate attorneys appearing before it, the court is likely already familiar with the relevant facts relating to the attorney's performance and services in the case giving rise to the fee dispute, Restatement (Third) of the Law Governing Lawyers § 42 cmt. b (2000), and it would be a waste of judicial time and resources to require a separate proceeding to adjudicate the charging lien. *See Gee v. Crabtree*, 560 P.2d 835, 836 (Colo. 1977).

wherein Leventhal retained his share of custody and the associated benefits does not demonstrate any affirmative claim to, or recovery of, money or property. Rather, LoBello preserved Leventhal's previously established joint custody rights against his ex-wife's attempt to revise them. This is similar to *Argentena*, where the attorney's efforts led to the dismissal of the case but did not involve an affirmative claim or recovery.

As to the assets distributed pursuant to the property settlement and divorce decree,[6] a problem arises because the property settlement took place eight months before LoBello filed and made even a colorable attempt at perfecting its lien, *see supra* note 4. NRS 18.015(3) imposes a time requirement on attorneys seeking to perfect, adjudicate and enforce a charging lien: ''The lien attaches . . . from the time of service of the notices required by this section.'' Although we have never expressly interpreted this section, Nevada's federal district court did so in *Schlang v. Key Airlines, Inc.*, 158 F.R.D. 666 (D. Nev. 1994).

In *Schlang*, the parties settled a wrongful termination action and their appeals were dismissed. *Id.* at 667-68. Former counsel filed a charging lien but failed to serve the notice required to perfect the lien until the settlement was consummated. *Id.* at 669-70. The federal court, citing NRS 18.015(3),[7] found that because the attorney did not perfect his lien before the settlement agreement was carried out, ''there no longer existed any proceeds to which the lien could attach.''[8] *Id.* at 670. It therefore declined to adjudicate and enforce the lien.

[Headnote 8]

We agree with *Schlang*, and hold that under NRS 18.015(3), the lien attaches to a judgment, verdict, or decree entered, or to money or property recovered, *after* the notice is served. This interpretation harmonizes NRS 18.015(3)'s attachment provisions with NRS 18.015(2)'s requirement that a lien be perfected by proper notice. *See Tonopah Lumber Co. v. Nev. Amusement Co.*, 30 Nev. 445, 455, 97 P. 636, 639 (1908). (''[A] lien can only legally exist when perfected in the manner prescribed by the statute creating it . . . .'' (internal quotation omitted)). Thus, if an attor-

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[6]Although this court has held that a charging lien may not attach to assets that are exempt from creditors under NRS 21.090, *see Bero-Wachs v. Law Office of Logar & Pulver*, 123 Nev. 71, 75, 157 P.3d 704, 706 (2007), we have not addressed whether a division of property in a divorce case is an affirmative recovery to which a lien may attach. In light of our disposition of this case, this question is not fairly presented, and we decline to examine it on a hypothetical basis.

[7]The court quotes NRS 18.015(3) but incorrectly cites to NRS 18.015(2).

[8]The *Schlang* court cited *In re Nicholson*, 57 B.R. 672 (D. Nev. 1986) (discussing when an attorney lien attaches to property).

ney waits to perfect the lien until judgment has been entered and the proceeds of the judgment have been distributed, the right to the charging lien may be lost. *See Sowder*, 977 P.2d at 1038.

Basic notice and fairness requirements support this interpretation. Nevada attorneys must notify their clients in writing of any interest the attorney has that is adverse to a client. RPC 1.8(a); *In re Singer*, 109 Nev. 1117, 1118, 865 P.2d 315, 315 (1993). Other courts have found that charging liens constitute adverse interests and applied a similar written notice rule. *See Fletcher v. Davis*, 90 P.3d 1216, 1221 (Cal. 2004). NRS 18.015(3) promotes these policies by requiring an attorney to serve notice and perfect a charging lien in a timely manner.

Diligent perfection of the lien under NRS 18.015(3) ensures that the client, the client's opponent in the litigation, and others have notice of the attorney's lien and may conduct the litigation and deal with any recovery it produces accordingly. A timely motion to adjudicate and enforce the charging lien under NRS 18.015(4) also enables the court to evaluate the lien while it has jurisdiction over any affirmative recovery, while the attorney's performance is fresh in its mind, and before the judgment is satisfied and the proceeds are distributed. *See Weiland v. Weiland*, 814 So. 2d 1252, 1253 (Fla. Dist. Ct. App. 2002) (holding that notice was untimely where the attorney waited to establish the lien until approximately two months after the case concluded); *Sowder*, 977 P.2d at 1038 (holding that a law firm waived its right to assert its charging lien when it waited several months after the property was distributed to assert its charging lien). *See also Anderson v. Farmers Coop. Elevator Ass'n, Inc.*, 874 F. Supp. 989, 992 (D. Neb. 1995) (quashing the attorney charging lien because notice of the lien was untimely, made after the property had been transferred to the opposing party); *Libner v. Maine Cnty. Comm'rs Ass'n*, 845 A.2d 570, 573 (Me. 2004) (holding that no lien may be imposed without direct and specific notice to the fund of an opposing party or its carriers that a lien is asserted before the proceeds are disbursed). It would be unreasonable and unfair to clients and to third parties to allow attorneys to claim a lien on any judgment at any time, no matter how much time has passed since the case concluded.

Here, LoBello perfected its lien eight months after the stipulated divorce decree was entered and the property was distributed—well after the time a lien could have attached to any of the property governed by that settlement.[9] Moreover, the custody settlement did not

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[9]*Compare Kramer v. Kramer*, 96 Nev. 759, 762, 616 P.2d 395, 397 (1980) (the court loses jurisdiction over property divided by a divorce decree where the parties wait for longer than six months to modify the decree), *with Collins v. Murphy*, 113 Nev. 1380, 1384-85, 951 P.2d 598, 600-01 (1997) (holding

modify the property distribution in the divorce decree or otherwise bring that property back into dispute. Most importantly, LoBello admits that all outstanding issues were resolved before it filed or tried to perfect the lien, and it did not show that any recovery was still pending resolution or other legal action. *Cf. Fein v. Schwartz*, 404 S.W.2d 210, 227 (Mo. Ct. App. 1966) (holding that where property remained to be transferred after the conclusion of a case, the lien was timely perfected before the transfer of property even though notice was served after the conclusion of the case). By the time LoBello filed and tried to perfect its lien, there was nothing to which the lien could have attached.[10]

This court is not unsympathetic to LoBello's situation. But when an attorney seeks a charging lien—a unique lien enforced by unique methods—the attorney must comply with the particular requirements of the statute. *Cf. Sowder*, 977 P.2d at 1038. If LoBello wishes to pursue its claims through other means, it may do so. However, LoBello may not rely on perfecting and prosecuting a charging lien filed eight months after the final decree is entered, when the case was completely concluded.

Accordingly, we reverse.

HARDESTY and SAITTA, JJ., concur.

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that it was unfairly prejudicial and an error to adjudicate a motion for attorney fees filed after the deadline for filing a notice of appeal had passed), *superseded by rule amendment*, *In the Matter of Amendments to the Nevada Rules of Civil Procedure*, ADKT No. 426 (Order Amending Nevada Rule of Civil Procedure 54, February 6, 2009).

[10]Even though LoBello's contract stated it would have a lien on any recovery if Leventhal failed to pay fees, at best this evidenced an intent to claim a charging lien if Leventhal defaulted on payment and LoBello gained recovery on Leventhal's behalf. *See Sowder*, 977 P.2d at 1038.