deliberative process privileges in denying CRS's requests. Because CRS has never argued that these privileges do not apply, we conclude that CRS has waived any argument against the AOC's asserted privileges. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (''A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.'').

Thus, we conclude that the district court properly rejected access to the requested information based on the confidentiality provisions set forth in the rules of this court, and we therefore affirm its decision.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, A GOVERNMENT ENTITY; AND JARED WICKS, AN INDIVIDUAL, APPELLANTS, *v.* ELIZABETH YEGHIAZARIAN, AN INDIVIDUAL; ELIZABETH YEGHIAZARIAN, AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF RAYMOND YEGHIAZARIAN; CHRISTINA YEGHIAZARIAN; NATALIA YEGHIAZARIAN; AND ANDREW YEGHIAZARIAN, RESPONDENTS.

No. 59382

November 7, 2013 312 P.3d 503

Appeal from a district court judgment in a wrongful death action and from a post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Personal representative of motorist's estate brought wrongful death action against city police department arising out of fatal accident during which police cruiser collided with motorist's vehicle. Following jury trial, the district court entered judgment for $250,000 in personal representative's favor and awarded attorney fees and costs, 2011 WL 7464418. Police department appealed. The supreme court, GIBBONS, J., held that: (1) exclusion of motorist's blood alcohol content of .049 at time of fatal collision with police officer's cruiser was not abuse of discretion, (2) opinion of personal representative's expert that police officer was traveling at speed of 74 mph in 45-mph speed zone at time of collision was product of reliable methodology, (3) award of compensatory damages in amount of $250,000 was correctly determined, (4) nonattorney staff costs were part of ''reasonable attorney fees'' that personal representative estate could recover under ''offer of judg-

ment'' rule, and (5) the district court was required to consider reasonableness of hourly rates charged for nonattorney office staff and paralegals.

Affirmed in part, vacated in part, and remanded.

Marquis Aurbach Coffing and *Craig R. Anderson, Micah S. Echols*, and *Chad F. Clement*, Las Vegas, for Appellants.

Saggese & Associates, Ltd., and *Marc A. Saggese*, Las Vegas, for Respondents.

1. Appeal and Error.
   The supreme court reviews a district court's decision to exclude evidence for an abuse of discretion.
2. Appeal and Error.
   The district court's exercise of discretion will not be disturbed absent a showing of palpable abuse.
3. Evidence.
   Exclusion of motorist's blood alcohol content (BAC) of .049 at time of fatal collision with police officer's cruiser was not abuse of discretion, in wrongful death action against police department brought by personal representative of motorist's estate, absent any evidence suggesting that motorist was intoxicated or expert testimony explaining how BAC affected motorist at time of accident. NRS 48.015, 48.025.
4. Appeal and Error.
   The supreme court reviews a district court's decision to admit expert testimony for an abuse of discretion.
5. Appeal and Error.
   The supreme court will only grant a new trial if the appellant's substantial rights were affected by evidentiary error.
6. Evidence.
   Opinion of expert for personal representative of motorist's estate that police officer was traveling at speed of 74 mph in 45-mph speed zone at time of fatal collision was product of reliable methodology, and thus, was admissible, in wrongful death action against police department, despite police department's assertion that expert did not examine scene of accident or inspect vehicles after collision, and relied exclusively on reports and photographs. Like police department's expert, personal representative's expert was retained years after accident; he relied on reports, diagrams, and photographs provided by police department; he was able to calculate to a reasonable degree of scientific certainty vehicles' starting positions, pre-brake and impact speeds, and general angle at which vehicles collided; and his decision to utilize shorter measurement could be challenged on cross-examination. NRS 50.275.
7. Evidence.
   The requirement that an expert's testimony will assist the trier of fact to understand the evidence or to determine a fact in issue asks whether the proposed expert's testimony is relevant and the product of reliable methodology. NRS 50.275.
8. Evidence.
   In determining whether an expert's testimony is a product of reliable methodology, the district court considers whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) pub-

lished and subjected to peer review; (4) generally accepted in the scientific community; and (5) based more on particularized facts rather than assumption, conjecture, or generalization. NRS 50.275.

9. APPEAL AND ERROR.
The supreme court reviews issues of statutory interpretation de novo.

10. STATES.
The statutory cap on damages that the state must pay for its tortious conduct furthers a legitimate interest in protecting the state treasury. NRS 41.035(1).

11. DEATH.
Award of compensatory damages in amount of $250,000 in wrongful death action against police department was correctly based on general verdict of $2 million, reduced by 25 percent for motorist's comparative negligence to $1.5 million, and then the district court's reduction to statutory cap of $50,000 per plaintiff for five plaintiffs, under statute in effect at time of police officer's collision with motorist. NRS 41.035(1), 41.141(1), (2)(b)(1), (2).

12. COSTS; DEATH.
Nonattorney staff costs were part of ''reasonable attorney fees'' that personal representative of motorist's estate could recover in wrongful death suit against police department after police department rejected offer of judgment for $200,000 and judgment was entered following jury trial in amount of $250,000. NRS 17.115(4)(d)(3); NRCP 68(f)(2).

13. COSTS; DEATH.
On motion for attorney fees and costs brought by personal representative of motorist's estate under offer of judgment rule, the district court was required to consider reasonableness of hourly rates charged for nonattorney office staff and paralegals. NRS 17.115(4)(d)(3); NRCP 68(f)(2).

Before GIBBONS, DOUGLAS and SAITTA, JJ.

OPINION

By the Court, GIBBONS, J.:

In this appeal from a judgment for the plaintiffs in a wrongful death action, we consider whether evidence of the deceased's blood alcohol content (BAC) may be admitted to show his comparative negligence. We conclude that admission of a person's BAC requires additional evidence suggesting intoxication from either a percipient witness or an expert who can testify regarding that person's commensurate level of impairment.

We also consider three other issues: (1) whether the district court abused its discretion by allowing an expert to testify based on an allegedly unreliable report, (2) whether the district court erred in reducing the jury verdict based on the deceased's comparative negligence before imposing NRS 41.035's mandatory cap on an award of damages against a public entity, and (3) whether the district court abused its discretion in awarding attorney fees that included charges for nonattorney staff. Based on our analysis of these issues, we affirm the district court's judgment; however, we

vacate in part the award of attorney fees and costs and remand this case to the district court for further analysis of the claims for attorney fees from counsel, paralegals, and office staff pursuant to the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

FACTS AND PROCEDURAL HISTORY

Raymond Yeghiazarian was traveling westbound on Sahara Avenue and attempted a left turn at a permissive green light in order to proceed southbound on Fort Apache Road. At the same time, appellant Las Vegas Metropolitan Police Department (LVMPD) Officer Jared Wicks was driving his patrol vehicle eastbound on Sahara Avenue approaching Fort Apache Road. The speed limit on Sahara was 45 mph, but Officer Wicks was traveling between 58 mph and 74 mph. Officer Wicks did not have his police siren or lights activated. Raymond apparently did not realize how fast Officer Wicks was approaching and entered the intersection without enough time to clear it. Officer Wicks slammed on his brakes, but the two cars collided. As a result of the accident, Raymond suffered multiple internal injuries and trauma to his brain stem. After spending three weeks in a coma, Raymond died. A blood sample drawn from Raymond hours after the crash revealed that he had a BAC of .049 percent. Officer Wicks' blood was not drawn or tested for alcohol or other substances after the crash.

Raymond's wife Elizabeth, individually and as the representative of her husband's estate, as well as her son and two daughters (collectively, the Yeghiazarian family), filed a complaint against LVMPD and Officer Wicks (collectively, LVMPD) alleging negligence resulting in Raymond's death. LVMPD asserted that Raymond's injuries were caused by his own negligence, which was comparatively greater than any negligence of Officer Wicks. Before trial, LVMPD attempted to exclude testimony from the Yeghiazarian family's expert, Dr. John E. Baker, P.E., because his conclusion that Officer Wicks was traveling 74 mph was allegedly based on speculation and generalization. The district court denied the motion, stating that the discrepancies and purported weaknesses in Dr. Baker's report went to the weight of his testimony, not its admissibility. The Yeghiazarian family sought to exclude evidence of Raymond's BAC because it was unfairly prejudicial. The district court agreed, citing LVMPD's lack of other evidence suggesting intoxication, either by way of a percipient witness or expert testimony.

The subsequent jury trial lasted five days. It was undisputed that Officer Wicks was speeding without his warning lights or siren on at the time of the accident, but the expert witnesses disagreed regarding how far over the speed limit he was going. All of the ex-

perts agreed, however, that if Officer Wicks had been driving the posted speed limit, Raymond would have made it through the intersection with time to spare. The jury deliberated for three hours before returning with a $2 million verdict in favor of the Yeghiazarian family. Regarding the parties' comparative negligence, the jury found that Officer Wicks was 75-percent negligent and Raymond was 25-percent negligent. The district court applied the comparative negligence reduction before imposing the mandatory $50,000 limitation on awards for damages in tort actions against state entities under NRS 41.035.[1] Therefore, the district court issued a judgment against LVMPD for $250,000, representing $50,000 for each of the five plaintiffs. After trial, the Yeghiazarian family requested attorney fees and costs under NRS 17.115 because LVMPD had rejected their $200,000 offer of judgment four months before trial. The district court awarded the Yeghiazarian family $88,104.75 in attorney fees and $9,631.53 in costs and denied LVMPD's motions for a new trial and to alter or amend the judgment.

LVMPD now appeals, arguing that the district court (1) should not have excluded evidence of Raymond's .049 percent BAC, (2) should not have permitted Dr. Baker to testify, (3) incorrectly calculated damages, and (4) abused its discretion in awarding attorney fees. We examine each argument in turn.

The district court did not abuse its discretion by excluding evidence of Raymond's BAC

LVMPD first argues that the district court abused its discretion by excluding evidence of Raymond's alcohol consumption prior to the accident. LVMPD maintains that the evidence was relevant and was not so unfairly prejudicial as to substantially outweigh its probative value. The Yeghiazarian family responds that the district court correctly excluded the BAC evidence because LVMPD lacked a percipient witness to testify regarding Raymond's level of intoxication or an expert to testify as to the possible effects of a .049 percent BAC on an individual of Raymond's age and weight. Here, we agree with the Yeghiazarian family.

[Headnotes 1, 2]

We review a district court's decision to exclude evidence for an abuse of discretion. *M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). The district court's exercise of discretion will not be disturbed ''absent

[1]The version of NRS 41.035 in existence at the time of the accident provided for a maximum damages award of $50,000 per claimant. The current version provides for a maximum damages award of $100,000 per claimant. 2007 Nev. Stat., ch. 512, §§ 3.3, 3.5, at 3024-25.

a showing of palpable abuse.'' *Id.* All relevant evidence is admissible at trial unless otherwise excluded by law or the rules of evidence. NRS 48.025. Evidence is relevant if it has ''any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'' NRS 48.015. Relevant evidence may be excluded if, among other things, its ''probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.'' NRS 48.035(1).

We recently addressed the admissibility of evidence of alcohol consumption in *FGA, Inc. v. Giglio*, 128 Nev. 271, 278 P.3d 490 (2012). In that slip-and-fall case, the district court excluded evidence that Giglio, the plaintiff, had consumed two alcoholic drinks and that a key witness had consumed four alcoholic drinks in the hour before Giglio's slip and fall. *Id.* at 276, 278 P.3d at 493. We concluded that the district court did not abuse its discretion by excluding evidence of Giglio's alcohol consumption when no ''causal link [was demonstrated] between the alleged impairment and the injury'' because the evidence was insufficient to show intoxication. *Id.* at 285, 278 P.3d at 499. But we concluded that the district court abused its discretion by excluding evidence that the key witness consumed alcohol because it was relevant to the reliability of his perception of the circumstances surrounding Giglio's slip and fall. *Id.*

[Headnote 3]

Here, LVMPD attempted to introduce Raymond's alcohol consumption as substantive evidence, not for impeachment purposes, and therefore a causal connection between the alleged intoxication and the accident was necessary. *See id.* But LVMPD failed to present any evidence of Raymond's intoxication other than Raymond's BAC, which was under the legal limit. Admission of Raymond's BAC on its own would have required the jury to speculate as to its effects on Raymond's reaction time and judgment at the time of the accident. Thus, Raymond's BAC alone reflects the fact that he consumed alcohol but does not establish his level of intoxication or impairment at the time of the accident. His BAC is inadmissible because it is substantially more prejudicial than probative without other evidence suggesting Raymond's intoxication or an expert who can explain to a jury how his BAC, ascertained hours after the accident, would have affected him at the time of the accident. *Lock v. City of Phila.*, 895 A.2d 660, 665-66 (Pa. Commw. Ct. 2006); *see Holderer v. Aetna Cas. & Sur. Co.*, 114 Nev. 845, 852-53, 963 P.2d 459, 464 (1998) (holding that evidence of driver's ingestion of a ''strong dose'' of sleeping pills and antidepressants was improperly admitted because the causal connection between the medication and the accident was mere speculation).

Certainly, if Raymond was intoxicated at the time of the accident, that information would have been relevant. *See Lock*, 895 A.2d at 664-66 (affirming a district court's admission of evidence of alcohol consumption in a factually similar scenario when supported by evidence of intoxication including slurred speech, glassy eyes, alcohol odor on the breath, defendant's admission of the amount of alcohol consumed, and testimony from a forensic toxicologist on the effects of a .134 percent BAC). Since LVMPD lacked other evidence suggesting Raymond's intoxication at the time of the accident, we conclude that the district court properly excluded evidence of his BAC.

The district court did not abuse its discretion in permitting the Yeghiazarian family's expert to testify

[Headnotes 4-6]

LVMPD next argues that the Yeghiazarian family's expert, Dr. John Baker, should not have been permitted to testify because his expert report was based on unsound methodology. The Yeghiazarian family responds that Dr. Baker's opinions were based on a reliable methodology, not speculation. We review a district court's decision to admit expert testimony for an abuse of discretion. *In re Mosley*, 120 Nev. 908, 921, 102 P.3d 555, 564 (2004). We will only grant a new trial if LVMPD's substantial rights were affected by error. *Brown v. Capanna*, 105 Nev. 665, 672, 782 P.2d 1299, 1304 (1989); *see* NRS 47.040 (''[E]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.''). Here, we agree with the Yeghiazarian family.

[Headnotes 7, 8]

NRS 50.275 provides that ''[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.'' This court has distilled this statute into three main requirements for admissible expert testimony: (1) qualification, (2) assistance, and (3) limited scope. *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). The assistance requirement asks whether the proposed expert's testimony is relevant and the product of reliable methodology. *Id.* at 500, 189 P.3d at 651. In determining whether the testimony is a product of reliable methodology, the district court considers whether the opinion is ''(1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community . . . ; and (5) based more on particularized

facts rather than assumption, conjecture, or generalization.'' *Id*. at 500-01, 189 P.3d at 651-52 (footnotes omitted).

LVMPD argues that Dr. Baker's opinion was unreliable under the fifth factor because it was based on speculation and conjecture. LVMPD contends that Dr. Baker did not examine the scene of the accident or inspect the vehicles after the collision and relied exclusively on reports and photographs. LVMPD also argues that Dr. Baker should have relied on the shorter measurement of skid marks instead of the longer measurement when discrepancies existed between the reports. LVMPD contends that Dr. Baker should have compared his findings to eyewitness accounts and Officer Wicks' deposition testimony.

We conclude that the district court did not abuse its discretion in determining that Dr. Baker's testimony was the product of reliable methodology under *Hallmark*. Dr. Baker, like LVMPD's expert, was not retained until years after the accident. Dr. Baker relied on reports, diagrams, and pictures produced by LVMPD. The fact that Dr. Baker chose to use the longer measurement instead of the shorter measurement for the skid marks was an appropriate topic for cross-examination. Further, the disagreement among Dr. Baker and others regarding Officer Wicks' pre-braking speed was founded on whether the figures from the ''black box'' in Officer Wicks' patrol car or from the airbag accelerometer were more reliable in determining impact speed—also an appropriate topic for cross-examination. The record indicates that Dr. Baker was able to calculate to a reasonable degree of scientific certainty the vehicles' starting positions, their pre-braking and impact speeds, and the general angle at which the vehicles collided. Therefore, we cannot say the district court abused its discretion by allowing Dr. Baker to testify.

The district court correctly calculated damages under NRS 41.035. [Headnote 9]

After the jury's verdict, the district court applied comparative negligence to reduce the jury's $2 million verdict to $1.5 million prior to reducing the jury award to the statutory maximum of $50,000 for each of the five plaintiffs under NRS 41.035, for a total award of $250,000. LVMPD argues that this method of calculation failed to take into account the 25-percent reduction in damages for Raymond's comparative negligence. The Yeghiazarian family responds that the district court correctly reduced the $2 million verdict by 25 percent to reflect Yeghiazarian's comparative negligence before reducing the amount to the statutory maximum. As a question of law, we review issues of statutory interpretation de novo. *State, Dep't of Motor Vehicles v. Taylor-Caldwell*, 126 Nev. 132, 134, 229 P.3d 471, 472 (2010). We agree with the Yeghiazarian family.

[Headnote 10]

NRS 41.141(1) provides that a plaintiff's comparative negligence does not bar recovery so long as his or her negligence was not greater than the negligence of the defendants. The jury is required to return a general verdict with the total amount of damages the plaintiff is entitled to recover without considering comparative negligence, plus a special verdict indicating the respective percentages of negligence attributable to each party. NRS 41.141(2)(b)(1), (2). The version of NRS 41.035(1) that was in effect at the time of the accident provided that awards for damages in tort actions filed against state entities ''may not exceed the sum of $50,000.'' This ''statutory cap on the damages the state must pay for its tortious conduct furthers a legitimate interest in protecting the state treasury.'' *Arnesano v. State ex rel. Dep't of Transp.*, 113 Nev. 815, 819, 942 P.2d 139, 142 (1997), *abrogated in part on other grounds by Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007). We have previously defined ''damages'' under NRS 41.035(1) as:

> ''A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another. A sum of money awarded to a person injured by the tort of another. Restatement, Second, Torts, § 12A. Money compensation sought or awarded as a remedy for a breach of contract or for tortious acts.''

Arnesano, 113 Nev. at 821, 942 P.2d at 143 (quoting *Black's Law Dictionary* 389 (6th ed. 1990)). An ''award'' is ''[a] final judgment or decision, esp. one by an arbitrator or by a jury assessing damages.'' *Black's Law Dictionary* 157 (9th ed. 2009).

[Headnote 11]

The jury's award in this case encompassed the amount of the general verdict minus the percentage of comparative negligence that the jury noted on its special verdict form—in this case the $2 million general verdict less Raymond's 25-percent fault rendered a final jury award of $1.5 million. Under NRS 41.035(1), the jury's award could not exceed $50,000 per plaintiff, so the district court correctly interpreted the statute to reduce the award after adjusting for Raymond's comparative negligence. *See State v. Eaton*, 101 Nev. 705, 709-11, 710 P.2d 1370, 1373-74 (1985) (holding that the district court properly subtracted the amount the plaintiff received for releasing other co-defendants before reducing the jury verdict to the statutory maximum), *overruled on other grounds by*

State ex rel. Dep't of Transp. v. Hill, 114 Nev. 810, 818, 963 P.2d 480, 485 (1998). Therefore, we conclude that the district court properly applied comparative negligence and NRS 41.035(1).

The district court did not abuse its discretion in awarding attorney fees

[Headnote 12]

The district court awarded attorney fees and costs to the Yeghiazarian family because LVMPD rejected the Yeghiazarian family's $200,000 offer of judgment and the Yeghiazarian family obtained a judgment of $250,000 against LVMPD. NRS 17.115(4)(d)(3) provides that if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the district court may order that party to pay the ''reasonable attorney's fees'' that the other party incurs from the date of service of the offer to the date of entry of the judgment. *See also* NRCP 68(f)(2) (stating that ''[i]f the offeree rejects an offer [of judgment] and fails to obtain a more favorable judgment, . . . the offeree shall pay the offeror's post-offer costs . . . and reasonable attorney's fees'').

LVMPD argues that $34,034.75 of the $88,104.75 attorney fees award was for the work of ''office staff,'' and that the Yeghiazarian family should therefore only be able to recover $54,070, the amount charged by attorneys Marc Sagesse and his associate Robert Flummerfelt. LVMPD urges us to adopt the dissenting opinion in *Missouri v. Jenkins*, 491 U.S. 274, 295-98 (1989) (Rehnquist, C.J., dissenting), which opined that nonattorney staff charges are not part of a ''reasonable attorney's fee.'' The Yeghiazarian family argues that nonattorney staff costs are recoverable because they are part of a reasonable attorney fee and promote cost-effective litigation. We agree with the Yeghiazarian family. We review an award of attorney fees and costs for an abuse of discretion. *Ozawa v. Vision Airlines*, 125 Nev. 556, 562, 216 P.3d 788, 792 (2009).

We decline LVMPD's invitation to adopt the dissenting opinion in *Jenkins*. Rather, we agree with the majority opinion in that case, which stated that

> [A] ''reasonable attorney's fee'' cannot have been meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client . . . . We thus take as our starting point the self-evident

> proposition that the ''reasonable attorney's fee'' provided for by statute should compensate the work of paralegals, as well as that of attorneys.

Jenkins, 491 U.S. at 285. Further, the use of paralegals and other nonattorney staff reduces litigation costs, so long as they are billed at a lower rate. *Id*. at 288. The Ninth Circuit and other jurisdictions have also adopted this position. *See Richlin Sec'y Serv. Co. v. Chertoff*, 553 U.S. 571, 580-83 (2007) (reaffirming *Jenkins*); *Trs. of Constr. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1257 (9th Cir. 2006) (''[F]ees for work performed by nonattorneys such as paralegals may be billed separately, at market rates, if this is the prevailing practice in a given community.'' (internal quotations omitted)); *U.S. Football League v. Nat'l Football League*, 887 F.2d 408, 416 (2d Cir. 1989) (''Paralegals' time is includable in an award of attorney's fees.''); *Todd Shipyards Corp. v. Dir., Office of Workers' Comp. Programs*, 545 F.2d 1176, 1182 (9th Cir. 1976) (''Paralegals can do some of the work that the attorney would have to do anyway and can do it at substantially less cost per hour.''); *Guinn v. Dotson*, 28 Cal. Rptr. 2d 409, 413 (Ct. App. 1994) (reasonable attorney fees include necessary support services for attorneys). As NRS 17.115(4)(d)(3) and NRCP 68(f)(2) both refer to ''reasonable attorney's fees,'' we conclude that this phrase includes charges for persons such as paralegals and law clerks. Therefore, we conclude that the district court did not abuse its discretion by including charges for these services in its calculation of attorney fees.

[Headnote 13]

But while the district court analyzed whether the hourly rate charged by Mr. Saggese was reasonable, it failed to evaluate whether Mr. Flummerfelt's, the paralegals', or the office staff's hourly rates were reasonable under the circumstances. We therefore vacate the attorney fees award and remand this case to the district court for further analysis of the claims for attorney fees from Mr. Flummerfelt, the paralegals, and the office staff pursuant to the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

We have considered the parties' remaining arguments and conclude that they are without merit. Accordingly, we affirm the district court's judgment, affirm in part and vacate in part the district court's post-judgment order, and remand this matter to the district court for further proceedings consistent with this opinion.

DOUGLAS and SAITTA, JJ., concur.

HALEY BROOKSBY; TYSON BROOKSBY; AND TREY BROOKSBY, APPELLANTS, *v.* NEVADA STATE BANK, A NEVADA CORPORATION, RESPONDENT.

No. 58006

November 7, 2013 312 P.3d 501

Appeal from a district court order denying a petition for a hearing concerning the return of bank account funds under NRS 21.120 (third-party claims on writs of garnishment in aid of execution) and NRS 31.070 (third-party claims). Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Judgment creditor executed by writ of garnishment on funds in joint bank account held by judgment debtor with nondebtors. Nondebtors subsequently filed verified petition for wrongful execution and garnishment of funds. The district court summarily denied petition, and nondebtors appealed. The supreme court, PARRAGUIRRE, J., held that: (1) bank account funds held jointly by judgment debtor and nondebtors were not subject to execution by writ of garnishment absent determination whether funds truly belonged solely to judgment debtor, and (2) seven-day limitations period for judgment creditor to give sheriff an undertaking after third-party claim on property seized by writ of garnishment did not impose deadline for nondebtors to file third-party claim to funds seized from joint back account held with judgment debtor.

Reversed and remanded.

Steven W. Shaw, Las Vegas, Nevada, for Appellants.

Gordon Silver and *Erika A. Pike Turner* and *Joel Z. Schwarz*, Las Vegas, for Respondent.

1. GARNISHMENT.
   Bank account funds held jointly by judgment debtor and nondebtors were not subject to execution by writ of garnishment absent determination whether funds truly belonged solely to judgment debtor. NRS 31.070.
2. GARNISHMENT.
   Seven-day limitations period for judgment creditor to give sheriff an undertaking after third-party claim on property seized pursuant to writ of garnishment did not impose deadline for nondebtors to file third-party claim to funds seized from joint bank account held with judgment debtor, especially since nondebtors were not served with notice of writs of execution and garnishment. NRS 31.070.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

A judgment creditor may garnish only a debtor's funds that are held in a joint bank account, not the funds in the account owned solely by the nondebtor. In post-judgment proceedings below, a judgment creditor garnished the funds in bank accounts held by the judgment debtor jointly with her nondebtor children. The children, claiming that the garnished funds belonged to them alone, objected and petitioned the district court for relief, but the district court summarily denied their petition. Because the children's claims to the funds were timely and properly made, we reverse the district court's decision and remand this matter for an evidentiary hearing to determine whether the garnished funds actually belong, and thus must be returned, to the nondebtor children.

FACTS AND PROCEDURAL HISTORY

Appellants Haley, Tyson, and Trey Brooksby are the children of judgment debtors who, as guarantors of a commercial loan, owe respondent Nevada State Bank on a $4.1 million post-foreclosure judgment. Nevada State Bank executed on the judgment through writs of execution and garnishment of the judgment debtors' Wells Fargo bank accounts. Although the writs and instructions did not mention the Brooksby children's Wells Fargo bank accounts, those accounts were held jointly with their mother and thus were levied as well. According to the Brooksby children, their Wells Fargo bank accounts were established when they were minors and held funds that belonged to them alone—money given to them as birthday presents, college scholarships, and wages they earned from odd jobs while in high school.[1] The Brooksby children were not served with the writs of execution and garnishment, but upon noticing that their funds had been seized, they began corresponding with Wells Fargo and Nevada State Bank.

When their use of informal means failed to result in the return of funds, they made verified claims for wrongful execution and petitioned the district court for a hearing in the deficiency/guarantor action between their parents and Nevada State Bank. The verified claims were not served on the constable who had served the writs of execution and garnishment, however, and upon Nevada State Bank's objection, the children made renewed verified claims one month later, which were mailed to the constable. The next month, without a hearing, the district court denied the Brooksby children's petition and claims; the district court minutes indicate only that the pleading was improper. Unclear on why their petition and claims

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[1]At the relevant time, Haley, Tyson, and Trey were 19, 17, and 15 years old, respectively.

were denied but presuming that it was based on Nevada State Bank's objection to lack of proper service on the constable, two days later, the Brooksby children filed renewed claims and, shortly thereafter, another petition for the return of their account funds under NRS 21.120 (third-party claims concerning writs of garnishment in aid of execution) and NRS 31.070 (third-party claims statute). Again without holding a hearing, the district court denied their claims and petition, this time stating that the claims were untimely. The Brooksby children appealed.

DISCUSSION

In their appeal, the Brooksby children argue that bank account funds held jointly by a judgment debtor and a nondebtor are subject to levy by a judgment creditor only to the extent that they are owned by the judgment debtor and thus do not constitute property belonging solely to the nondebtor. We agree.

[Headnote 1]

Only property owned by the judgment debtor is subject to garnishment, and questions regarding title to that property as between the judgment creditor and a third party are properly determined by the court having jurisdiction under NRS 31.070. NRS 31.249(2); *Kulik v. Albers, Inc.*, 91 Nev. 134, 137, 532 P.2d 603, 605-06 (1975); *see also* NRS 21.120 (referring third-party claims concerning writs of garnishment in aid of execution to the NRS 31.070 process). In line with this ownership rule, a majority of courts, under a variety of theories, have held that a judgment creditor is not entitled to joint bank account funds that truly belong to someone other than the judgment debtor. *See, e.g.*, *Maloy v. Stuttgart Mem'l Hosp.*, 872 S.W.2d 401, 402 (Ark. 1994) (noting that this appears to be the majority view and citing *Traders Travel Int'l, Inc. v. Howser*, 753 P.2d 244 (Haw. 1988)); *Triplett v. Brunt-Ward Chevrolet, Inc.*, 812 So. 2d 1061, 1066 (Miss. Ct. App. 2001); *Jemko, Inc. v. Liaghat*, 738 P.2d 922, 924-25 (N.M. Ct. App. 1987); *Union Props., Inc. v. Cleveland Trust Co.*, 89 N.E.2d 638, 641 (Ohio 1949); *Beehive State Bank v. Rosquist*, 439 P.2d 468, 469 (Utah 1968); Martha A. Churchill, Annotation, *Joint Bank Account as Subject to Attachment, Garnishment, or Execution by Creditor of One Joint Depositor*, 86 A.L.R. 5th 527 (2001). We agree that, under *Kulik* and the authority cited above, Nevada State Bank is not entitled to retain any funds owned solely by the Brooksby children and garnished from their joint bank accounts with the judgment debtors.

[Headnote 2]

Nevada State Bank argues, however, that the Brooksby children's claims were properly denied because they were untimely made under NRS 31.070, after the constable delivered the funds to

the judgment creditor. NRS 31.070(1) provides that, if a third-party claim is served upon the sheriff (or constable), the judgment creditor has seven days in which to give the sheriff an undertaking, or else the sheriff must release the property to the third party. If no verified third-party claim is served on the sheriff, the sheriff is not liable for taking or keeping the property. *Id.* The NRS 31.070 time limits—both to make a verified claim while the property is still in the sheriff's hands and to make an undertaking—are designed to protect the sheriff from liability, but nowhere does that statute include an absolute deadline for making a third-party claim to the property before a court, especially when, as here, the third party is not served with notice of the writs of execution and garnishment. *See Kulik*, 91 Nev. at 138, 532 P.2d at 606 (noting that the undertaking portions of NRS 31.070 provide for interim relief; they do not affect the district court's jurisdiction). The Brooksby children sought return of the funds within a few days of their accounts being garnished, first informally and then, when that proved unsuccessful, by filing claims and a petition for relief about three months later. Therefore, it appears that the Brooksby children timely sought relief in the district court. Further, the Brooksby children do not assert that the joint bank accounts were exempt from garnishment, but that the funds therein are not available to satisfy the demands of their parents' judgment creditors because the funds do not belong to their parents. Thus, Nevada State Bank's argument that joint bank accounts are not exempt from garnishment is irrelevant. Nor do we see any procedural impediment to the district court's resolution of the Brooksby children's renewed verified claims and petition.[2]

Because the Brooksby children appear to have made proper and timely claims asserting ownership of the garnished funds, they should have an opportunity to demonstrate, in an evidentiary hearing, that the funds are owned by them, not the judgment debtors, and thus are not subject to garnishment by Nevada State Bank. *See Maloy*, 872 S.W.2d at 402 (explaining that all funds in joint bank accounts are presumptively subject to garnishment by the judgment creditor of one of the account holders, but that the account holders may rebut that presumption in an evidentiary hearing by showing that a nondebtor actually owns some or all of the funds). For these reasons, we reverse the district court's order denying the Brooksby children's petition for a hearing and claims concerning the return of the bank account funds and remand this matter to the district court for further proceedings consistent with this opinion.

HARDESTY and CHERRY, JJ., concur.

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[2]In light of this conclusion, we need not reach the parties' arguments concerning the first order denying the Brooksby children's original petition.

THE STATE OF NEVADA DEPARTMENT OF TAXATION, APPELLANT, *v.* MASCO BUILDER CABINET GROUP DBA QUALITY CABINETS OF NEVADA, RESPONDENT.

No. 60342

November 7, 2013 312 P.3d 475

Appeal from a district court post-judgment order awarding pre- and post-judgment interest in a tax case. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Following the supreme court's affirmance of tax refund, 127 Nev. 730, 265 P.3d 666 (2011), taxpayer moved for interest on refund. The district court awarded taxpayer pre- and post-judgment interest. Department of Taxation appealed. The supreme court, HARDESTY, J., held that: (1) taxpayer did not waive right to interest on overpayment, and (2) Department failed to timely make determination that taxpayer's overpayment of taxes was intentional or by reason of carelessness.

Affirmed.

Catherine Cortez Masto, Attorney General, and *Blake A. Doerr*, Senior Deputy Attorney General, Carson City, for Appellant.

Justice Law Center and *Bret O. Whipple*, Las Vegas, for Respondent.

1. TAXATION.
   Whether and under what circumstances interest is required on a tax refund is a question of law that is reviewed de novo.
2. TAXATION.
   Taxpayer was not required to request interest on overpayment of taxes in its petition for redetermination before the administrative law judge, and thus, it did not waive its right to interest on overpayment by failing to do so before seeking relief in the district court. NRS 360.2937, 372.660, 372.665.
3. STATUTES.
   The supreme court looks to the plain language of a statute when interpreting its meaning and legislative intent.
4. STATUTES.
   Statutory language that is unambiguous is given its ordinary meaning unless it is clear that this meaning was not intended.
5. TAXATION.
   Tax statutes must explicitly state their meaning and will not be stretched beyond what is stated.
6. STATUTES.
   Statutes must be construed as a whole, and phrases may not be read in isolation to defeat the purpose behind the statute.
7. STATUTES.
   A specific statute controls over a general statute.
8. TAXATION.
   Department of Taxation failed to timely make determination that taxpayer's overpayment of taxes was intentional or by reason of carelessness,

which finding would have precluded an interest award on the overpayment, where the Department did not make the determination during the administrative process at the time the administrative law judge was considering taxpayer's overpayment claim. NRS 372.665.

9. ADMINISTRATIVE LAW AND PROCEDURE.
The exhaustion doctrine provides that, before seeking judicial relief, a petitioner must exhaust any and all available administrative remedies, so as to give the administrative agency an opportunity to correct mistakes and perhaps avoid judicial intervention altogether.

10. TAXATION.
Department of Taxation's determination that a tax overpayment has been made intentionally or by reason of carelessness, which determination precludes an interest award on the overpayment, should be made during the administrative review of the taxpayer's claim, and no later than the date that the refund amount is determined; it is at that time that the interest is due and the full refund amount must be calculated. NRS 360.2937, 372.660, 372.665.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, HARDESTY, J.:

In 2011, this court affirmed a district court order granting respondent Masco Builder Cabinet Group a tax refund for overpaid taxes. Thereafter, appellant State of Nevada Department of Taxation refused to pay interest on Masco's tax refund, arguing that (1) Masco failed to demand interest in its initial refund claim, thus waiving its right to interest; and (2) NRS 372.665 permits the Department to withhold interest on tax refunds owed due to the taxpayer's intentional or careless overpayment, and because no determination as to the applicability of that provision had been made by the Department, no refund is due at this time. We reject both arguments and affirm the district court's order awarding interest.

FACTS AND PROCEDURAL HISTORY

Masco filed a claim with the Department for a refund of overpaid taxes. The Department denied Masco's claim, and Masco litigated the matter before an administrative law judge (ALJ), who concluded that Masco was entitled to a refund. The Department appealed the decision to the Tax Commission, which reversed the ALJ's decision. Masco then filed a petition for judicial review in the district court, and the district court reversed the Tax Commission's decision, resulting in a refund award. The Department then appealed to this court. In *State, Department of Taxation v. Masco Builder Cabinet Group*, 127 Nev. 730, 265 P.3d 666 (2011), we

affirmed the district court's order concluding that Masco was entitled to a tax refund as initially granted by the ALJ.

According to Masco, after this court's decision it sought the status of the tax refund and interest from the Department. Without a response from the Department, Masco filed a motion in the district court for judgment on the refund. In that motion, Masco also argued that it was entitled to pre- and post-judgment interest pursuant to the general tax statutes of NRS Chapter 360 and the sales and use tax statutes of NRS Chapter 372. The Department opposed Masco's motion, contending that Masco failed to request interest prior to this court's final ruling, thus waiving its right to do so. Additionally, the Department argued that any interest allowed under the tax statutes was limited by the Department's right under NRS 372.665 to deny interest if it determined that an ''overpayment [of taxes] has been made intentionally or by reason of carelessness.'' NRS 372.665. Because the Department had not had an opportunity to determine whether interest was barred by intentional or careless overpayment, the Department asserted that the district court could not award interest at this point.

The district court granted Masco's request for pre- and post-judgment interest, finding that the taxpayer is not required to affirmatively request interest. The district court also found that the Department should have made a determination of whether Masco acted intentionally or carelessly under NRS 372.665 when it was finally determined that Masco was entitled to a refund, and because no such determination was made at that time, Masco was now entitled to interest upon its post-judgment motion request. The Department appeals.

DISCUSSION

[Headnote 1]

We are asked to determine whether Masco waived its right to seek interest because it failed to demand interest in its initial tax refund claim, and whether NRS 372.665 permits the Department to withhold interest on the tax refund until it determines whether Masco's ''overpayment [of taxes] has been made intentionally or by reason of carelessness'' under NRS 372.665. Whether and under what circumstances interest is required on a tax refund is a question of law, and this court reviews questions of law de novo. *Schettler v. RalRon Capital Corp.*, 128 Nev. 209, 214, 275 P.3d 933, 936 (2012); *see also Hardy Cos., Inc. v. SNMARK, L.L.C.*, 126 Nev. 528, 533, 245 P.3d 1149, 1153 (2010). We conclude, as a matter of law, that Masco did not waive its right to seek interest and that the interest is due and must be calculated at the time when the amount of the tax refund required to be paid is determined, un-

less the Department determines at that time that interest is barred under NRS 372.665. Therefore, we affirm the district court's order.

Masco did not waive its right to seek interest by failing to demand interest in its initial refund claim

[Headnote 2]

The Department argues that Masco did not request interest on its overpayment in its petition for redetermination before the ALJ, and that failure to do so prevented a determination of whether interest was barred under NRS 372.665. Masco contends that it requested interest before the Tax Commission when it specifically requested that the Tax Commission grant Masco's refund ''along with statutorily mandated interest.'' Masco further argues that, regardless, the tax statutes, specifically NRS 360.2937 and 372.660, generally mandate interest on all refunds of overpayments, including the one awarded to Masco.

[Headnotes 3, 4]

To determine whether Masco waived its right to interest by failing to demand it in its original refund request, we conduct a statutory analysis of the applicable tax statutes. This court looks to the plain language of a statute when interpreting its meaning and legislative intent. *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009). Statutory language that is unambiguous ''is given 'its ordinary meaning unless it is clear that this meaning was not intended.' '' *State Tax Comm'n v. Am. Home Shield*, 127 Nev. 382, 386, 254 P.3d 601, 603 (2011) (quoting *Dep't of Taxation v. DaimlerChrysler Servs. N. Am., L.L.C.*, 121 Nev. 541, 543, 119 P.3d 135, 136 (2005)).

[Headnotes 5-7]

Tax statutes must explicitly state their meaning and will not be stretched beyond what is stated. *Id.*; *State, Dep't of Taxation v. Visual Commc'ns, Inc.*, 108 Nev. 721, 725, 836 P.2d 1245, 1247 (1992). ''Statutes must be construed as a whole, and phrases may not be read in isolation to defeat the purpose behind the statute.'' *Am. Home Shield*, 127 Nev. at 386, 254 P.3d at 604; *see also S. Nev. Homebuilders v. Clark Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). ''A specific statute controls over a general statute.'' *Am. Home Shield*, 127 Nev. at 388, 254 P.3d at 605.

Here, construing these unambiguous statutes as a whole, we conclude that NRS 360.2937 and NRS 372.660 grant interest upon the final determination by the Department of overpaid taxes. NRS 360.2937 provides in pertinent part that ''[e]xcept as otherwise provided . . . *interest must be paid upon an overpayment of any tax* provided for in . . . [NRS Chapter] 372.'' (Emphasis added.) Within the NRS Chapter 372 sales and use tax statutes, NRS

372.660 states that ''[e]xcept as otherwise provided in NRS 360.320 or any other specific statute,[1] *interest must be paid upon any overpayment of any amount of tax* at the rate set forth in, and in accordance with the provisions of, NRS 360.2937.'' (Emphasis added.) There is nothing in these statutes requiring Masco to affirmatively request interest on its overpayment before the ALJ or even before the Department. Therefore, we conclude that Masco was not required to make this request, and thus did not waive its right to seek statutory interest by failing to do so before seeking relief in the district court.[2]

The Department may not withhold interest on tax refunds when it has failed to timely make a determination under NRS 372.665

[Headnote 8]

NRS 372.665 provides that ''[i]f the Department determines that any overpayment has been made intentionally or by reason of carelessness, it may not allow any interest on it.'' The Department argues that, even if Masco's failure to raise the interest issue administratively did not bar its right to seek interest, the award of interest by the district court was premature under the exhaustion of administrative remedies doctrine. In other words, the Department argues that because it has not yet determined whether an exception to the interest statutes applies under NRS 372.665, the district court lacked authority to award interest. We reject this argument for two reasons.

[Headnote 9]

First, the exhaustion doctrine provides that, before seeking judicial relief, a petitioner must exhaust any and all available administrative remedies, so as to give the administrative agency an opportunity to correct mistakes and perhaps avoid judicial intervention altogether. *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571-72, 170 P.3d 989, 993-94 (2007). While the exhaustion doctrine applies in this matter because the Department statutorily maintains original jurisdiction in all claims for tax refunds, *see* NRS 372.680 (addressing the administrative process), we have concluded that interest is due on any overpayment with no need to file a separate claim. Thus, Masco fully complied with the doctrine in this case.

[Headnote 10]

Second, NRS 372.665 is silent as to when the Department must make its determination that the overpayment was made intention-

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[1]NRS 360.320 governs offset calculations and is not relevant here. The only asserted exception is NRS 372.665, which is discussed later in this opinion.

[2]For the same reason—that no ''claim'' is required—the interest is not barred by the doctrine of claim preclusion. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1052, 194 P.3d 709, 711 (2008).

ally or carelessly. Because the statute provides a basis for canceling the Department's obligation to pay statutory interest and the issues of intentional or careless overpayment are inextricably intertwined with the reasons for the claim, we hold that the Department's determination under NRS 372.665 should be made during the administrative review of the taxpayer's claim, and no later than the date that the refund amount is determined. It is at that time that the interest is due under NRS 360.2937 and NRS 372.660 and the full refund amount must be calculated. *See generally* NRS 360.320 (explaining that interest must be computed and used in calculating offsets of certain overpayments).

While NRS 372.665 provides a basis for the Department to avoid paying interest, the burden rests on the Department to timely make the necessary determination under that statute. Here, the Department failed to timely determine whether Masco acted intentionally or carelessly. The Department should have made this determination during the administrative process, at the time that the ALJ was considering the evidence and arguments concerning the claim. Thus, we determine that the district court did not err in awarding Masco statutory interest on its overpayment. With regard to the amount awarded, we decline to consider the Department's argument that the district court applied the wrong rate, because the Department failed to contest the requested rate in the district court. *See In re AMERCO Derivative Litig.*, 127 Nev. 196, 217 n.6, 252 P.3d 681, 697 n.6 (2011) (''[W]e decline to address an issue raised for the first time on appeal.''). Accordingly, the judgment of the district court is affirmed.

PARRAGUIRRE and CHERRY, JJ., concur.

CARLOS R. ELIZONDO, APPELLANT, *v.* HOOD MACHINE, INC.; AND EMPLOYERS INSURANCE COMPANY OF NEVADA, RESPONDENTS.

No. 61229

November 7, 2013 312 P.3d 479

Appeal from a district court order denying a petition for judicial review in a workers' compensation matter. First Judicial District Court, Carson City; James Todd Russell, Judge.

Injured worker petitioned for review of summary dismissal of fourth request to reopen workers' compensation claim. The district court affirmed, and worker appealed. The supreme court, HARDESTY, J., held that: (1) hearing officer's summary dismissal of worker's request to reopen claim did not comply with statutory obligation to include ''specific findings of fact and conclusions of

law, separately stated''; and (2) issue or claim preclusion did not apply to requests to reopen workers' compensation claim.

Reversed and remanded.

Evan B. Beavers, Nevada Attorney for Injured Workers, and *Mary Bartell*, Deputy Attorney for Injured Workers, Carson City, for Appellant.

Beckett, Yott, McCarty & Spann, Chtd., and *James A. McCarty*, Reno, for Respondents.

1. ADMINISTRATIVE LAW AND PROCEDURE.
   The standard for reviewing petitions for judicial review of administrative decisions is the same for the supreme court as it is for the district court.
2. ADMINISTRATIVE LAW AND PROCEDURE.
   The supreme court reviews an administrative agency's factual findings for clear error or an arbitrary abuse of discretion and will only overturn those findings if they are not supported by substantial evidence.
3. ADMINISTRATIVE LAW AND PROCEDURE.
   ''Substantial evidence'' exists if a reasonable person could find the evidence adequate to support the administrative agency's conclusion.
4. ADMINISTRATIVE LAW AND PROCEDURE.
   On appeal from the decision of an administrative agency, a de novo standard of review is applied when the supreme court addresses a question of law, including the administrative construction of statutes.
5. ADMINISTRATIVE LAW AND PROCEDURE.
   On appeal from an administrative agency decision, like the district court, the supreme court decides pure legal questions without deference to an agency determination.
6. WORKERS' COMPENSATION.
   Appeals officer's summary dismissal of injured worker's fourth request to reopen claim for workers' compensation benefits did not comply with statutory obligation to make, in writing, ''specific findings of fact and conclusions of law, separately stated.'' NRS 233B.125.
7. ADMINISTRATIVE LAW AND PROCEDURE.
   The statutory requirement for a hearing officer to make written, specific factual findings not only helps ensure that the administrative agency engages in reasoned decision making, but they also facilitate judicial review; factual findings enable the courts to evaluate the administrative decision without intruding on the agency's fact-finding function. NRS 233B.125.
8. JUDGMENT.
   Claim preclusion may apply in a suit to preclude both claims that were or could have been raised in a prior suit, while issue preclusion would not preclude those issues not raised in the prior suit.
9. JUDGMENT.
   Issue and claim preclusion are common law doctrines used as defenses to bar the relitigation of issues or claims previously litigated.
10. WORKERS' COMPENSATION.
    Issue or claim preclusion did not apply to injured worker's fourth request to reopen workers' compensation claim after three prior requests to reopen were either denied or dismissed. NRS 616C.390.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we are asked to determine whether the appeals officer's conclusory order in a workers' compensation matter failed to meet the statutory requirements of NRS 233B.125, and whether the doctrines of claim and issue preclusion apply to require dismissal of Carlos Elizondo's fourth request to reopen an industrial injury claim under NRS 616C.390. We conclude that the appeals officer's order was procedurally deficient and that the appeals officer erred by applying the doctrines of issue and claim preclusion to bar Elizondo's request to reopen his claim. Therefore, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

While employed by respondent Hood Machine, appellant Carlos Elizondo sustained an abdominal injury in 2000 and filed an industrial injury claim. Hood Machine's insurer, respondent Employers Insurance Company of Nevada (EICON), accepted the claim at least partly based upon a CT scan that indicated a potential left inguinal hernia.[1] The record is not entirely clear as to what then transpired, but it appears that after evaluation and treatment, no evidence of a hernia was found. In 2001, Dr. Susan Ramos concluded that Elizondo was stable and ratable. Thereafter, the physician who conducted Elizondo's permanent partial disability (PPD) examination gave him a zero-percent disability rating, and EICON closed his claim later that same year.

Prior requests to reopen claim

On three prior occasions, Elizondo requested that his claim be reopened, all of which requests were denied. In 2002, his request to reopen was based upon opinions from physicians, including Dr. Ramos, that he should have further testing because of the continued abdominal pain he was experiencing. After that claim was denied, he again sought to reopen the claim in 2004, this time using the report of a different doctor, which stated that he did in fact have a left inguinal hernia. However, this doctor could not state

[1]The record in this case does not contain the supporting documents for the original claim, and subsequent claims and denials. Furthermore, the appeals officer's decision at issue in this case made no findings of fact as to what transpired concerning the original and prior claims. Therefore, this court must rely on statements made by the parties in briefs and motions for the majority of these facts.

whether the hernia was related to the injury suffered in 2000, and the claim was again denied.

In 2007, Elizondo again sought to reopen his claim. This time he presented a new opinion from Dr. Ramos where she stated that the small hernia originally was not easily found but was now easily identifiable. Dr. Ramos provided her belief that the hernia related back to the original injury in 2000. The claim was again denied, and Elizondo petitioned the district court for judicial review of the denial. In denying Elizondo's petition, the district court reasoned that Elizondo had ''failed to produce any evidence that the primary cause of the change of circumstances [was] the injury for which the claim was originally made,'' and that ''no doctor has stated that the hernia is a result of the injury that occurred in 2000,'' and thus, substantial evidence supported the appeals officer's determination.

Elizondo appealed the district court's order, and this court affirmed the denial of judicial review, explaining, similarly to the district court, that ''none of the medical reports that were properly before the appeal[ ]s officer concluded that [Elizondo]'s original injury in 2000 was the primary cause of the hernia,'' and therefore, substantial evidence supported the determination.

Fourth request to reopen claim

In 2011, Elizondo filed a fourth request to reopen his claim. In this request, Elizondo included a letter dated July 19, 2011, from Dr. Ramos. In her letter, Dr. Ramos opined that Elizondo ''has a definite left inguinal hernia,'' and ''that this hernia is a result of the original injury[,] and the claim should be reopened[,] and he should have the hernia fixed.'' Elizondo's fourth request was again denied by EICON.

Elizondo again administratively appealed the denial of his request, and the hearing officer affirmed the denial. The hearing officer explained that ''[t]he medical reporting from Dr. Ramos is a reaffirmation of her prior opinion regarding causation and does not meet the requirements of NRS 616C.390. The standard required for admissibility of an expert opinion regarding causation is a 'reasonable degree of medical probability.' '' Elizondo then administratively appealed from the hearing officer's decision. Before the appeals officer, EICON moved to dismiss, arguing that Elizondo was precluded from reopening his claim under the doctrine of res judicata. In a short order, without providing any factual and legal explanation, the appeals officer granted EICON's motion to dismiss, summarily concluding that:

> The Employers Insurance Company of Nevada (EICN) filed its Motion to Dismiss on January 9, 2012. The Claimant filed his Opposition on January 27, 2012. EICN filed its Reply on February 6, 2012.

> After careful consideration of all of the pleadings and papers on file, and for good cause, the Appeals Officer adopts the arguments of the Insurer, and therefore, the Motion to Dismiss is GRANTED.

Elizondo filed a petition for judicial review and argued before the district court that the appeals officer's order failed to meet the statutory requirements of NRS 233B.125 and that it was not supported by substantial evidence. EICON contended that Elizondo had repeatedly failed to state a new cause of action allowing him to withstand application of the doctrine of res judicata and to relitigate his request to reopen his claim. In denying the petition, the district court concluded that because ''Elizondo has not stated a new cause of action that can withstand the application of *res judicata*, whether applying issue or claim preclusion, as both of those theories preclude the re-litigation of his request for reopening,'' there was no error of law in the appeals officer's decision. Elizondo now appeals.

DISCUSSION

[Headnotes 1-3]

On appeal, ''[t]he standard for reviewing petitions for judicial review of administrative decisions is the same for this court as it is for the district court.'' *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011); *see also City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 119, 251 P.3d 718, 721 (2011) (''We do not give any deference to the district court decision when reviewing an order regarding a petition for judicial review.'') ''We review an administrative agency's factual findings 'for clear error or an arbitrary abuse of discretion' and will only overturn those findings if they are not supported by substantial evidence.'' *Warburton*, 127 Nev. at 686, 262 P.3d at 718 (quoting *Day v. Washoe Cnty. Sch. Dist.*, 121 Nev. 387, 389, 116 P.3d 68, 69 (2005)). ''Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion.'' *Law Offices of Barry Levinson v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 384 (2008). This court ''will 'not reweigh the evidence or revisit an appeals officer's credibility determination.' '' *City of Las Vegas v. Lawson*, 126 Nev. 567, 571, 245 P.3d 1175, 1178 (2010) (quoting *Milko*, 124 Nev. at 362, 184 P.3d at 384).

[Headnotes 4, 5]

A de novo standard of review is applied when this court addresses a question of law, ''including the administrative construction of statutes.'' *Holiday Ret. Corp. v. State, Div. of Indus. Relations*, 128 Nev. 150, 153, 274 P.3d 759, 761 (2012); *Sierra Nev.*

Adm'rs v. Negriev, 128 Nev. 478, 481, 285 P.3d 1056, 1058 (2012). ''Like the district court, [this court] decide[s] 'pure legal questions without deference to an agency determination.' '' *City of Reno*, 127 Nev. at 119, 251 P.3d at 721 (quoting *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986)).

The appeals officer's order failed to meet the statutory requirements of NRS 233B.125

[Headnote 6]

Elizondo argues that the appeals officer's order fails to meet the statutory requirements of NRS 233B.125 because the order summarily dismissed Elizondo's claim and does not include any specific findings of fact or citation to the law that the appeals officer relied on in reaching her conclusion. Furthermore, Elizondo asserts that the order fails to support its final determination by applying the facts to the law. We agree.

[Headnote 7]

NRS 233B.125 governs adverse written orders in administrative proceedings and states, in pertinent part, that ''a final decision *must include findings of fact and conclusions of law, separately stated*.'' (Emphasis added.) As we have consistently recognized, ''factual findings not only help ensure that the administrative agency engages in reasoned decision making, but they also facilitate judicial review.'' *Dickinson v. Am. Med. Response*, 124 Nev. 460, 469, 186 P.3d 878, 884 (2008). Factual findings enable the courts to evaluate the administrative decision without intruding on the agency's fact-finding function. *Id.*

Here, under the plain and unambiguous language of NRS 233B.125, the appeals officer's order should have ''include[d] findings of fact and conclusions of law, separately stated.'' *See Warburton*, 127 Nev. at 686, 262 P.3d at 718 (stating that this court will not look beyond statutory language that is plain and unambiguous). Instead, the appeals officer's order made reference to and generally adopted EICON's arguments as pleaded in its motion to dismiss. There is no indication in the record that EICON intended for its motion to dismiss to serve as ''proposed findings of fact,'' and even if such intended purpose existed, the appeals officer failed to ''include a ruling upon each proposed finding,'' as required by NRS 233B.125. Without any findings, it is not clear upon which facts the appeals officer relied in determining that claim or issue preclusion applied here.

Therefore, we conclude that the appeals officer's order fails to meet the statutory requirements of NRS 233B.125 and is thus procedurally deficient. Because the appeals officer's order is deficient, it precludes adequate review on appeal and prevents this court from determining whether Elizondo's substantial rights were violated.

See NRS 233B.135(3) (stating that remand may be necessary ''if substantial rights of the petitioner have been prejudiced'').

The appeals officer erred in applying the doctrines of claim and issue preclusion to bar Elizondo's request to reopen his workers' compensation claim pursuant to NRS 616C.390

[Headnote 8]

Elizondo argues that his statutory right under NRS 616C.390 to request a reopening of his claim cannot be defeated by the application of res judicata—either claim or issue preclusion[2]—because such application has been rejected by this court in *Jerry's Nugget v. Keith*, 111 Nev. 49, 888 P.2d 921 (1995). EICON contends that the application of preclusion principles in an administrative proceeding does not violate any statutory or procedural law and does not constitute an error of law.

NRS 616C.390 governs the reopening of industrial injury claims. Upon written application, the insurer is required to reopen a claim if:

> (a) A change of circumstances warrants an increase or rearrangement of compensation during the life of the claimant;
>
> (b) The primary cause of the change of circumstances is the injury for which the claim was originally made; and
>
> (c) The application is accompanied by the certificate of a physician or a chiropractor showing a change of circumstances which would warrant an increase or rearrangement of compensation.

NRS 616C.390(1). In *Jerry's Nugget*, this court considered whether an employee's request to reopen his workers' compensation claim under this statute could be barred by the doctrines of issue and claim preclusion.[3] 111 Nev. at 54-55, 888 P.2d at 925. This court specifically addressed the application of NRS 616.012(3),[4] which provides that the provisions of the workers'

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[2]Res judicata encompasses two doctrines: (1) claim preclusion and (2) issue preclusion. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1051-52, 194 P.3d 709, 711 (2008). ''[C]laim preclusion may apply in a suit to preclude both claims that were or could have been raised in a prior suit, while issue preclusion would not preclude those issues not raised in the prior suit.'' *Id.* at 1056, 194 P.3d at 714. This court has adopted the terms of claim preclusion and issue preclusion, over the use of ''res judicata.'' *Id.* at 1054, 194 P.3d at 713.

[3]The court in *Jerry's Nugget* was interpreting NRS 616.545, which was renumbered as NRS 616C.390, the statute at issue here. However, the language of NRS 616.545, the statute pertinent to the analysis in *Jerry's Nugget*, was not altered in the enumeration to NRS 616C.390.

[4]NRS 616.012 has also been renumbered since the decision in *Jerry's Nugget* and is now NRS 616A.010, but the language remains the same.

compensation statutes '' 'are based on a renunciation of the rights and defenses of employers and employees recognized at common law.' '' *Id*. at 55, 888 P.2d at 925 (quoting NRS 616.012(3), which has been renumbered as NRS 616A.010). While we questioned the Legislature's intent to completely bar issue and claim preclusion in the workers' compensation context, we nevertheless concluded that the Legislature intended the terms of the workers' compensation statutes to control the awarding or denial of benefits, which prevents use of the doctrines of issue and claim preclusion as defenses to reopening a claim if an employee can show a change in circumstance. *Id*.

[Headnote 9]

Issue and claim preclusion are common law doctrines used as defenses to bar the relitigation of claims or issues previously litigated. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 712 (2008) (defining the test in Nevada for when claim and issue preclusion may serve as a defense); *see also Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 82 (1984); *Quintana v. Baca*, 233 F.R.D. 562, 566 (C.D. Cal. 2005); *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604, 608 (Colo. 2005); 50 C.J.S. *Judgments* § 931 (2009). Thus, given the statutory bar to the common law defenses discussed above, the court in *Jerry's Nugget* correctly rejected the use of issue and claim preclusion doctrines as defenses in a workers' compensation case.[5]

[Headnote 10]

As such, to the extent that the district court rejected Elizondo's request to reopen his claim based on the doctrines of issue and claim preclusion, it committed error. The proper analysis under *Jerry's Nugget* is whether there is a change of circumstance. Because the district court failed to provide any findings of fact or conclusions of law, this court cannot properly review the appeals officer's determination that there was no change of circumstances warranting reopening under NRS 616C.390. Therefore, we reverse the district court's order denying Elizondo's petition for judicial review and direct the district court to remand the matter to

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[5]This court recognizes that other jurisdictions have determined that issue and claim preclusion can apply to the reopening of a workers' compensation claim. *See, e.g.*, *Stainless Specialty Mfg. Co. v. Indus. Comm'n of Ariz.*, 695 P.2d 261, 264 (Ariz. 1985); *Feeley v. Indus. Claim Appeals Office of State*, 195 P.3d 1154, 1156 (Colo. App. 2008); *AMP, Inc. v. Ruebush*, 391 S.E.2d 879, 881 (Va. Ct. App. 1990). However, those courts do not identify or reference a statutory scheme similar to the one in Nevada, where the Legislature expressly abrogated common law rights and defenses in the workers' compensation context. Nevada's law is therefore distinguishable.

the appeals officer so that findings of fact and conclusions of law may be properly made.[6]

PARRAGUIRRE and CHERRY, JJ., concur.

CAREY HUMPHRIES, AN INDIVIDUAL; AND LORENZA ROCHA, II, AN INDIVIDUAL, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MICHAEL VILLANI, DISTRICT JUDGE, RESPONDENTS, AND NEW YORK-NEW YORK HOTEL & CASINO, LLC, A NEVADA LIMITED LIABILITY COMPANY DBA NEW YORK-NEW YORK HOTEL & CASINO, REAL PARTY IN INTEREST.

No. 61690

November 7, 2013 312 P.3d 484

Original petition for a writ of mandamus challenging a district court order granting a motion to compel joinder of a necessary party in a negligence action.

Casino patrons brought premises liability action against property owner stemming from assault by a third party. The district court granted property owner's motion to compel patrons to join their assailant as a defendant to action. Patrons petitioned for writ of mandamus. The supreme court, PARRAGUIRRE, J., held that: (1) petition for writ of mandamus was appropriate avenue of review, and (2) third-party assailant was not necessary party in premises liability action against property owner.

Petition granted.

Craig W. Drummond, Las Vegas; *Hofland & Tomsheck* and *Joshua L. Tomsheck*, Las Vegas, for Petitioners.

Kravitz, Schnitzer, Sloane & Johnson, Chtd., and *Martin J. Kravitz* and *Kristopher T. Zeppenfeld*, Las Vegas, for Real Party in Interest.

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[6]Given our disposition in this matter, it is not necessary for us to reach the merits of Elizondo's argument that the protection of his substantial rights requires that EICON's motion to dismiss be treated as a motion for summary judgment. Nor do we consider the merits of EICON's argument that the appeals officer correctly applied the law-of-the-case doctrine in taking judicial notice of the prior decisions related to this matter and correctly relied on prior findings in those appeals.

1. MANDAMUS.
   Petition for writ of mandamus was appropriate avenue through which to challenge the district court's order compelling casino patrons to join third-party assailant as necessary party in premises liability action against property owner, where the case was in the early stages of litigation, and the district court's order forced patrons to join assailant and assert causes of action against him, despite the running of the statute of limitations, or have their action dismissed, and there was the need for the supreme court to clarify an important legal issue regarding premises liability. Const. art. 6, § 4; NRS 34.170.
2. 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 or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
3. MANDAMUS.
   It is within the supreme court's discretion to determine whether to consider a petition for a writ of mandamus. Const. art. 6, § 4.
4. PUBLIC AMUSEMENT AND ENTERTAINMENT.
   Third-party assailant of casino patrons was not a necessary party to premises liability action by patrons against property owner, where property owner's, as alleged cotortfeasor, ability to dispute its liability to patrons was not impacted by assailant's, as other cotortfeasor, absence from action, as impleader of assailant by property owner provided a mechanism to apportion damages, and joint tortfeasors had no right to determine whether they were to be jointly or separately sued for their wrong, as this right rested with the party aggrieved. NRS 41.141; NRCP 19.
5. APPEAL AND ERROR.
   The supreme court reviews a district court's interpretation of the rules of civil procedure and statutory construction de novo.
6. COURTS.
   Courts may consult the interpretation of a federal counterpart to the Nevada Rules of Civil Procedure as persuasive authority.
7. PARTIES.
   While Nevada law allows a defendant to implead a third-party defendant, it does not require the original plaintiff to accept the third-party defendant as a defendant in the plaintiff's case.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

In the underlying premises liability action, the premises owner successfully moved the district court to order the plaintiffs to join the plaintiffs' assailant as a defendant to the action, on the ground that the assailant is a party necessary to the litigation. NRCP 19 provides that a person must be joined as a party if the court cannot afford complete relief in that person's absence. We conclude that the assailant was not a necessary party under NRCP 19 be-

cause the district court can afford complete relief to the parties, the defendant is able to implead the assailant as a third party under NRCP 14, and creating a per se joinder requirement would unfairly burden plaintiffs. Accordingly, we grant the petition for a writ of mandamus.

FACTS

In April 2010, petitioners Carey Humphries and Lorenza Rocha, II, were involved in an altercation with Erik Ferrell on real party in interest New York-New York's casino floor. Security officers and police stopped the altercation and detained Ferrell. He was arrested and subsequently convicted of one count of attempted battery with substantial bodily harm.

In May 2011, Humphries and Rocha filed a complaint against New York-New York, alleging various causes of action for negligence based on its duty to protect. The complaint did not include any claims against Ferrell. New York-New York's answer asserted Humphries' and Rocha's comparative negligence as an affirmative defense.

Following Humphries' and Rocha's complaint, this court issued an opinion in *Café Moda, L.L.C. v. Palma*, 128 Nev. 78, 272 P.3d 137 (2012), in which we interpreted Nevada's comparative negligence statute, NRS 41.141. In *Café Moda*, the plaintiff sued two defendants, one as an intentional tortfeasor and the other as a negligent tortfeasor, and the negligent tortfeasor asserted that it was only severally liable under NRS 41.141. *Id.* at 79, 272 P.3d at 138. We clarified that, in a case alleging comparative negligence, an intentional tortfeasor's liability is joint and several, but a merely negligent cotortfeasor's liability is several, even if the injured party is not ultimately found to be comparatively negligent.

In light of *Café Moda*'s holding on the apportionment of liability between intentional and negligent cotortfeasors in comparative negligence cases, New York-New York moved to compel Humphries and Rocha to join Ferrell, arguing that Ferrell was a necessary party under NRCP 19(a). The district court granted New York-New York's motion, explaining that ''[j]oinder of Ferrell is necessary to ensure [New York-New York] is afforded full protection under the *Café Moda* case.'' The district court further determined that joinder was feasible, since Ferrell resides in Nevada and his identity is known. It thus compelled Humphries and Rocha to join Ferrell.

Humphries and Rocha have petitioned this court for a writ of mandamus. They seek to vacate the order compelling joinder, arguing that the district court erred in compelling them to join a new party defendant when the complaint does not allege a cause of ac-

tion against that defendant. They further argue that joinder of a necessary party is infeasible when the statute of limitations has run on the possible causes of action against the new defendant and that Ferrell is not an indispensable party.

DISCUSSION

We begin by addressing whether writ relief is appropriate. Determining that it is, we then consider whether the district court properly concluded that Ferrell was a necessary party under NRCP 19(a).

Writ of mandamus

[Headnotes 1-3]

Article 6, Section 4 of the Nevada Constitution gives this court jurisdiction to issue writs 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 or to control an arbitrary or capricious exercise of discretion.'' *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (citing NRS 34.160). A writ will not issue where there is a plain, speedy, and adequate remedy in the ordinary course of the law. NRS 34.170; *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. It is within this court's discretion to determine whether to consider petitions for this extraordinary remedy. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

In this case, Humphries and Rocha do not have a plain, speedy, and adequate remedy in the ordinary course of the law. This case is in the early stages of litigation, and the district court's order forces Humphries and Rocha to join Ferrell and assert causes of action against him, despite the running of the statute of limitations, or have their action dismissed. *See Lund v. Eighth Judicial Dist. Court*, 127 Nev. 358, 363, 255 P.3d 280, 284 (2011) (citing *In re Simons*, 247 U.S. 231, 239-40 (1918) (concluding that extraordinary writ relief was warranted because a legal error affected the course of the litigation and the party aggrieved should not have to wait until the final judgment was entered to correct the error)). Moreover, this petition identifies confusion and uncertainty surrounding *Café Moda* and NRS 41.141, highlighting the need to clarify an important legal issue of which this court's review would promote sound judicial economy and administration. *Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 559. Accordingly, we will exercise our discretion and consider this petition to address whether NRS 41.141 and *Café Moda* render Ferrell a party necessary to the underlying action under NRCP 19(a).

The district court erred in compelling Humphries and Rocha to join Ferrell as a necessary party

[Headnote 4]

Humphries and Rocha argue that plaintiffs have the right to decide whom to sue, and that the district court erred by interpreting *Café Moda* as creating a per se rule that intentional tortfeasors are necessary parties in premises liability actions. New York-New York responds that in order for it to be afforded the protection of several liability under NRS 41.141(4), Ferrell is a necessary party and must be joined to the action.

Considering these arguments, we first review whether tortfeasors who were jointly and severally liable under the traditional apportionment of liability were considered necessary parties under NRCP 19 before examining apportionment of fault under Nevada's comparative negligence statute, NRS 41.141, and our interpretation of it in *Café Moda* and *Warmbrodt v. Blanchard*, 100 Nev. 703, 692 P.2d 1282 (1984), *superseded on other grounds as stated in Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 740-43 & n.39, 192 P.3d 243, 253-55 & n.39 (2008). We then consider the effect of NRS 41.141 upon apportionment of liability in this case, as compared with traditional joint and several liability, and the policies behind apportionment of fault to cotortfeasors. Finally, given New York-New York's ability to implead Ferrell as a third-party defendant and assert a cause of action for contribution against him, we decline to disturb the traditional view that, when plaintiffs have sued a tortfeasor who is jointly and severally liable or severally liable, cotortfeasors are not necessary parties under NRCP 19(a).

[Headnote 5]

This court reviews a district court's interpretation of the Nevada Rules of Civil Procedure and statutory construction de novo, even when considered in a writ petition. *See Lund*, 127 Nev. at 362, 255 P.3d at 283; *Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559. NRCP 19(a) provides that a person must be joined in an action if that person is necessary to the action. A person is necessary to the action if (1) in his absence, the court cannot accord complete relief among the existing parties; or (2) he has an interest in the action and his absence will impair his ability to protect his interest or subject one of the existing parties to inconsistent obligations. NRCP 19(a)(1)-(2). If that person is not a party to the action, the court must order that person be made a party, if feasible. NRCP 19(a). If joinder is not feasible, the court must determine, in equity and good conscience, whether the action should proceed or be dismissed. NRCP 19(b) (providing a four-factor test to determine whether a necessary party is indispensable).

Humphries and Rocha cite *McPherson v. Hoffman*, 275 F.2d 466, 470 (6th Cir. 1960), for the proposition that Ferrell is not a necessary party and argue that New York-New York cannot force Ferrell's joinder upon them because '' '[j]oint tort[ ]feasors have no right to determine whether they shall be jointly or separately sued for their wrong. This right rests with the party aggrieved . . . .' '' *Id*. (quoting *Detroit City Gas Co. v. Syme*, 109 F.2d 366, 369 (6th Cir. 1940)). This court cited to *McPherson* and held that ''the plaintiff has the right to decide for himself whom he shall sue,'' and that a defendant may not use NRCP 14 to offer a third party as a defendant, even though the third party may ultimately be liable to the defendant for any damages assessed against the defendant. *Reid v. Royal Ins. Co.*, 80 Nev. 137, 141, 390 P.2d 45, 47 (1964). *Reid* and *McPherson* involve instances in which the defendant and nonparty tortfeasor were subject to joint and several liability.

[Headnote 6]

Under the traditional doctrine of joint and several liability, courts allowed plaintiffs to seek the entirety of their damages from a single tortfeasor. Restatement (First) of Torts § 875 (1939). This allowed plaintiffs to recover all damages caused jointly by multiple tortfeasors, even in the presence of a contributing cause or cotortfeasor from which no recovery was available. *Id*. at cmt. a. Since liability required that each tortfeasor be a proximate cause of a plaintiff's injury, each tortfeasor was entirely liable for the full measure of damages. *Mahan v. Hafen*, 76 Nev. 220, 225, 351 P.2d 617, 620 (1960). Thus, under the traditional rule, no injustice occurred when only one of several possible defendants was held liable for a plaintiff's damages; the plaintiff was fully compensated, and the defendant held liable could seek contribution, if any was to be had, from his cotortfeasors. Courts have acknowledged the nature of joint and several liability in the context of NRCP 19 by recognizing that cotortfeasors are not necessary parties under NRCP 19(a) because complete relief can be afforded to a plaintiff from a jointly and severally liable defendant, or a severally liable defendant, without the presence of other possible cotortfeasors. *See, e.g.*, *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990) (noting that '' 'a tortfeasor with the usual ''joint-and-several'' liability is merely a permissive party to an action against another with like liability,' '' and not a necessary one (quoting Fed. R. Civ. P. 19 advisory committee's notes to Rule 19(a) (1966 amendment))); *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 313-19 (3d Cir. 2007) (determining that other possible obligors were not necessary parties under Fed. R. Civ. P. 19 when a defendant was jointly and severally liable); *UTI Corp. v. Fireman's Fund Ins. Co.*, 896 F. Supp. 389, 392-96 (D.N.J. 1995) (determining that

other possible obligors were not necessary parties under Fed. R. Civ. P. 19 when a defendant was severally liable).[1]

As we recognized in *Café Moda* and *Warmbrodt*, however, the Legislature has supplanted the traditional, common-law functioning of joint and several liability by enacting NRS 41.141. *Café Moda*, 128 Nev. at 80, 272 P.3d at 139; *Warmbrodt*, 100 Nev. at 707-08, 692 P.2d at 1285-86. As currently enacted, NRS 41.141(1) and (2)(a) abolish contributory negligence and allow a plaintiff to recover damages if his comparative negligence is not greater than that of a defendant (if the plaintiff has sued only one defendant) or the combined negligence of multiple defendants (if the plaintiff has sued multiple defendants). NRS 41.141(4) alters joint and several liability by permitting apportionment of fault and providing for several liability amongst negligent defendants ''[w]here recovery is allowed against more than one defendant.'' NRS 41.141(5) specifies certain theories under which defendants will remain jointly and severally liable.

In *Café Moda*, a case involving multiple defendants, we examined the interaction between NRS 41.141(4) and (5). *Café Moda* stemmed from an altercation between Palma, the plaintiff, and another patron on the premises of Café Moda. 128 Nev. at 79, 272 P.3d at 138. Palma, who was stabbed by the other patron, sued the assailant on a theory of intentional tort and Café Moda on a theory of negligence. *Id.* Café Moda asserted an affirmative defense of comparative negligence. The jury apportioned 80% of the fault to the assailant, 20% of the fault to Café Moda, and no fault to Palma. *Id.* The district court entered a judgment holding each of the defendants jointly and severally liable for 100% of Palma's damages based on the district court's reading of NRS 41.141. *Id.*

On appeal, we determined that NRS 41.141(4), in addition to eliminating joint and several liability between two defendants in a negligence action where a defendant asserts comparative negligence as a defense, also abolishes joint and several liability between an intentional tortfeasor and a negligent tortfeasor where the negligence theory of liability arises from the same injury as the intentional tort. *Id.* at 83, 272 P.3d at 141. Accordingly, we concluded that the assailant was jointly and severally liable for 100% of Palma's damages, while Café Moda was only severally liable for 20% of the total damages. *Id.*

In *Warmbrodt*, a case involving one defendant, we examined the effect of NRS 41.141(4) upon the defendant's liability in light of an absent tortfeasor. *Warmbrodt* arose from the alleged malpractice of accountants and attorneys. 100 Nev. at 705, 692 P.2d at 1284.

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[1]We may consult the interpretation of a federal counterpart to a Nevada Rule of Civil Procedure as persuasive authority. *Coury v. Robison*, 115 Nev. 84, 91 n.4, 976 P.2d 518, 522 n.4 (1999).

The attorneys were dismissed from the action at summary judgment, and the case against the accountants proceeded to trial. *Id.* at 706, 692 P.2d at 1284. The jury was instructed to compare and assign the negligence of the plaintiffs, the accountants, and the attorneys. *Id.* The jury apportioned 90% of the fault to the accountants, 10% of the fault to the attorneys, and no fault to the plaintiffs, and the judge deducted 10% from the total damages in the award given to the plaintiffs against the accountants. *Id.*

On appeal, we determined that the district court erred when it instructed the jury to consider the negligence of the attorneys and assign fault to them. *Id.* at 707-09, 692 P.2d at 1285-86. In particular, we construed the ''plain language'' of NRS 41.141(4) as ''requir[ing] apportioning of liability 'among the *defendants*,' and then only '[w]here recovery is allowed against more than one *defendant*' in an action.'' *Id.* at 708, 692 P.2d at 1286 (quoting NRS 41.141(4)). Thus, we noted the Legislature's contrasting use of ''defendant'' and ''defendants'' and held that where recovery was not allowed against more than one defendant, ''the statute did not limit the liability of a sole defendant.'' *Id.* Accordingly, we concluded that the district court erred when it instructed the jury to apportion fault between the attorneys and accountants, and we held that the accountants were jointly and severally liable for 100% of the damages suffered by the plaintiffs. *Id.* at 709, 692 P.2d at 1286.

Thus, *Café Moda*, *Warmbrodt*, and NRS 41.141 indicate that a negligent defendant should be held severally liable only for the percentage of fault apportioned to it where a plaintiff has sued multiple tortfeasors and recovery is allowed against more than one defendant. *See Café Moda*, 128 Nev. at 83, 272 P.3d at 140 (noting that the amendments to NRS 41.141 that returned several liability to multiple defendants was ''designed to prevent the deep-pocket doctrine'' (internal quotations omitted)); *Warmbrodt*, 100 Nev. at 707-08, 692 P.2d at 1285-86 (holding that liability could not be apportioned when recovery was allowed against only one defendant). While allowing a plaintiff to pursue an action against only one negligent defendant for the entirety of the plaintiff's damages is contrary to the policy of applying several liability to a deep-pocket defendant, the statutory scheme in NRS 41.141(4) applies several liability only when there is ''more than one defendant,'' and here, there is only one defendant. Thus, as illustrated in *Warmbrodt*, without Ferrell as a party, NRS 41.141(2)(b)(2) does not permit the fact-finder to apportion fault between Ferrell and New York-New York, and without Ferrell as a defendant, NRS 41.141(4) does not permit the district court to apply several liability to New York-New York. 100 Nev. at 708-09, 692 P.2d at 1286. Accordingly, NRS 41.141 encompasses the circumstances here, wherein the plaintiff has sued one tortfeasor amongst multiple cotortfeasors,

and the statute does not change the result reached under the traditional joint and several liability analysis: the defendant is still jointly and severally liable for the entire judgment against it.[2]

In light of NRS 41.141(4)'s apportionment of fault and NRS 41.141(2)(b)(2)'s limitation on assignment of fault to parties to the action, we are not persuaded to alter the traditional analysis of whether cotortfeasors are necessary parties under NRCP 19(a) when a jointly and severally liable defendant is sued. Under NRCP 19(a)(1), a plaintiff may still be afforded complete relief against the liable defendant(s) he sues, regardless of the existence of other cotortfeasors. *See Potts v. Vokits*, 101 Nev. 90, 92, 692 P.2d 1304, 1306 (1985) (holding that absent parties would not preclude complete relief from being accorded to the plaintiff and defendant); *see also Angst v. Royal Maccabees Life Ins. Co.*, 77 F.3d 701, 705 (3d Cir. 1996) (''Completeness is determined on the basis of those persons who are already parties, and not as between a party and the absent person whose joinder is sought.''); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (''[T]he court must decide if *complete relief* is possible among those already parties to the suit. This analysis is independent of the question whether relief is available to the absent party.''). That a defendant may have a cause of action for contribution against a cotortfeasor does not preclude complete relief between the plaintiff and defendant. Similarly, under NRCP 19(a)(2), a cotortfeasor's ability to dispute his liability to the plaintiffs will not be impacted by an action to which the cotortfeasor is not a party, and the defendant will not be subject to inconsistent obligations. *See Gen. Refractories Co.*, 500 F.3d at 318-19 (determining that the defendant would not be subject to inconsistent obligations under Fed. R. Civ. P. 19(b)); *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 406-13 (3d Cir. 1993) (same). Accordingly, a cotortfeasor is not a party necessary to a plaintiff's action against another cotortfeasor.

Policy considerations also militate against a per se rule requiring a plaintiff to join cotortfeasors to an action as necessary parties. For example, if a plaintiff is unable to join a tortfeasor because the tortfeasor is unknown, immune from liability, or outside

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[2]Although the Legislature enacted several liability for negligent defendants ''to prevent the 'deep-pocket doctrine,' '' *Café Moda*, 128 Nev. at 83, 272 P.3d at 140 (quoting Hearing on A.B. 249 Before the Senate Judiciary Comm., 65th Leg. (Nev., March 8, 1989)), the Legislature did not indicate that several liability should be applied in cases such as this where the plaintiff sued only one defendant. We decline New York-New York's invitation to construe NRS 41.141(4) as doing so, and we leave it to the Legislature to consider the policies behind Nevada's comparative negligence statute and alter the law if they deem it advisable to do so. *See Berkson v. LePome*, 126 Nev. 492, 503, 245 P.3d 560, 568 (2010) (leaving alterations of the statutes of limitations to the Legislature).

the court's jurisdiction, dismissal for failure to join the tortfeasor as a necessary and indispensable party would prevent a plaintiff from recovering any damages and force a plaintiff to bear the entire burden of the damages, regardless of the original defendant's availability or fault. Indeed, for a negligent tortfeasor to accrue any liability at all, the tortfeasor must be the proximate cause of the injury and thus is not without fault. NRS 41.141(1) and (2)(a) further protect a negligent tortfeasor who is the sole defendant in an action by eliminating the tortfeasor's liability where the plaintiff's percentage of fault is greater than the tortfeasor's percentage of fault. Placing the risk of an unknown, immune, or unavailable intentional tortfeasor on an available and at-fault tortfeasor is more equitable than dismissal for failure to join a necessary party. Thus, policy considerations behind the apportionment of liability do not support treating cotortfeasors as necessary parties under NRCP 19(a).

Finally, we note that New York-New York has the ability to implead Ferrell on a theory of contribution, which will afford New York-New York some relief without requiring joinder of a cotortfeasor as a necessary party under NRCP 19(a). *Pack v. LaTourette*, 128 Nev. 264, 268, 277 P.3d 1246, 1249 (2012). In *Pack*, the original defendant, a taxicab driver who injured the original plaintiff in an automobile accident, discovered that the third-party defendant, a doctor, might have contributed to the plaintiff's injuries through negligent treatment and sought to implead the doctor to assert a claim of contribution. *Id*. at 266, 277 P.3d at 1247-48. This court held that under NRCP 14(a), a defendant ''may implead a third-party defendant based on an inchoate claim for contribution.'' *Id*. at 269, 277 P.3d at 1249. This court further held that this includes ''the possibility of joining a third-party defendant 'against whom a cause of action has not yet accrued.' '' *Id*. (citing 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1451 (3d ed. 2010)). A right to contribution exists ''where two or more persons become jointly or severally liable in tort for the same injury to [a] person . . . even though judgment has not been recovered against all or any of them.'' NRS 17.225(1).[3] Furthermore, contribution claims are not limited to original defendants, as the third-party defendant in *Pack* also was not a defendant in the plaintiff's original claim. 128 Nev. at 265-66, 277 P.3d at 1247.

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[3]In contrast, some states only permit a defendant to implead a third-party defendant for a contribution claim where there is a *joint* judgment against the two defendants. *E.g.*, Cal. Civ. Proc. Code § 875 (West 1980); N.Y. C.P.L.R. § 1401 (McKinney 1997). This precludes contribution claims where the tortfeasor from whom the defendant seeks contribution is not a defendant in the original action. However, under Nevada law, such an interpretation of NRCP 14(a) would be inconsistent with NRS 17.225(1).

[Headnote 7]

While Nevada law allows a defendant to implead a third-party defendant, it does not require the original plaintiff to accept the third-party defendant as a defendant in the plaintiff's case. *Reid v. Royal Ins. Co.*, 80 Nev. 137, 141, 390 P.2d 45, 47 (1964). Impleader thus provides an avenue to apportion fault when the plaintiff chooses not to pursue a claim against a potential tortfeasor. By not requiring the plaintiff to join a cotortfeasor while permitting the defendant to implead that tortfeasor, we place the burden of joining a nonparty onto the party that has an incentive to bring that nonparty into the litigation.

If New York-New York impleads Ferrell as a third-party defendant, the district court should apply those provisions of NRS 41.141 that are applicable to the action. NRS 41.141(1) and (2)(a) require that the plaintiff's fault not be greater than the defendant's. Humphries and Rocha cannot recover against New York-New York if their percentage of fault is greater than New York-New York's, even if their percentage of fault is less than New York-New York's and Ferrell's combined percentages of fault. NRS 41.141(2)(a). If Humphries and Rocha can recover, then the jury should render a special verdict ''indicating the percentage of negligence attributable to each party remaining in the action,'' including the third-party defendant, Ferrell. NRS 41.141(2)(b)(2). As the only ''defendant'' that Humphries and Rocha sued, New York-New York will be jointly and severally liable for the entire judgment, NRS 41.141(4), but it will be able to seek contribution from Ferrell for the portion of fault that the jury attributed to him.

Thus, we conclude that the district court's order compelling joinder of Ferrell as a necessary party under NRCP 19(a) was in error. Impleader of Ferrell by New York-New York under NRCP 14 provides a mechanism to apportion damages. Requiring joinder under NRCP 19(a) is premised on the notion that without compelling joinder of Ferrell as a necessary party, complete relief cannot be afforded to the parties. However, complete relief may be afforded between Humphries and Rocha and New York-New York without Ferrell's joinder, and New York-New York can pursue apportionment of fault without Ferrell's joinder through impleader under NRS 17.225(1) and NRCP 14(a), even though New York-New York cannot avail itself of several liability apportioned amongst multiple defendants under NRS 41.141(4). *See Clark Cnty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 388 n.4, 168 P.3d 87, 91 n.4 (2007) (noting that the purpose of a contribution claim is to apportion damages between cotortfeasors).

Accordingly, Ferrell is not a necessary party under NRCP 19(a), and the district court erred by compelling Humphries and Rocha to

join Ferrell. We therefore grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order compelling Ferrell's joinder and to enter an order denying New York-New York's motion to compel Ferrell's joinder as a necessary party.

HARDESTY and CHERRY, JJ., concur.