once the jury determines when Coast knew or should have known of "appreciable [property] damage," the district court must then apply the "manifestation rule" and determine which policy limit applies to Coast's property loss. Once the policy limit is established, a breach of contract award based on property damage cannot exceed that amount.

Finally, we conclude that because the jury's verdict on Coast's UCPA claim was influenced by an improper interpretation of the contract, the verdict must be vacated. We therefore vacate in part, and reverse and remand for further proceedings consistent with this opinion.[5]

Pickering, Hardesty, Parraguirre, Douglas, Cherry, and Saitta, JJ., concur.

FIRST FINANCIAL BANK, N.A., Appellant, *v.* GORDON R. LANE and CAROL LANE, Individually and as Trustees of the LANE FAMILY TRUST; and JOHN C. SERPA, Individually and as Trustee of the JOHN C. SERPA TRUST, Respondents.

No. 62606

December 24, 2014 339 P.3d 1289

Appeal from a district court judgment in a deficiency judgment action. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Mortgagee brought deficiency judgment action against mortgagors and breach of guarantee action against guarantor. The district court entered judgment in favor of defendants, and mortgagee appealed. The supreme court, Pickering, J., held that the limitation in statute defining "indebtedness" with regard to foreclosure sales and deficiency judgments did not in and of itself set an assignee-assignor consideration-based limit on assignee mortgagee's deficiency judgment recovery.

Reversed and remanded.

Lionel Sawyer & Collins and *Leslie Bryan Hart* and *Courtney Miller O'Mara*, Reno, for Appellant.

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[5]Based upon our holding, we vacate the award of attorney fees and do not address the other issues raised by the parties. Although we could address the remaining issues of law raised, many of these issues depend on the insurance coverage issue. Therefore, we conclude that it is not appropriate to address them at this time.

Lemons, Grundy & Eisenberg and *Douglas R. Brown*, Reno; *Mir Saied Kashani*, Los Angeles, California, for Respondents.

1. Mortgages.
   The limitation in statutory provision defining indebtedness with regard to foreclosure sales and deficiency judgments, which provided that "such amount constituting a lien is limited to the amount of the consideration paid by the lienholder," served to limit the amount that a lender can recover in a deficiency judgment for future advances secured but unpaid at the time of default, and thus, did not, in and of itself, set an assignor-assignee consideration-based limit on assignee mortgagee's deficiency judgment recovery against mortgagors and guarantor. NRS 40.451, 40.459(1)(c).
2. Assignments.
   An assignment operates to place the assignee in the shoes of the assignor and provides the assignee with the same legal rights as the assignor had before assignment.
3. Statutes.
   The supreme court will not read a statute to abrogate the common law without clear legislative instruction to do so.

Before the Court En Banc.

OPINION

By the Court, Pickering, J.:

This case presents the question of whether the definition of "indebtedness" found in NRS 40.451 limits, through its interaction with NRS 40.459(1)(a) and NRS 40.459(1)(b), the amount a successor lienholder can recover in an action for a deficiency judgment to the amount of consideration such a lienholder paid to obtain its interest in the note and deed of trust. Specifically, we must determine the meaning of NRS 40.451's final sentence, "[s]uch amount constituting a lien is limited to the amount of consideration paid by the lienholder." Based on our review of NRS 40.451's text, context, and history, we hold that the clause simply ensures that a lender cannot recover in deficiency judgment for future advances secured but not paid at the time of default. And because the section therefore places no consideration-based limitation on this lender's recovery against the instant borrowers and guarantor, we reverse the district court's order to the contrary in this case and remand for further proceedings consistent with this opinion.

I.

Respondent borrowers, Gordon and Carol Lane, took out a three million dollar loan, individually and as trustees of the Lane Family Trust, secured by a piece of commercial real estate. Respondent John C. Serpa, individually and as trustee of the John C. Serpa

Trust, executed a personal guaranty thereupon. The Lanes defaulted on their obligation, and Serpa failed to fulfill his guarantor duties. But before the original lender exercised its right to foreclose, the Federal Deposit Insurance Corporation was appointed its receiver and assigned the interest in the Lanes' loan to appellant First Financial Bank, N.A. (FFB), in exchange for $2,256,879.90 (or 75% of the then-due balance of principal and accrued interest on the loan, $3,009,166.66). FFB foreclosed and sold the property in question—having a fair market value of $2,300,000.00—to itself at auction for $1,890,000.00. FFB then brought a deficiency judgment and breach of guaranty action against respondents, and the district court entered final judgment in respondents' favor "under NRS 40.451 because the fair market value of the subject property [$2,300,000.00] exceeds the consideration [FFB] paid [the FDIC] to acquire a lien on the property [$2,256,879.90]." FFB appeals.

II.

NRS 40.451, the statute upon which the district court based its determination, delineates the categories of debt one seeking a deficiency judgment may collect, that is, an obligor's "indebtedness":

> [First Sentence:] As used in [the deficiency judgment statutes] "indebtedness" means the principal balance of the obligation secured by a mortgage or other lien on real property, together with all interest accrued and unpaid prior to the time of foreclosure sale, all costs and fees of such a sale, all advances made with respect to the property by the beneficiary, and all other amounts secured by the mortgage or other lien on the real property in favor of the person seeking the deficiency judgment. [Limitation:] Such amount constituting a lien is limited to the amount of the consideration paid by the lienholder.

Each item in the first sentence of NRS 40.451 represents a category of obligation that a mortgage or deed of trust can secure that, together, comprise the "indebtedness" enforceable by an action for a deficiency judgment following foreclosure. *See* NRS 40.455-40.459. Thus, category one is the unpaid principal balance of the original obligation; category two is interest accrued but unpaid on the first; category three subsumes the costs and fees associated with the foreclosure sale; and category four captures expenditures that the lender makes to protect the property and thus its security, such as payment of casualty insurance, needed maintenance, or towards liens that would take priority over the lender's security interest. *See* Restatement (Third) of Property: Mortgages § 2.2 (1997). The fifth category concerns other secured amounts that must be treated as separate and apart from the "principal balance of the obligation" for the purposes of indebtedness calculation—*i.e.*, future advances. *Id.*

§ 2.1; *see* NRS 106.025(5), Covenant 5 (identifying future advances as distinct from "mortgage debt"); Uniform Land Security Interest Act (ULSIA) § 302 cmt. 1 (1975) (distinguishing between an "advance" made when a security agreement first attaches and "future advances").

At issue is the effect on those five indebtedness categories of NRS 40.451's second sentence, the limitation: "Such amount constituting a lien is limited to the amount of the consideration paid by the lienholder."

A.

[Headnote 1]

The opening phrase "[s]uch amount" suggests that the limitation "applies to the last antecedent," *see Sims' Lessee v. Irvine*, 3 U.S. 425, 444 n.2 (1799); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 146 (2012), that is, that it affects only category five or "all other amounts secured by the mortgage or other lien." NRS 40.451. Moreover, of the remaining text of NRS 40.451, the language in the limitation, "amount constituting a lien" most nearly mirrors that of the category directly proximate, "amounts secured by . . . lien." Indeed, as NRS 40.451 was originally enacted, this pairing was obvious, since the final category of indebtedness was described as comprising "all other amounts secured by the mortgage or deed of trust *or which constitute a lien*," A.B. 493, 55th Leg. (Nev. 1969), using the same words—amounts, constitute, and lien—as the limitation sentence uses. In the section's original form that clause was the only appearance of the term "lien" in the first sentence—in its 1969 version, category one referred to a "mortgage or deed of trust" rather than a "mortgage or other lien," as it does currently. *Id.* And when the original language was altered to its present state in 1989, *see* S.B. 479, 65th Leg. (Nev. 1989), the change was only intended to accomplish a "minor grammatical correction[ ] to existing law." Remarks of Michael E. Buckley, Hearing on S.B. 479 Before the Senate Judiciary Comm., 65th Leg. (May 30, 1989). Thus, NRS 40.451's text, both as it originally existed and as it exists today, indicates that the limitation was intended to reach only the final category of indebtedness, achieving the unremarkable effect of ensuring that a lender could not recover in deficiency judgment for future advances secured but unpaid at the time of default. *See also* ULSIA § 302 cmt. 4 (1975) (discussing the priority of future advances and assuming that only advances actually paid to a borrower could be recovered by a lender).

Likewise, to the extent that the Legislature discussed the meaning of NRS 40.451's limitation, that discussion suggests that the clause merely states this proposition, so self-evident that it almost could have gone without saying at all. In particular, the attorney who pro-

posed the definition of indebtedness now codified in NRS 40.451, Mr. Edward Hale, described the section's limitation as capping deficiency judgment according to that amount "*due and owing* to the party seeking money judgment by the party against whom the judgment is sought." Hearing on A.B. 493 Before the Assembly Comm. on Judiciary, 55th Leg. (March 13, 1969) (emphasis added). And during the Legislature's meetings on a later enacted statute limiting deficiency recovery in the context of speculation in instruments—meetings that can provide insight into the common understanding of NRS 40.451, if not the Legislative intent behind it—the sponsor of the relevant bill addressed the state of the then-applicable law of deficiency judgments, of which NRS 40.451 was a key component, stating, "Under current statute, a court can award deficiency judgments under Chapter 40 of the Nevada Revised Statutes (NRS) after a foreclosure sale *provided the sale is less than the amount that the borrower owes the lender*." Hearing on A.B. 273 Before the Assembly Comm. on Commerce & Labor, 76th Leg. (March 23, 2011) (emphasis added).

In this way, in *Interim Capital LLC v. Herr Law Group, Ltd.*, a federal district court held that an interpretation of NRS 40.451's limitation that considered the clause in isolation to "limit[ ] the entire indebtedness to the amount a purchaser of a note paid for that note" could not be squared with the section's text or legislative history. *See* 2:09-CV-01606-KJD-LRL, 2011 WL 7047062, at *6 (2011) (unpublished disposition) ("The last sentence of NRS 40.451 modifies only the last omnibus or catchall category in the list of items comprising indebtedness."). First, consistent with our reasoning above, the federal district court recognized that "'[s]uch' is an adjective meaning 'of the character, quality, or exten[t] previously indicated or implied,'" and that the phrase "such amount" therefore referred back to "all other amounts" in category five. *Id.* at *7 & n.8 (quoting *Merriam Webster's Collegiate Dictionary* 1176 (10th ed. 1993)). Going further, the federal district court noted that "[i]ndebtedness is not defined as an 'amount,' but rather a list of types of obligations[,]" and therefore, "[g]rammatically, 'such amount' [could not] reasonably reference 'indebtedness' in this context." *Interim Capital*, 2011 WL 7047062, at *7. Confirming this reading, the federal district court continued, was Assemblyman Richard Bryan's explanation that "the last sentence of NRS 40.451 equates to the 'lender being limited to actual out of pocket expenses that he may recover.'" *Interim Capital*, 2011 WL 7047062, at *7 (quoting Hearing on A.B. 493 Before the Assembly Comm. on Judiciary, 55th Sess., March 13, 1969, at 13). According to the *Interim Capital* court, that Bryan "refer[red] to actual out of pocket expenses is evidence that the statement modifies the catch-all 'other amounts' as opposed to indebtedness generally." *Interim Capital*,

2011 WL 7047062, at *8. Finding this reasoning persuasive, we adopt it here as additional support. *See Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 440 n.2, 245 P.3d 542, 546 n.2 (2010) (this court may rely on unpublished federal district court decisions where persuasive).

Thus, the meaning of NRS 40.451's limitation is plain, its intended result uncomplicated. We hold that the clause affects only the final category of NRS 40.451 indebtedness—namely, other amounts secured by a lien on the property in question—and that it serves to limit the measure of that final category for the purposes of deficiency recovery to consideration actually exchanged between a lender and borrower to induce said lien.

B.

With the 2011 enactment of NRS 40.459(1)(c)—which addresses speculation in instruments by providing that if a person seeking a deficiency judgment "acquired the right to obtain the judgment from a person who previously held that right," that person's judgment may not exceed "the amount by which the amount of the consideration paid for that right exceeds the fair market value of the property sold at the time of sale or the amount for which the property was actually sold"—respondents argue that latent ambiguity was unearthed in NRS 40.451, to wit: the phrase "consideration paid" in the limitation could refer to that consideration paid by a third-party secondary purchaser to obtain an assignment of the secured debt.[1] *See Sandpointe Apartments v. Eighth Judicial Dist. Court*, 129 Nev. 813, 821-22, 313 P.3d 849, 854-56 (2013). Under such a reading, the section would limit an element of that successor-in-interest's indebtedness to the money paid to acquire the relevant instruments, rather than the more straightforward reading proffered above. Thus, after NRS 40.459(1)(c)'s enactment, in *Sandpointe*, a case where the potential retroactive effect of NRS 40.459(1)(c) was in issue, we discussed whether NRS 40.451's limitation denoted "consideration paid" by a successor assignee without deciding the matter. *Id.* at 821-22, 313 P.3d at 854-56. Respondents seize on language in *Sandpointe* favoring an interpretation contrary to that adopted above and by the federal district court in *Interim Capital*; dictum, wherein we stated that NRS 40.451's final sentence may limit "one factor" for the purposes of calculating indebtedness, specifically the first category or principal obligation, to the amount of consideration that a "successor paid for the mortgage or lien." *Id.* at 855. But the proper interpretation of NRS 40.451 was not squarely presented in *Sand-*

[1]The parties concede that NRS 40.459(1)(c) does not itself control this case's outcome because the sale in question took place prior to the section's effective date.

pointe, and therefore principles of *stare decisis* do not apply with the same force that they might otherwise. *See Sherman v. S. Pac. Co.*, 31 Nev. 285, 290, 102 P. 257, 259 (1909).[2] And in any case, respondents' interpretation of NRS 40.451 lacks merit.

[Headnotes 2, 3]

First, NRS 40.451's text provides no support for the respondents' reading inasmuch as it makes no mention of successors-in-interest, and because the categories of indebtedness it describes are all obligations owed by a borrower to a lender, to which consideration paid by a successor to obtain the debt's assignment is irrelevant. And, even setting aside the maxim "expressio unius est exclusio alterius" and its application here, *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967), the Legislature's failure to make any such mention is significant, because the respondents' interpretation of the section would amount to an abrogation of "the common law of most states, [which] has long recognized that 'an assignment operates to place the assignee in the shoes of the assignor, and provides the assignee with the same legal rights as the assignor had before assignment.'" *Interim Capital*, 2011 WL 7047062, at *6 (quoting *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 803 (Minn. 2004)). This court will not read a statute to abrogate the common law without clear legislative instruction to do so. *See Orr Ditch & Water Co. v. Justice Court of Reno Twp., Washoe Cnty.*, 64 Nev. 138, 164, 178 P.2d 558, 570 (1947).

Second, though it was the introduction of NRS 40.459(1)(c) by the Legislature that awakened NRS 40.451's supposed dormant ambiguity, that introduction also offers persuasive evidence that NRS 40.451's limitation does not contemplate consideration exchanged between an assignor and assignee. NRS 40.459(1)(c) now limits the value of the lien (as well as that of NRS 40.451 categories two through five) to the consideration paid by a successor-in-interest to the mortgagee, so respondents' interpretation of NRS 40.451 would render NRS 40.459(1)(c) nearly obsolete where an assignment of rights is in issue. And, where no assignment is in play, NRS 40.451's limitation would have no practical effect because the "consideration paid" by the lienholder, as respondents interpret the phrase, will also be the "principal balance" of the loan. *See also Interim Capital*, 2011 WL 7047062, at *8 (noting that the "[d]efendants cannot account how their interpretation would apply to a primary lender").

Even presented with this reality, respondents press that, under their interpretation, NRS 40.459(1)(c) does not leave NRS 40.451 entirely meaningless because the former would limit the entire

[2]To the extent that the parties rely on *Sandpointe* to limit the value of a lien to the amount the successor-in-interest paid, this argument improperly extends *Sandpointe* to apply to an issue that it did not resolve and is thus without merit.

amount of the *judgment* to consideration paid by the assignee, while the latter would only limit the value of the *lien*, that is, the principal obligation, to consideration paid by the assignee (theoretically leaving categories two through five demarcated above unlimited for the purposes of deficiency judgment recovery). But, pragmatically speaking, this is a distinction without much difference; the effect of any limitation on the value of a lien in the deficiency judgment context is also to limit the total amount of the judgment since the allowed indebtedness is the minuend in the base equation. And, all of respondents' lawyerly hair-splitting aside, it is simply not reasonable to read the sections as accomplishing so nearly the same effect given the body of litigation NRS 40.459(1)(c) spurred shortly after its 2011 enactment,[3] and the relative dearth of case law involving NRS 40.451, which languished in obscurity from its enactment in 1969 until *Interim Capital* was decided in 2011, during which time it was cited only as the first in a sequence of statutes that governed deficiency judgments.[4]

Third, NRS 40.451's legislative history confirms the accuracy of this court's current bearing—foremost in that throughout the multitude of hearings to which the Legislature subjected then A.B. 493, 55th Leg. (Nev. 1969), there was no mention of successors-in-interest to the note and deed of trust, nor of any intent to dramatically alter the common law's landscape with regard to assignors and assignees, concerns that, as demonstrated above, would have likely been central if the limitation had the meaning respondents contend, and which were indeed central in the Legislature's conversations surrounding the later enacted NRS 40.459(1)(c). *See, e.g.*, Hearing on A.B. 273 Before the Assembly Comm. on Commerce & Labor, 76th Leg. (March 23, 2011) (discussing the change in law NRS 40.459(1)(c) would achieve as to successors-in-interest). The 1969 Legislature's silence on this issue is, perhaps, unsurprising given that, as respondents recognized at oral argument, it was unlikely that "the Legislature [that enacted NRS 40.451] even thought about speculation in instruments, which really was not an issue in 1969." Indeed, when NRS 40.459(1)(c) was introduced in 2011, its sponsor explained, the Legislature was *changing the law* so as to "prevent[ ] a creditor from profiting from a judgment in excess of the amount the creditor paid for the right to pursue such a judgment." Hearing on A.B. 273 Before the Assembly Comm. on Commerce & Labor, 76th Leg. (March 23, 2011) (emphasis added).

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[3]*See, e.g.*, *Branch Banking & Trust Co. v. Pahrump 194, LLC*, 51 F. Supp. 3d 993 (D. Nev. 2014); *Branch Banking & Trust Co. v. Regena Homes, LLC*, 2014 WL 3661109 (D. Nev. July 23, 2014); *Sandpointe*, 129 Nev. 813, 313 P.3d 849.

[4]*See, e.g.*, *Mfrs. & Traders Trust Co. v. Eighth Judicial Dist. Court*, 94 Nev. 551, 556, 583 P.2d 444, 448 (1978), *overruled by First Interstate Bank of Nev. v. Shields*, 102 Nev. 616, 730 P.2d 429 (1986).

III.

We therefore hold that NRS 40.451 does not in and of itself set an assignor-assignee, consideration-based limit on FFB's recovery against respondents. The limitation speaks only to the final category of indebtedness, "all other amounts secured by the mortgage or other lien on the real property in favor of the person seeking the deficiency judgment," and limits the measure of that category to consideration extended by the lender to the borrower.

In the district court, the parties stipulated to several legal questions—"[W]hether FFB's seeking a deficiency judgment is limited by the amount FFB paid when acquiring the Loan and Guarantees"; "[I]f necessary, the balance due under the Loan at the time of the foreclosure sale, plus additional accrued interest, additional late charges and any collection costs, but after giving credit for the fair market value of the Property as of the date of the foreclosure"; and, "[W]hether, based on applicable law, any deficiency is owed and if so, how much." Our reversal of the district court's judgment as to the first question necessarily reopens the latter two. Thus, remand is necessary, and we leave to the district court to consider in the first instance the issue respondents belatedly tender on appeal respecting limitations peculiar to Serpa's guarantee. Therefore, we reverse the district court's summary judgment and remand this matter for further proceedings consistent with this opinion.

GIBBONS, C.J., and HARDESTY, PARRAGUIRRE, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

THOMAS EDWIN BRANT, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 63787

December 24, 2014 340 P.3d 576

Appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

The supreme court, PICKERING, J., held that: (1) proffer of expert testimony on police interrogation techniques concerning defendant's allegedly false confession was insufficient to establish that testimony was relevant and reliable, and thus district court did not abuse its discretion in excluding testimony; (2) the district court's comments about police officer not having used a particular interrogation technique and stating that officer had "been very patient" did not amount to plain error; and (3) prior acts of domestic violence of

man who defendant alleged was the real killer were not admissible to contradict man's testimony that he had never been violent to a woman.

Affirmed with instructions as to restitution.

Jeremy Bosler, Public Defender, *John Reese Petty*, Chief Deputy Public Defender, and *Emilie Meyer*, Deputy Public Defender, Washoe County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Richard A. Gammick*, District Attorney, and *Terrence P. McCarthy*, Deputy District Attorney, Washoe County, for Respondent.

1. Criminal Law.
   To testify as an expert witness, the witness must satisfy the following requirements: (1) he or she must be qualified in an area of scientific, technical, or other specialized knowledge (the qualification requirement); (2) his or her specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue (the assistance requirement); and (3) his or her testimony must be limited to matters within the scope of his or her specialized knowledge (the limited scope requirement). NRS 50.275.
2. Criminal Law.
   The district court has wide discretion to determine the admissibility of expert testimony on a case-by-case basis. NRS 50.275.
3. Criminal Law.
   The supreme court's review of a district court's determination of the admissibility of expert testimony is deferential, and the district court's exercise of discretion will not be disturbed unless abused. NRS 50.275.
4. Criminal Law.
   The proponent of the expert witness testimony must demonstrate that the testimony is relevant and the product of reliable methodology. NRS 48.015, 48.035(2), 50.275.
5. Criminal Law.
   In determining whether expert witness testimony is the product of reliable methodology, a district court should consider whether the proffered 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 (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization. NRS 50.275.
6. Criminal Law.
   For the supreme court to find an abuse of discretion in the exclusion of expert testimony on police interrogation techniques concerning defendant's allegedly false murder confession, there needed to be a specific proffer, supported by scientific or other proof, citing particularized facts, establishing that the testimony was relevant and reliable. NRS 48.015, 48.035(2), 50.275.
7. Criminal Law.
   Proffer of expert testimony on police interrogation techniques concerning defendant's allegedly false murder confession was insufficient to establish that testimony was relevant and reliable, and thus the district court did not abuse its discretion in excluding testimony; record did not establish a link between frontal lobe injuries like defendant's and a tendency

to falsely incriminate oneself, defendant's neuropsychologist testified that no research or studies have established such a correlation, defendant's expert's proposed testimony offered no contest on this point, and there was no evidence to establish a scientific or other recognized basis for challenging interrogation techniques that were used. NRS 48.015, 48.035(2), 50.275.

8. Criminal Law.

The district court's comments about police officer not having used a particular interrogation technique and stating that officer had "been very patient" did not amount to plain error in murder trial, when comments occurred over the course of a nine-day trial, in which evidence of defendant's guilt was strong and did not prejudice defendant in the presentation of his defense.

9. Witnesses.

Prior acts of domestic violence of man who defendant alleged was the real killer were not admissible in murder prosecution to contradict man's testimony that he had never been violent to a woman; the district court sustained objection to defense counsel's question asking man whether he had struck his former girlfriend, and impeachment with extrinsic evidence on a collateral matter was generally not permitted. NRS 48.045(2), 50.085(3).

Before the Court En Banc.

OPINION

By the Court, Pickering, J.:

A jury convicted Thomas Brant of the first-degree murder of Kimberly Seaton, whose body was found in a shallow grave in Brant's garage. Under questioning by the police, Brant confessed to strangling Seaton. Brant's theory of defense was that another man, Robert Belsey, killed her. The defense maintained that Brant came home one night to find Seaton dead in the living room; that Brant buried Seaton without reporting her death because he did not want his sister, who owned the house, to find out Seaton had been staying there; and that Brant's confession to killing Seaton was false. In furtherance of these theories Brant designated an expert to testify on police interrogation techniques and also sought to introduce evidence of two incidents of domestic violence in which Belsey had been involved three years earlier. The district court excluded this evidence, and Brant appeals. We affirm.

I.

A.

More than a month elapsed between Seaton's disappearance and the filing of a missing person report. On receiving the missing person report, the police investigated, learned that Seaton's last-known address was Brant's house, and went there to ask Brant about her. Brant denied knowledge of Seaton's whereabouts. He told the police that Seaton had moved out at his request some weeks earlier, after

he came home one night and Seaton, who was drunk and belligerent, verbally assaulted him. Brant gave the police permission to search his house and, once that was completed, the outbuildings on his property, including his detached garage.

Brant unlocked the garage and opened the door but did not follow the police inside. He and a detective (Detective Gallop) stayed outside hunting for Brant's cat, which had gotten out during the search. Beneath some pallets in the garage, the police found a body buried in a mixture of loose dirt and kitty litter. At that point, the police halted the search to obtain a search warrant. On being told by the officers that they had "found something" in the garage, Brant swooned and leaned against a tree for support. Teary-eyed, Brant said that he had "no idea" what they could have found.

Detective Gallop asked Brant to accompany him to the police station to be interviewed, and Brant agreed. The two rode together in Gallop's car. When they arrived, Brant asked to use the restroom. In the restroom, standing at the sink washing his hands, Brant said to Gallop, "I know what they found over there. She was dead when I got home Sunday night."

Gallop escorted Brant to an interview room and read Brant his *Miranda* rights, which Brant waived. A nearly six-hour interrogation followed, counting food, coffee, bathroom, and cigarette breaks. Everything that occurred in the interview room, including the breaks, was videotaped; the exchanges Detective Gallop had with Brant outside the interview room, including at Brant's house and in the police station restroom, were audiotaped. Under interrogation, Brant admitted that, acting alone and without telling anybody, he buried Seaton in his garage. Initially, Brant maintained that he found Seaton dead in his living room and panicked; he explained that he secretly buried Seaton so that his sister, who owned the house, would not find out Seaton had been living there. Toward the end of the interrogation, Brant abandoned this explanation and confessed to killing Seaton: Brant stated that he "snapped" after Seaton verbally assaulted him and that he struck Seaton repeatedly on the side of the head and face and strangled her, crushing her throat.

Brant's account of Seaton's death is consistent with the injuries the police found on Seaton's body and with the coroner's findings as to Seaton's injuries and cause of death.

B.

When Brant was a teenager, he suffered a severe head injury that left him with permanent brain damage, primarily to his frontal lobe. Although the district court excluded Brant's police interrogation expert—a ruling Brant has appealed and that we discuss below—it did allow Brant to present expert testimony from a neuroradiologist, Dr. Anthony Bruno, and a neuropsychologist, Dr. Ted Young. Dr.

Bruno reviewed Brant's radiology and testified to Brant's frontal lobe damage. Dr. Young reviewed the radiological reports, tested Brant, interviewed him, and reviewed Brant's work and family history. While Brant's brain injuries did not affect his intelligence—Brant's IQ tested well above average—they compromised Brant's "executive ability to resist impulses," and made him less focused and more reactive, especially under emotional stress, than a normal adult. Dr. Young found Brant's functionality surprising given the extent of the brain damage visible on his radiographs.

II.

A.

Brant did not move to suppress his confession as involuntary. Rather, his contention was, and is, that the latter part of his confession—the part where he admits killing Seaton, in addition to finding her body and burying it in his garage—is false. To support his false-confession theory, Brant designated an expert on police interrogation techniques, Dr. Jorey Krawczyn. The district court excluded Dr. Krawczyn's testimony on the grounds that it would not assist the jury in understanding the evidence or deciding a fact in issue.

[Headnotes 1-3]

NRS 50.275 governs the admissibility of expert testimony. "To testify as an expert witness under NRS 50.275, the witness must satisfy . . . three requirements: (1) he or she must be qualified in an area of 'scientific, technical or other specialized knowledge' (the qualification requirement); (2) his or her specialized knowledge must 'assist the trier of fact to understand the evidence or to determine a fact in issue' (the assistance requirement); and (3) his or her testimony must be limited 'to matters within the scope of [his or her specialized] knowledge' (the limited scope requirement)." *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (quoting NRS 50.275). The district court has "wide discretion" to determine the admissibility of expert testimony on a "case-by-case basis." *Higgs v. State*, 126 Nev. 1, 18, 222 P.3d 648, 659 (2010). Our review is deferential, and the district court's exercise of discretion will not be disturbed unless abused. *Hallmark*, 124 Nev. at 498, 189 P.3d at 650.

[Headnotes 4, 5]

To meet *Hallmark*'s assistance requirement, the proponent of the expert witness testimony must demonstrate that the testimony "is relevant and the product of reliable methodology." *Id.* at 500, 189 P.3d at 651. "Relevant evidence" is "evidence having 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 with-

out the evidence," NRS 48.015, but, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence." NRS 48.035(2). As for reliability, a "district court [should] consider whether the proffered 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 (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization." *Higgs*, 126 Nev. at 19, 222 P.3d at 660.

The district court held a pretrial hearing on the admissibility of proposed expert witness testimony. Dr. Krawczyn did not testify at the hearing or prepare a written report. The district court "assume[d]" that Dr. Krawczyn "is qualified in methods of police interrogation" based on defense counsel's representation that Dr. Krawczyn is a clinical psychologist who "provides lectures on interview and interrogation techniques utilizing body language and neurolinguistic dynamics" and was being offered as an expert on police interrogation techniques.[1] Counsel further represented that Dr. Krawczyn had reviewed the audio- and videotapes of Brant's "interviews and interrogations," including "at the house, the . . . formalized interrogation [at the police station] and also all the smoke breaks in between." "Based upon what he saw in the review," Dr. Krawczyn "determined detective Gallop is using some standardized questions that [date] back to a 1956 polygraph operator's course and eventually progressed in the Criminal Division"; Gallop may have "used the Reid techniques,"[2] but without asking Gallop, the defense "cannot with 100 percent certainty say that is the technique." There is "a question [of] is this a good technique to use with a brain injury" that "goes to susceptibility and reliability of the statement." Summing up, defense counsel stated that,

> . . . there are identified factors or . . . interrelated components that are part of the concept of interrogative susceptibility that just better form the social interaction between the interrogat[or and] the interviewee. This is what we need the expert to go

[1]The record does not contain Dr. Krawczyn's curriculum vitae, although it is discussed by counsel in the transcript of the pretrial hearing, and the admissibility of his testimony does not appear to have been briefed in writing in the district court. The transcript reflects that counsel lodged a copy of *United States v. Hall*, 974 F. Supp. 1198 (C.D. Ill. 1997), *aff'd*, 165 F.3d 1095 (7th Cir. 1999), with the clerk after the district court deemed Dr. Krawczyn's testimony inadmissible.

[2]The record does not explain the reference to the "Reid technique" but our research indicates that it refers to a manual of interrogation techniques, Fred E. Inbau & John E. Reid, *Criminal Interrogation and Confessions* (1962), that now is in its fifth edition, Fred E. Inbau, John E. Reid, Joseph P. Buckley & Brian C. Jayne, *Criminal Interrogation and Confessions* (5th ed. 2013).

> through, the factors and explain how these factors came together.[3]

[Headnotes 6, 7]

"[T]he phenomenon of false confessions is a growing area of psychological and social science," and we "do not foreclose the possibility that under appropriate circumstances expert testimony [in this arena] could be relevant to a defendant's case and helpful to a jury." *Commonwealth v. Hoose*, 5 N.E.3d 843, 863 (Mass. 2014); *People v. Bedessie*, 970 N.E.2d 380, 388-89 (N.Y. 2012); *see United States v. Adams*, 271 F.3d 1236, 1244 (10th Cir. 2001). For this court to find an abuse of discretion in the exclusion of such testimony, though, there needed to be a specific proffer, supported by scientific or other proof, citing particularized facts, establishing that the testimony is relevant and reliable. The proffer in this case does not provide us the information needed to undertake that analysis.

At first blush, Brant's frontal lobe injuries suggest that his case may fall in line with cases such as *United States v. Shay*, 57 F.3d 126, 133 (1st Cir. 1995), where the appellate court remanded for the trial court to consider expert psychiatric testimony intended to establish that the defendant suffered from an identifiable mental disorder causing him to make grandiose, self-inculpatory statements. *See also* David A. Perez, *The (In)admissibility of False Confession Expert Testimony*, 26 Touro L. Rev. 23, 63-64 (2010) ("admitting psychiatric testimony is not the same as admitting false confession expert testimony: the former informs the jury about a technical topic (i.e., a mental illness), while the latter draws conclusions for the jury regarding the credibility of a particular statement"). But the record before us does not establish a link between frontal lobe injuries like Brant's and a tendency to falsely incriminate oneself. On the contrary, at the hearing on the admissibility of experts, Brant's neuropsychologist, Dr. Young, testified that, to his knowledge, no research or studies have established such a correlation:

> Prosecution: So, Doctor, with regard to the . . . question about whether somebody with this particular injury would be more likely to lie?
>
> Dr. Young: Yes.
>
> Prosecution: Would they be more likely to lie to incriminate themselves or bring negative consequences upon themselves?
>
> Dr. Young: Well, yeah. I think that is a question I can't answer. I don't know of any research that addressed that kind of question. I really don't know how to respond.

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[3]Counsel disclaimed any intention of having Dr. Krawczyn "invade the province of the jury and make the final conclusion or opinion as to whether Mr. Brant's statement in its entirety or particular[s is] false."

Dr. Krawczyn's proposed testimony offered no contest to Dr. Young on this point. *See also Adams*, 271 F.3d at 1246 (distinguishing *Shay* as a case involving "a mental disorder characterized by an extreme form of pathological lying" on which expert testimony would be of assistance, as opposed to a case not involving such pathology).

This leaves the fact that, in interrogating Brant, Detective Gallop may have used the Reid technique (or a 1956 polygraph operator's technique) and the suggestion that a susceptible witness may make unreliable statements to establish the relevance and reliability of Dr. Krawcyzn's testimony. But with no evidence to establish a scientific or other recognized basis for challenging the interrogation techniques utilized in this case—which Dr. Krawczyn should have been able to identify if they were problematic, since he had complete audio- and videotapes of Brant's interview and interrogation—we have only Dr. Krawczyn's *ipse dixit* that the techniques possibly used may have influenced Brant's confession. This is not enough to establish an abuse of discretion in excluding such testimony. *See Bedessie*, 970 N.E.2d at 388 (upholding the exclusion of expert testimony on an assertedly false confession where the expert's "descriptions of the allegations on which he purported to base his expert opinion were general or vague and not, in fact, linked to any published analysis"); *United States v. Jacques*, 784 F. Supp. 2d 59, 66 (D. Mass. 2011) (excluding expert testimony that "the Reid technique enhanced the risk of an unreliable confession" where the expert proffering this opinion did not point to data or studies that established this); *see also People v. Linton*, 302 P.3d 927, 957-58 (Cal. 2013) (upholding the exclusion of expert testimony on false confessions where, as here, the jury had before it complete recordings of the defendant's interrogation and the proffered expert testimony was "highly speculative"); *Hoose*, 5 N.E.3d at 863-64 (to like effect).[4]

Brant complains that he needed Dr. Krawczyn to establish that the phenomenon of false confessions exists. But he accomplished that through Detective Gallop, who acknowledged under cross-examination that false confessions can and do occur. And, as discussed above, the proffer with respect to Dr. Krawczyn does not establish what else Dr. Krawczyn might have said that would be of assistance to the jury.

"We have consistently held that this Court will not speculate as to the nature and substance of excluded testimony." *Burgeon v. State*, 102 Nev. 43, 47, 714 P.2d 576, 579 (1986) (citing *Van Valkenberg v. State*, 95 Nev. 317, 594 P.2d 707 (1979)). Without a more detailed,

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[4]*Linton*, 302 P.3d at 957, and *Hoose*, 5 N.E.3d at 863, both emphasize that the defendant did not recant his confession and that the evidence did not otherwise cast doubt on the veracity of the challenged confession, which is also true here. Indeed, Brant appears to have affirmed his confession that he killed Seaton in the interview of him that his neuropsychologist, Dr. Young, conducted.

properly substantiated proffer, we cannot say the district court abused its discretion in excluding Dr. Krawczyn's testimony.

B.

[Headnote 8]

Brant next challenges as judicial misconduct two unobjected-to statements by the district judge that he asserts improperly vouched for Detective Gallop's credibility and disparaged the defense. The first statement occurred during Gallop's cross-examination. After Gallop testified that he did not adhere to the Reid or any other particular interrogation technique, the district judge cautioned counsel that, "we don't need to spend a lot of time on a technique that he was not using in this interrogation." The second occurred at the end of Gallop's testimony, where the district judge stated, "Detective Gallop you have been very patient. You are excused." Since the defense did not object to the statements, plain error review obtains. *Oade v. State*, 114 Nev. 619, 622, 960 P.2d 336, 338 (1998).

This court has cautioned district judges against "making comments concerning the facts of any case at trial." *Shannon v. State*, 105 Nev. 782, 788, 783 P.2d 942, 946 (1989); *see Kinna v. State*, 84 Nev. 642, 647, 447 P.2d 32, 35 (1968) ("The court may not hamper or embarrass counsel in the conduct of the case by remarks or rulings which prevent counsel from presenting his case effectively or from obtaining full and fair consideration from the jury."). Detective Gallop's testimony took considerable time, interrupted as it was by testimony from an otherwise unavailable witness and the screening of Brant's videotaped confession. It thus is not clear that the district judge's comment respecting Gallop's patience disparaged the defense. But assuming that it could be taken as disparagement, and assuming further that the judge improperly commented on Gallop's testimony about not using the Reid technique, the comments did not amount to plain error. The comments occurred over the course of a nine-day trial, in which the evidence of guilt was strong, and did not prejudice Brant in the presentation of his defense. *See McNair v. State*, 108 Nev. 53, 63, 825 P.2d 571, 578 (1992) (no reversible error when the "departures from strict judicial impartiality were brief episodes within the context of the entire trial"); *Randolph v. State*, 117 Nev. 970, 985, 36 P.3d 424, 434 (2001).

C.

[Headnote 9]

Last, Brant challenges the district court's refusal to allow him to introduce evidence of "other crimes, wrongs or acts" by the man whom Brant theorized was the real killer, Robert Belsey. NRS 48.045(2). Belsey had known Seaton for many years and gave inconsistent statements about his feelings toward her and about Brant,

which the district court allowed Brant to explore through Belsey and the officer who interviewed Belsey, Detective English. Through Belsey's ex-girlfriend, Stavas, Brant also sought to introduce evidence of two prior incidents of domestic violence involving Belsey and Stavas three or four years earlier to impeach Belsey's credibility and to establish identity and modus operandi. In *Bigpond v. State*, 128 Nev. 108, 116, 270 P.3d 1244, 1245-46 (2012), we clarified that evidence of "other crimes, wrongs or acts" may be admitted for a nonpropensity purpose other than the nonpropensity purposes listed in NRS 48.045(2).

On appeal, Brant contends that Belsey's prior acts of domestic violence should have been admitted to contradict Belsey's testimony that he "had never been violent to a woman." But the cited statement was not properly before the jury, because the district court sustained the objection to defense counsel's question asking Belsey whether he had struck his former girlfriend. And, even if there was a statement to impeach, impeachment with extrinsic evidence on a collateral matter generally is not permitted. NRS 50.085(3); *McKee v. State*, 112 Nev. 642, 646, 917 P.2d 940, 943 (1996) ("It is error to allow the State to impeach a defendant's credibility with extrinsic evidence relating to a collateral matter.").[5]

D.

One final point remains: The district court ordered restitution of $3,624.51 when the amount should have been $2,128.59. Brant filed his notice of appeal before his objection to the restitution amount was resolved. Since the parties have stipulated in this appeal that the district court should reduce the restitution ordered to $2,128.59, we direct the district court to correct the restitution amount in the judgment of conviction.

For these reasons, with the exception of the correction ordered with respect to the restitution appropriate, we affirm.

GIBBONS, C.J., and HARDESTY, PARRAGUIRRE, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

[5]We also find no abuse of discretion in the exclusion of the prior bad acts evidence offered, to the extent argued on appeal for other nonpropensity purposes, as the two incidents were remote in time, too dissimilar to establish identity or modus operandi, and cumulative insofar as they were offered as indirect impeachment of Belsey's credibility on the points on which direct impeachment was allowed. *See Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006) ("A district court's decision to admit or exclude [prior bad act] evidence under NRS 48.045(2) rests within its sound discretion and will not be reversed on appeal absent manifest error.").

SUSAN SADLER; AND JACK SADLER, SR., INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, APPELLANTS, *v.* PACIFICARE OF NEVADA, INC., A NEVADA CORPORATION, RESPONDENT.

No. 62111

December 31, 2014 340 P.3d 1264

Appeal from a district court order granting judgment on the pleadings in a negligence action. Eighth Judicial District Court, Clark County; Susan Scann, Judge.

Patients, on behalf of themselves and a proposed class of similarly situated individuals, filed complaint against health maintenance organization, asserting claims of negligence and negligence per se on the ground that organization failed to perform its duty to establish and implement quality assurance program to oversee the medical providers within its network and that organization's failure to monitor the medical providers allowed those providers to use unsafe injection practices, which resulted in patients and the putative class members being exposed to and/or placed at risk of contracting blood-borne diseases. The district court granted organization's motion for judgment on the pleading, and patients appealed. The supreme court, HARDESTY, J., held that: (1) economic loss doctrine did not bar patients' negligence claims; (2) as a matter of first impression, plaintiff may state a cause of action for negligence with medical monitoring as the remedy without asserting that he or she has suffered a present physical injury; and (3) in the absence of a present physical injury, patients stated claim for negligence.

Reversed and remanded.

[Rehearing denied May 1, 2015]

[En banc reconsideration denied September 17, 2015]

Marquiz Law Office and *Craig A. Marquiz*, Henderson; *George O. West, III*, Las Vegas, for Appellants.

Lewis Roca Rothgerber LLP and *Daniel F. Polsenberg* and *Joel D. Henriod*, Las Vegas; *Holland & Hart LLP* and *Constance L. Akridge* and *Matthew T. Milone*, Las Vegas, for Respondent.

1. PLEADING.
   The district court may grant a motion for judgment on the pleadings when the material facts of the case are not in dispute and the movant is entitled to judgment as a matter of law. NRCP 12(c).
2. APPEAL AND ERROR.
   Because an order granting a motion for judgment on the pleadings presents a question of law, the supreme court's review of such an order is de novo. NRCP 12(c).

3. Appeal and Error.
   As with a dismissal for failure to state a claim, in reviewing a judgment on the pleadings, the supreme court will accept the factual allegations in the complaint as true and draw all inferences in favor of the nonmoving party. NRCP 12(b)(5), (c).
4. Damages.
   Goal of a medical monitoring claim is to require the defendant to pay for the costs of long-term diagnostic testing to aid in early detection of latent diseases that may have been caused by the defendant's tortious conduct.
5. Negligence.
   To state a claim for negligence, a plaintiff must allege that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the breach was the legal cause of the plaintiff's injuries, and (4) the plaintiff suffered damages.
6. Negligence.
   Under the economic loss doctrine, a plaintiff generally cannot recover on an unintentional tort claim for purely economic losses.
7. Damages; Health.
   Economic loss doctrine did not bar patients' negligence claims against health care facilities, which were based on patients' need to undergo ongoing medical monitoring as a result of the unsafe injection practices at facilities, since patients did not allege purely economic losses; while their claims for medical monitoring were based in part on the expense of undergoing such testing, the complaint also alleged that facilities' actions exposed patients to unsafe injection practices, putting them at risk for contracting serious blood-borne diseases, and this exposure and increased risk were noneconomic detrimental changes in circumstances that patients alleged they would not have experienced but for the negligence of facilities.
8. Damages; Negligence; Torts.
   As an intentional infliction of emotional distress claim does not require a physical injury, such an injury is not necessarily a prerequisite to a tort claim generally; however, based on the requirements for a negligent infliction of emotional distress claim, a physical injury may be required in order to establish certain torts.
9. Damages.
   Plaintiff may state a cause of action for negligence with medical monitoring as the remedy without asserting that he or she has suffered a present physical injury.
10. Damages.
    To establish damages for medical monitoring claim, a plaintiff must show that he or she incurred costs as a result of the defendant's actions, and to satisfy this element, it is necessary for the plaintiff to demonstrate that the medical monitoring at issue is something greater than would be recommended as a matter of general health care for the public at large.
11. Damages.
    In a negligence action for which medical monitoring is sought as a remedy, a plaintiff may satisfy the injury requirement for the purpose of stating a claim by alleging that he or she is reasonably required to undergo medical monitoring beyond what would have been recommended had the plaintiff not been exposed to the negligent act of the defendant.
12. Damages.
    In the absence of a present physical injury, patients, who had so far tested negative for blood-borne diseases, including hepatitis B, hepatitis C, and HIV, or who had not yet been tested, stated claim for negligence

against health care facilities that had used unsafe injection practices based on the need to undergo ongoing medical monitoring as a result of the unsafe injection practices at facilities; patients sought medical monitoring as a remedy for negligence, and the injury that they alleged was the exposure to the unsafe conditions that caused them to need to undergo medical testing that they would not have needed in the absence of facilities' purported negligence.

13. Damages.

In the context of medical monitoring claim arising out of toxic tort, requiring exposure to a toxic substance is logical, as a plaintiff could not set forth an argument that he or she needed medical monitoring for something to which he or she had not been exposed.

14. Damages.

In medical monitoring claim, relevant inquiry is not on actual exposure to a toxic substance, but on whether the negligent act of the defendant caused the plaintiff to have a medical need to undergo medical monitoring.

Before Hardesty, Douglas and Cherry, JJ.

OPINION

By the Court, Hardesty, J.:

Following an outbreak of hepatitis C that was linked to unsafe injection practices used in procedures performed at certain health-care facilities in southern Nevada, patients of those facilities who had undergone such procedures were advised to submit to testing for blood-borne diseases, including hepatitis B, hepatitis C, and HIV. This appeal concerns whether, in the absence of a present physical injury, those patients who have so far tested negative for such diseases, or who have not yet been tested, may state a claim for negligence based on the need to undergo ongoing medical monitoring as a result of the unsafe injection practices at these health-care facilities. Because we conclude that such individuals may state a claim for negligence, we reverse the district court's dismissal of the complaint and remand this matter to the district court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants Jack and Susan Sadler, on behalf of themselves and a proposed class of similarly situated individuals,[1] filed a complaint in the district court against respondent PacifiCare of Nevada, Inc., a health maintenance organization, asserting claims of negligence and negligence per se on the ground that PacifiCare failed to perform its duty to establish and implement a quality assurance program to oversee the medical providers within its network. In the complaint,

[1]No class was certified in the district court before the entry of judgment on the pleadings.

the Sadlers alleged that PacifiCare's failure to monitor the medical providers allowed those providers to use unsafe injection practices, including reusing syringes and consequently injecting patients with medications from contaminated vials, which resulted in the Sadlers and the putative class members being "exposed to and/or placed at risk of contracting HIV, hepatitis B, hepatitis C and other blood-borne diseases, requiring subsequent medical monitoring . . . for infections of the same." As relief for their negligence claims, the Sadlers sought to have the court establish a court-supervised medical monitoring program at PacifiCare's expense.

PacifiCare moved for judgment on the pleadings, arguing that the Sadlers' complaint failed to state a negligence claim on the ground that they had not alleged an "actual injury," such as testing positive for a blood-borne illness. Instead, PacifiCare characterized the Sadlers' claim as one for a risk of exposure. And PacifiCare contended that the Sadlers' fear of injury or illness could not support their negligence claims. The Sadlers opposed the motion for judgment on the pleadings, arguing that the injury that must be alleged to state a tort claim does not need to be a physical injury, as suggested by PacifiCare. The crux of the Sadlers' opposition was that, by asserting that PacifiCare's negligence had caused them to need ongoing medical monitoring, they had alleged a legal injury sufficient to support their negligence claims.

Following a hearing on the matter, the district court granted PacifiCare's motion for judgment on the pleadings. In addressing the question of injury, the district court found it significant that the Sadlers had alleged exposure to blood generally, but had not specifically alleged exposure to infected blood. The court therefore concluded that the Sadlers' claims were based on a risk of exposure to infected blood, which the court found was insufficient to allege an injury. On this basis, the court granted judgment in favor of PacifiCare. This appeal followed.

DISCUSSION

Standard of review

[Headnotes 1-3]

Under NRCP 12(c), the district court may grant a motion for judgment on the pleadings when the material facts of the case "are not in dispute and the movant is entitled to judgment as a matter of law." *Bonicamp v. Vazquez*, 120 Nev. 377, 379, 91 P.3d 584, 585 (2004). Because an order granting a motion for judgment on the pleadings presents a question of law, our review of such an order is de novo. *Lawrence v. Clark Cnty.*, 127 Nev. 390, 393, 254 P.3d 606, 608 (2011). As with a dismissal for failure to state a claim, in reviewing a judgment on the pleadings, we will accept the factual

allegations in the complaint as true and draw all inferences in favor of the nonmoving party. *Cf. Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008) (setting forth the standard of review for an order dismissing a complaint under NRCP 12(b)(5)); *see also Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1241 (1987) (explaining that a "motion for a judgment on the pleadings has utility only when all material allegations of fact are admitted in the pleadings and only questions of law remain").

Medical monitoring

[Headnote 4]

The goal of a medical monitoring claim is to require the defendant to pay for the costs of long-term diagnostic testing to aid in early detection of latent diseases that may have been caused by the defendant's tortious conduct. *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 429 (W. Va. 1999). This court has previously considered medical monitoring in only one opinion, *Badillo v. American Brands, Inc.*, 117 Nev. 34, 16 P.3d 435 (2001), in which the plaintiffs sought a judgment requiring the defendant tobacco companies to pay for the plaintiffs' ongoing medical monitoring for tobacco-related diseases. *Id.* at 38, 16 P.3d at 438. There, the federal district court certified a question to this court, asking whether Nevada common law recognizes medical monitoring as either an independent tort action or a remedy. *Id.* at 37-38, 16 P.3d at 437. Considering the specific circumstances presented and the way such claims had been treated by other courts, the *Badillo* court concluded that there is no common law cause of action for medical monitoring in Nevada. *Id.* at 44, 16 P.3d at 441. Further, because Badillo had not identified an underlying cause of action, the court did not reach the question of whether medical monitoring is a viable remedy to a tort claim generally. *Id.* at 41, 16 P.3d at 440.

In this case, the Sadlers have specifically sought medical monitoring as a remedy for negligence, and thus, they do not ask this court to consider whether to recognize medical monitoring as an independent cause of action under the circumstances presented here. PacifiCare does not dispute that medical monitoring may be a viable remedy for a properly stated cause of action, but it contends that the Sadlers have not alleged a present physical injury and, therefore, have not sufficiently stated a claim for negligence. As the *Badillo* court did not answer whether medical monitoring is a remedy for negligence, this appeal presents a question of first impression for this court. To address it, we look first to our general negligence law before turning to how other courts have analyzed the injury requirement in the context of medical monitoring as a remedy.

Negligence

[Headnote 5]

In order to state a claim for negligence, a plaintiff must allege that "(1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the breach was the legal cause of the plaintiff's injuries, and (4) the plaintiff suffered damages."[2] *DeBoer v. Senior Bridges of Sparks Family Hosp., Inc.*, 128 Nev. 406, 412, 282 P.3d 727, 732 (2012). Thus, the third element of a negligence claim contemplates that the plaintiff has suffered an injury. *See id.* As the district court's order and the parties' arguments have all been limited to whether the injury requirement is satisfied in this case, we similarly limit our inquiry to that issue, leaving the remaining elements of the negligence claims to be considered by the district court on remand.

Injury generally

The Sadlers argue that they have alleged an injury based on actual exposure to infected blood by asserting that they were exposed to the blood of other patients and that they were "exposed to and/or placed at risk of contracting HIV, hepatitis B, hepatitis C and other blood-borne diseases." Alternatively, the Sadlers argue that, even if they did not allege actual exposure to contaminated blood, they nonetheless have stated a claim for negligence by alleging that PacifiCare injured them by causing them to need ongoing medical monitoring. Conversely, PacifiCare argues that a plaintiff attempting to state a claim for negligence must allege a present physical injury, such that, here, the plaintiffs would be required to allege that they had actually contracted an illness. In granting judgment in favor of PacifiCare, the district court appears to have recognized that an injury may be found on less than a showing of actual illness, but the court declined to find a cognizable injury because the Sadlers had not alleged actual exposure to contaminated blood.

[Headnote 6]

We begin our inquiry with the broad question, which asks whether the injury needed to state a tort claim must be a *physical* injury, or instead, whether some other type of *legal* injury may satisfy that requirement. Although PacifiCare has not argued that the Sadlers' claims were barred by the economic loss doctrine, our review of the parties' respective positions leads us to conclude that this doc-

[2]As noted above, the Sadlers' complaint alleged both negligence and negligence per se. Because the issue on appeal concerns only whether the Sadlers sufficiently alleged an injury, which would apply to both claims equally, we do not distinguish between the negligence and negligence per se claims within this opinion.

trine is implicated by the issue presented, as it is closely related to the injury requirement. In addressing negligence claims, this court has noted that the "economic loss doctrine marks the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby [generally] encourages citizens to avoid causing physical harm to others." *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 72-73, 206 P.3d 81, 86 (2009) (alteration in original) (internal quotation marks omitted). Thus, under the economic loss doctrine, a plaintiff generally cannot recover on an unintentional tort claim for "purely economic losses." *Id.* at 73, 206 P.3d at 86.

[Headnote 7]

Here, we cannot say that the Sadlers have alleged purely economic losses. While their claims for medical monitoring are based in part on the expense of undergoing such testing, the complaint also alleged that PacifiCare's actions exposed the Sadlers and the other putative class members to unsafe injection practices, putting them at risk for contracting serious blood-borne diseases.[3] This exposure and increased risk are noneconomic detrimental changes in circumstances that the Sadlers alleged they would not have experienced but for the negligence of PacifiCare. As a result, we conclude that the Sadlers' claims are not barred by the economic loss doctrine. Nevertheless, while these changes may constitute something other than economic losses, it still may be said that they do not amount to physical injuries. Thus, we still must determine whether tort law requires that the underlying injury be a physical one.

In *Terracon Consultants*, this court referred to a goal of tort law being to "encourage[ ] citizens to avoid causing physical harm to others," *id.* at 72-73, 206 P.3d at 86 (internal quotation marks omitted), but this court has not previously addressed whether physical harm or physical injury is a necessary element of all tort claims. This court has, however, discussed physical injury in the context of negligent and intentional infliction of emotional distress claims. *See Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 482-83, 851 P.2d 459, 462 (1993); *Nelson v. City of Las Vegas*, 99 Nev. 548, 555, 665 P.2d 1141, 1145 (1983). In that context, this court has required a plaintiff alleging negligent infliction of emotional distress to demonstrate

[3]It is important to distinguish here between considering the increased risk of disease as a circumstance demonstrating that the Sadlers may have suffered a noneconomic loss, and viewing increased risk as an independent claim for damages, which some other courts have rejected as not satisfying the present legal injury requirement, *see, e.g.*, *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30-31 (Ariz. Ct. App. 1987), or as too speculative or difficult to quantify. *See, e.g.*, *Ayers v. Twp. of Jackson*, 525 A.2d 287, 308 (N.J. 1987). Here, the Sadlers have not alleged a cause of action based on increased risk, and thus, whether this court would recognize such a cause of action is outside the scope of our inquiry.

some "physical impact" beyond conditions such as insomnia or general discomfort, *see Chowdhry*, 109 Nev. at 482-83, 851 P.2d at 462, but a physical impact or injury, as opposed to an emotional one, has not necessarily been required to state a claim for intentional infliction of emotional distress. *See Nelson*, 99 Nev. at 555, 665 P.2d at 1145 (setting forth the elements for an intentional infliction of emotional distress claim).

[Headnote 8]

As an intentional infliction of emotional distress claim does not require a physical injury, we cannot conclude that such an injury is necessarily a prerequisite to a tort claim generally. *See id.* Conversely, based on the requirements for a negligent infliction of emotional distress claim, we recognize that a physical injury may be required in order to establish certain torts. *See Chowdhry*, 109 Nev. at 482-83, 851 P.2d at 462. We therefore now consider whether a physical injury must be alleged in order to state a claim for negligence with medical monitoring as a remedy. As the parties have not identified, and our research has not revealed, any Nevada authority specifically requiring a party to allege a physical injury in order to state a negligence claim, particularly one that seeks medical monitoring as a remedy, we look to the decisions of other courts for guidance on this issue.

Physical injury in the context of medical monitoring

Several courts that have considered this issue have rejected medical monitoring claims primarily on the ground that a physical injury must be shown in order to state such a claim.[4] *See, e.g.*, *Hinton ex rel. Hinton v. Monsanto Co.*, 813 So. 2d 827, 829 (Ala. 2001) (concluding that a plaintiff failed to state a claim in the medical monitoring context when he did not allege a present, physical injury); *Wood v. Wyeth-Ayerst Labs., Div. of Am. Home Prods.*, 82 S.W.3d 849, 856-58 (Ky. 2002) (rejecting a claim for medical monitoring on the ground that traditional tort theory requires a plaintiff to demonstrate a present, physical injury). These cases tend to characterize medical monitoring claims as seeking compensation for the threat of future harm or for increased risk of harm. *See Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181, 184 (Or. 2008). And they therefore conclude that the increased risk of harm and consequent need for medical monitoring are insufficient to constitute a present injury

[4]The courts addressing medical monitoring claims have not always clearly distinguished between medical monitoring as an independent cause of action and medical monitoring as a remedy for some other cause of action. Regardless, as our focus herein is on the injury requirement, which is relevant to all of these medical monitoring claims, we do not find it necessary to differentiate between the cases discussing medical monitoring as a cause of action and those applying it as a remedy for a different cause of action. Within this opinion, we therefore use the phrase "medical monitoring claims" to refer to both types of cases.

necessary to state a negligence claim. *See id.* at 184-85; *see also Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 5 (Miss. 2007) ("The possibility of a future injury is insufficient to maintain a tort claim. Recognizing a medical monitoring cause of action would be akin to recognizing a cause of action for fear of future illness.").

We are not convinced that such a restricted view of an injury is appropriate in the present context. As an initial matter, the Restatement (Second) of Torts § 7(1) (1965), broadly defines an injury for the purpose of tort law as "the invasion of any legally protected interest of another." Not only is this definition not limited to physical injury, the same section separately defines "harm" as "the existence of loss or detriment in fact of any kind to a person resulting from any cause," and "physical harm" as "the physical impairment of the human body, or of land or chattels." *Id.* Thus, while these concepts are related, the differing definitions indicate that they are not interchangeable, and more, that injury is generally not limited to physical injury.

Applying the Restatement's definition of injury, a significant number of jurisdictions have concluded that the costs of medical monitoring may be recovered, either as an independent claim or as a remedy for an established tort, even in the absence of a present physical injury. *See, e.g.*, *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993); *Ayers v. Twp. of Jackson*, 525 A.2d 287 (N.J. 1987); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993). One of the earliest cases to consider a medical monitoring claim was *Friends For All Children*, 746 F.2d 816. In that case, a group of orphans was being transported out of South Vietnam when a locking system on their aircraft failed, resulting in "an explosive decompression and loss of oxygen" on the plane. *Id.* at 819. Friends For All Children, an organization acting on behalf of the children, filed a complaint against Lockheed Aircraft Corporation, the manufacturer of the airplane, seeking the establishment of a fund to pay the costs for monitoring the children for a neurological developmental disorder that may have been caused by the sudden decompression or the crash itself. *Id.* In opposing the relief sought by Friends For All Children, Lockheed argued that the District of Columbia would not recognize a claim for damages in the absence of a present physical injury. *Id.* at 824.

In addressing this claim, the *Friends For All Children* court first considered a hypothetical question in which an individual, Jones, was knocked down by the negligence of a second party, Smith. *Id.* at 825. The court reasoned that if Jones went to the hospital and, on the recommendation of his doctors, underwent testing to determine whether he had suffered injuries, Smith would be responsible for the costs of such testing, even if the testing demonstrated that Jones had not actually suffered any physical injuries. *Id.* Following from this hypothetical, and based on the Restatement's definition of injury,

the *Friends For All Children* court held that "an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury." *Id.* at 825-26. Thus, the court concluded that, when that interest is invaded, the defendant should be required to compensate the plaintiff for that invasion. *Id.*

The California supreme court later applied similar reasoning to a claim for medical monitoring in *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795. There, the plaintiffs alleged that the defendant had improperly disposed of toxic waste, exposing the plaintiffs to carcinogens that increased their risk of developing cancer. *Id.* at 801. In opposing the plaintiffs' request for medical monitoring costs, the defendant argued that, even if a present physical injury was not required, the plaintiffs were required to demonstrate that, as a result of the exposure, it was more likely than not that they would develop cancer. *Id.* at 822.

With regard to the need for a present physical injury, the *Potter* court referred back to *Friends For All Children* and the Restatement definition of injury, concluding that these authorities persuasively demonstrated that no physical injury should be required for a medical monitoring claim. *Id.* at 823-24. Moreover, the *Potter* court rejected the argument that the plaintiffs should be required to show a high likelihood that they would develop cancer, concluding instead that a court considering the availability of a medical monitoring recovery should focus on the reasonableness of the need for medical monitoring. *Id.* at 822-23. Additionally, the *Potter* court outlined several important public policy considerations in support of recognizing a medical monitoring recovery, including deterrence against irresponsible handling of toxic chemicals, preventing or mitigating future illness and therefore reducing overall costs, and serving justice by requiring the responsible party to pay the expenses of reasonable and necessary medical monitoring. *Id.* at 824. Relying on the Restatement, the decision in *Friends For All Children*, these policy considerations, and other similar reasoning, a number of other courts have likewise concluded that a physical injury is not required in order to recover the costs of medical monitoring that is reasonably required as a result of the defendant's tortious acts. *See Ayers*, 525 A.2d 287; *Redland Soccer Club, Inc. v. Dep't of the Army & Dep't of Def. of the United States*, 696 A.2d 137 (Pa. 1997); *Hansen*, 858 P.2d 970; *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999).

[Headnote 9]

Our consideration of these authorities persuades us to recognize that a plaintiff may state a cause of action for negligence with medical monitoring as the remedy without asserting that he or she has suffered a present *physical* injury. As discussed above, we have not found anything in this court's precedent or in the Restatement's definition of injury that limits an injury only to a physical one. On the

contrary, the Restatement definition specifically contemplates "the invasion of *any legally protected interest* of another" as an injury. Restatement (Second) of Torts § 7(1) (1965) (emphasis added). And the Restatement separately defines "physical harm," indicating that physical harm is not necessarily implicated by the term "injury." *See id.* § 7(3).

Further, we agree with the reasoning of the *Friends For All Children* court, which held that an individual has a legally protected interest in avoiding expensive diagnostic examinations. 746 F.2d at 826. And although the expense may be an economic loss, that economic loss is accompanied by noneconomic losses, including unwillingly enduring an unsafe injection practice and the resulting increase in risk of contracting a latent disease and need to undergo medical testing that would not otherwise be required. Moreover, as noted in *Potter*, there are significant policy reasons for allowing a recovery for medical monitoring costs, not the least of which is that early detection can permit a plaintiff to mitigate the effects of a disease, such that the ultimate costs for treating the disease may be reduced. 863 P.2d at 823-24. If medical monitoring claims are denied, plaintiffs who cannot afford testing may, through no fault of their own, be left to wait until their symptoms become manifest, losing valuable treatment time. *See id.* Rather than allowing this result, it is more just to require the responsible party to pay for the costs of monitoring necessitated by that party's actions. *See Friends For All Children*, 746 F.2d at 826 ("When a defendant negligently invades [an individual's legal] interest [in avoiding the need for medical testing], the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations.").

PacifiCare argues that a "need to be tested" is far too broad to constitute a legal injury, and indeed, some of the courts that have declined to recognize medical monitoring claims have expressed concern that allowing such claims will open the floodgates to litigation because "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring." *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997). We do not consider this concern to be persuasive, however, as any given plaintiff will still be required to plead and prove the essential elements of their underlying claim, including, for the purpose of a negligence claim, that the defendant actually caused the need for medical testing through a breach of a duty owed to the specific plaintiff. *See DeBoer*, 128 Nev. at 412, 282 P.3d at 732.

[Headnote 10]

Further, in order to establish damages for such a medical monitoring claim, a plaintiff will have to show that he or she incurred costs as a result of the defendant's actions. *See id.*; *see also* Restatement

(Second) of Torts § 902 (1979) (defining damages as "a sum of money awarded to a person injured by the tort of another"). To satisfy this element, it will be necessary for the plaintiff to demonstrate that the medical monitoring at issue is something greater than would be recommended as a matter of general health care for the public at large. *See Redland Soccer Club*, 696 A.2d at 146 (requiring a medical monitoring plaintiff to demonstrate that the "prescribed monitoring regime is different from that normally recommended in the absence of the exposure"). Otherwise, it could not be said that the need for testing was caused by the defendant's breach, and thus, the element of a negligence claim requiring that the defendant's breach be the legal cause of the plaintiff's injuries would not be satisfied. *See DeBoer*, 128 Nev. at 412, 282 P.3d at 732. Thus, we cannot agree that permitting recovery based on a need to be tested will open up the courts to extensive new litigation from individuals exposed to everyday toxic substances.

[Headnote 11]

Before we move on to address the specific allegations in the Sadlers' complaint, we note that, in recognizing medical monitoring remedies, several courts have identified elements or factors that a plaintiff must satisfy in order to recover the costs of monitoring. *See, e.g.*, *Potter*, 863 P.2d at 823; *Redland Soccer Club*, 696 A.2d at 145-46. At this early stage of the district court action, and in light of our treatment of medical monitoring as a remedy, rather than a cause of action, we decline to identify specific factors that a plaintiff must demonstrate to establish entitlement to medical monitoring as a remedy. Instead, we conclude that, in a negligence action for which medical monitoring is sought as a remedy, a plaintiff may satisfy the injury requirement for the purpose of stating a claim by alleging that he or she is reasonably required to undergo medical monitoring beyond what would have been recommended had the plaintiff not been exposed to the negligent act of the defendant.

The Sadlers' complaint

[Headnote 12]

Having concluded that a physical injury is not required to state a negligence claim with medical monitoring as the remedy, we now turn to whether, in light of our decision herein, the Sadlers' complaint sufficiently alleged an injury to state a negligence claim. As noted above, the Sadlers asserted that, as a result of PacifiCare's actions, they were "exposed to and/or placed at risk of contracting HIV, hepatitis B, hepatitis C and other blood-borne diseases." Based on this assertion, the Sadlers argue that they alleged actual exposure to blood-borne diseases, but alternatively, they contend that the allegations regarding their exposure to unsafe injection practices and a need for testing sufficiently alleged an injury. PacifiCare, on the other hand, argues that this statement in the Sadlers' complaint does

not amount to an allegation of actual exposure. And PacifiCare asserts that actual exposure to contaminated blood was, at a minimum, what the Sadlers must have alleged to state their negligence claim.

By using "and/or," the Sadlers failed to connect any particular plaintiff to the allegation that they were "exposed to" a blood-borne disease, as opposed to simply being "placed at risk of contracting" a blood-borne disease without necessarily having been actually exposed to such a disease. *See Gregory v. Dillard's Inc.*, 565 F.3d 464, 473 n.9 (8th Cir. 2009) (explaining that where an allegation referred generally to all plaintiffs and used the "and/or" formulation, it did not "connect any particular plaintiff to any particular allegation"). Thus, we cannot conclude that the Sadlers have alleged actual exposure to a blood-borne disease. Nevertheless, we disagree with PacifiCare that actual exposure to contaminated blood was required.

[Headnote 13]

Because medical monitoring claims largely arise out of the toxic tort area of litigation, most of the cases addressing these claims have involved some form of actual exposure to toxic substances, such as asbestos or potentially harmful chemicals. *See, e.g.*, *Potter*, 863 P.2d 795; *Ayers*, 525 A.2d 287. And several jurisdictions have concluded that a plaintiff must be required to show actual exposure to a known hazardous substance in order to recover on a medical monitoring claim. *See Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1477 (D. Colo. 1991) (concluding that the Colorado courts would find a complaint for medical monitoring to be deficient insofar as it failed to alleged that the plaintiffs had actually been exposed to a toxic substance); *Hansen*, 858 P.2d at 979 (providing that to recover medical monitoring damages, a plaintiff must demonstrate exposure to a toxic substance); *Redland Soccer Club*, 696 A.2d at 145 (holding that a plaintiff must prove "exposure greater than normal background levels . . . to a proven hazardous substance" in order to recover on a medical monitoring claim). Indeed, in the context of a toxic tort action, requiring exposure to a toxic substance is logical, as a plaintiff could not set forth an argument that he or she needed medical monitoring for something to which he or she had not been exposed.

[Headnote 14]

But it cannot be said that exposure to a toxic substance will always be necessary to demonstrate a reasonable need for medical monitoring. In *Friends For All Children*, 746 F.2d at 819, for example, no exposure to toxic substances was involved at all. There, the need for medical monitoring was caused by "an explosive decompression and loss of oxygen" that occurred during an airplane crash and by the airplane crash itself. *Id.* In considering these cases and the concerns at issue, we conclude that the relevant inquiry is not on actual exposure to a toxic substance, but on whether the negligent

act of the defendant caused the plaintiff to have a medical need to undergo medical monitoring.

Here, while the Sadlers may not have alleged that they were actually exposed to contaminated blood, they have alleged, and at this stage in the proceedings their allegations must be accepted as true, that they were exposed to unsafe injection practices and that these unsafe injection practices caused them to need to undergo medical monitoring. The injury that they have alleged is the exposure to the unsafe conditions that caused them to need to undergo medical testing that they would not have needed in the absence of the PacifiCare's purported negligence. As demonstrated by this case and *Friends For All Children*, to require a specific exposure to a contaminant would unnecessarily limit the ability of a plaintiff whose need for medical monitoring arises out of something other than direct exposure to a toxic material. Thus, we conclude that the Sadlers' complaint adequately alleged an injury in the form of exposure to unsafe injection practices that caused a need for ongoing medical monitoring to detect any latent diseases that may result from those unsafe practices.

We therefore further conclude that the district court erred by granting PacifiCare judgment on the pleadings in this case based on the failure of the Sadlers to allege a cognizable injury. As a result, we reverse the judgment on the pleadings and remand this matter to the district court for further proceedings consistent with this opinion.[5]

DOUGLAS and CHERRY, JJ., concur.

ROBERT LESLIE STOCKMEIER, APPELLANT, *v.*
TRACEY D. GREEN, STATE HEALTH OFFICER, RESPONDENT.

No. 62327

December 31, 2014 340 P.3d 583

Proper person appeal from a district court order denying a petition for a writ of mandamus and request for injunction. First Judicial District Court, Carson City; James Todd Russell, Judge.

Inmate at correctional center filed petition seeking mandamus and injunctive relief to compel Chief Medical Officer for the State of Nevada to comply with statute, requiring Chief Medical Officer to periodically examine and semiannually report to Board of State Prison Commissioners regarding nutritional adequacy of diet of incarcerated offenders. The district court denied the petition, and in-

[5]Given our conclusion herein, we need not address the Sadlers' alternative argument that the district court improperly dismissed the medical monitoring claim before they had the opportunity to conduct discovery.

mate, proceeding pro se, appealed. The supreme court reversed and remanded. On remand, the district court denied inmate's petition, and inmate, appearing pro se, appealed. The supreme court, CHERRY, J., held that: (1) Chief Medical Officer's examination of inmate diets and her resulting report to the Board fell short of what was required by statute, and (2) writ of mandamus was warranted to compel Chief Medical Officer to carry out the duties articulated by statute.

Reversed and remanded with instructions.

Robert Leslie Stockmeier, Lovelock, in Proper Person.

Catherine Cortez Masto, Attorney General, Carson City, and *Linda C. Anderson*, Chief Deputy Attorney General, Carson City, for Respondent.

1. MANDAMUS.

   The supreme court reviews a district court's denial of a petition for a writ of mandamus for an abuse of discretion and reviews questions of statutory interpretation de novo.

2. CONSTITUTIONAL LAW; PRISONS.

   While Nevada Chief Medical Officer's examination of inmate diets must account for religious and medical dietary needs and the age, sex, and activity level of the inmates, statute, requiring Chief Medical Officer to periodically examine and semiannually report to Board of State Prison Commissioners regarding nutritional adequacy of diet of incarcerated offenders, establishes no other requirements for what must be addressed or considered by the Chief Medical Officer or what information must be included in the report presented to the Board, and thus, the Legislature has chosen to provide the Chief Medical Officer with considerable discretion in fulfilling her duties under statute, and the supreme court will not infringe on the role of the Legislature by reading into the statute specific steps that the Chief Medical Officer must take in carrying out these statutory duties. NRS 209.382(1)(b).

3. PRISONS.

   Chief Medical Officer's examination of inmate diets and her resulting report to the Board of State Prison Commissioners fell short of what was required by statute, which required Chief Medical Officer to periodically examine and semiannually report to Board regarding nutritional adequacy of diet of incarcerated offenders, given that Medical Officer's report included no analysis of the diets of general population inmates, addressed diets at only one of Nevada's correctional facilities, and generally lacked any indication as to how the required examination was conducted; Medical Officer's report did not detail what foods were being served to inmates at Nevada's various correctional facilities, much less provide any explanation of how these unidentified foods provided inmates with nutritionally adequate diet. NRS 209.382(1)(b).

4. PRISONS.

   While inmate diets need not be a perfect example of nutritional balance, merely ensuring that inmate diets do not cause malnutrition or vitamin deficiencies is not sufficient under statute, requiring Chief Medical Officer to periodically examine and semiannually report to Board of State Prison Commissioners regarding nutritional adequacy of diet of incarcerated offenders; Medical Officer must do something more than merely look for signs of malnutrition or vitamin deficiency in the inmates in order to comply with the requirements imposed by statute. NRS 209.382(1)(b).

5. PRISONS.

In the absence of any evidence regarding the frequency or scheduling of the meetings of Board of State Prison Commissioners, the supreme court would not declare that the statutory semiannual reporting requirement imposed on Chief Medical Officer, to report on nutritional adequacy of diet of incarcerated offenders twice a year, necessitated that Medical Officer provide reports to the Board at strict six-month intervals. NRS 209.382(1)(b).

6. MANDAMUS.

Writ of mandamus was warranted to compel Chief Medical Officer to carry out the duties articulated by statute, requiring Chief Medical Officer to periodically examine and semiannually report to Board of State Prison Commissioners regarding nutritional adequacy of diet of incarcerated offenders, given that evidence demonstrated that Medical Officer had failed to fulfill her statutory duties. NRS 34.160, 209.382(1)(b).

Before HARDESTY, DOUGLAS and CHERRY, JJ.

OPINION

By the Court, CHERRY, J.:

NRS 209.382(1)(b) requires respondent, Nevada's Chief Medical Officer,[1] to periodically examine and semiannually report to the Board of State Prison Commissioners regarding "[t]he nutritional adequacy of the diet of incarcerated offenders." At issue here is the district court's denial of appellant's petition for mandamus and injunctive relief, which sought to compel respondent to comply with the duties imposed by this statute. Our review of this decision requires us to determine whether respondent sufficiently complied with the dictates of NRS 209.382(1)(b). And in this regard, we conclude that respondent's examination of inmate diets and her resulting report to the Board fell well short of what was required, as her report included no analysis of the diets of general population inmates, addressed diets at only one of Nevada's correctional facilities, and generally lacked any indication as to how the required examination was conducted. We therefore reverse the denial of appellant's petition and remand this matter to the district court with instructions to issue a writ of mandamus compelling respondent to exercise her statutory duties in accordance with this opinion.

FACTS AND PROCEDURAL HISTORY

This case began when appellant Robert Leslie Stockmeier, an inmate at Lovelock Correctional Center, filed the underlying district

[1]Since the filing of appellant's petition, the Legislature has replaced the State Health Officer with a Chief Medical Officer. *Compare* 2001 Nev. Stat., 17th Special Sess., ch. 14, § 14, at 194 (prior version of the statute referring to the State Health Officer), *with* NRS 209.382. This opinion will therefore refer to this position as the Chief Medical Officer in accordance with the current version of that statute.

court petition seeking mandamus and injunctive relief to compel respondent Tracey Green, in her capacity as the Chief Medical Officer for the State of Nevada, to comply with NRS 209.382(1)(b) by examining the nutritional adequacy of inmate diets and making the required semiannual reports to the Board regarding her findings. Stockmeier alleged that Green failed to comply with her statutory duties as to either of these requirements. In particular, he maintained that she had never examined the ingredients or nutritional properties of inmate diets and instead relied on the report of a dietician who merely reviewed a printed menu detailing what was being offered to inmates. Stockmeier further asserted that Green had failed to report to the Board regarding a finding from a Nevada Department of Corrections dietician that indicated that the diets served to inmates were high in sodium, cholesterol, and protein, which could lead to obesity, heart disease, and diabetes.

After the petition was filed, Stockmeier moved for summary judgment and Green submitted a response, addressing both the petition and the summary judgment motion, which asserted that she had regularly inspected inmate diets and had recently provided a written report of her findings to the Board. To support this contention, Green attached a cover letter addressed to the Acting Director of the Department of Corrections, which had purportedly been accompanied by her report to the Board. Although the letter indicated that Green had "no recommendations" for improving the inmate diets, a copy of the report was not provided to the district court. Nonetheless, the district court denied the petition, and Stockmeier, proceeding pro se, appealed that decision to this court.

On appeal, this court reversed the district court's denial of Stockmeier's petition. *See Stockmeier v. Green*, Docket No. 58067 (Order of Reversal and Remand, March 13, 2012). In so doing, this court noted that Green had failed to provide the district court with copies of any reports and that she had not submitted any other evidence to refute Stockmeier's assertion that she had failed to exercise the duties imposed by NRS 209.382(1)(b). As a result, this court concluded that the district court had abused its discretion in denying the petition and remanded the matter with instructions to "require [Green] to submit evidence, such as the reports that were purportedly attached to the [cover] letter" so as to allow the district court to address the merits of Stockmeier's petition. *Stockmeier*, Docket No. 58067 (Order of Reversal and Remand, March 13, 2012).

On remand, Green submitted the entire report that she had presented to the Board in 2011 and provided minutes from a December 5, 2011, Board meeting at which she had appeared and informed the Board that she had found no nutritional deficiencies in her inspection of inmate diets. The report that Green provided, however, focused mainly on issues regarding medical care and sanitation in Nevada's prisons, rather than the diets served to the inmate pop-

ulation. To the extent that inmate diets were discussed, the report indicated that a dietician had reviewed the regular and medical diets provided for inmate consumption at one facility every six months and that the hospital at that facility had met the nutritional needs of prisoner-patients.[2]

Following Green's submission of these materials, Stockmeier submitted a response arguing that the report demonstrated Green's failure to comply with NRS 209.382(1)(b) because it contained no discussion of the diets served to general population inmates and only a limited discussion of medical diets for a small number of inmates. In reply, Green asserted that her office maintains only records of deficiencies discovered in inmate diets rather than areas of compliance. She also provided a declaration stating that her employees "regularly inspected the correctional facilities and periodically examined 'the nutritional adequacy of the diet of incarcerated offenders'" in accordance with NRS 209.382(1)(b)'s requirements. Green's declaration did not offer any details regarding how or when the inspections were conducted, although it did state that no cases of malnutrition or vitamin deficiencies had been discovered.

After considering the parties' submissions, the district court denied Stockmeier's petition, concluding that Green had complied with the requirements of NRS 209.382(1)(b) by preparing and presenting the 2011 report to the Board. The district court further agreed with Green's contention that assessing nutritional adequacy merely required her to ensure that inmates were not being malnourished. Despite its conclusion that Green had adequately performed her statutory duties, the district court nonetheless noted Green's failure to carry out her inspection and reporting duties "on a uniform and consistent basis" and cautioned her to continue to comply with NRS 209.382(1)(b) "in a uniform and documented manner." Again representing himself, Stockmeier appealed that determination to this court.

DISCUSSION

NRS 209.381(1) requires that each offender incarcerated at an institution or facility operated by the Nevada Department of Corrections be provided a "healthful diet." To that end, NRS 209.382(1)(b) provides that "[t]he Chief Medical Officer shall periodically examine and shall report to the Board" on a semiannual basis regarding "[t]he nutritional adequacy of the diet of incarcerated offenders taking into account the religious or medical dietary needs of an offender and the adjustment of dietary allowances for age, sex and level of

[2]It appears from the report and Green's response to Stockmeier's civil pro se appeal statement that the dietician had conducted this review at the behest of the correctional facility, rather than as part of Green's inspection of inmate diets.

activity." After the required examination is conducted and the report of that examination is presented to the Board, if the Chief Medical Officer's report reveals any deficiencies in the nutritional adequacy of the diet offered to incarcerated offenders, NRS 209.382(2) provides that "[t]he Board shall take appropriate action to remedy any [reported] deficiencies."

[Headnote 1]

In this appeal, Stockmeier maintains that Green failed to comply with the duties imposed by NRS 209.382(1)(b) and that the district court should have granted his petition and compelled her to do so. Green disagrees. We review a district court's denial of a petition for a writ of mandamus for an abuse of discretion, and we review questions of statutory interpretation de novo. *Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010).

Green failed to comply with the broad examination and reporting requirements set forth in NRS 209.382(1)(b)

[Headnote 2]

While the Chief Medical Officer's examination of inmate diets must account for religious and medical dietary needs and the age, sex, and activity level of the inmates, NRS 209.382(1)(b) establishes no other requirements for what must be addressed or considered by the Chief Medical Officer or what information must be included in the report presented to the Board. In this regard, it seems that the Legislature has chosen to provide the Chief Medical Officer with considerable discretion in fulfilling her duties under NRS 209.382(1)(b), and we will not infringe on the role of the Legislature by reading into the statute specific steps that the Chief Medical Officer must take in carrying out these statutory duties. *See N. Lake Tahoe Fire Prot. Dist. v. Washoe Cnty. Bd. of Cnty. Comm'rs*, 129 Nev. 682, 688, 310 P.3d 583, 588 (2013) (noting that it is the Legislature that makes policy and value choices by enacting laws and that this court's role is to construe and apply those laws). Instead, we limit our consideration to assessing Green's efforts in examining and reporting to the Board regarding the nutritional adequacy of inmate diets.

The report to the Board was inadequate

[Headnote 3]

Our review of the record demonstrates Green's failure to sufficiently examine and report upon the nutritional adequacy of inmate diets. While Green relies on the single 2011 report to support her assertion that she complied with NRS 209.382(1)(b)'s requirements, that report serves only to undermine this position. Green's report primarily focuses on issues other than inmate diets, and the limit-

ed materials included in the report regarding this subject provide no information on, or analysis of, the nutritional adequacy of the general population diets. Indeed, there is nothing in the report to even indicate that Green or her staff actually examined the diets served to the general inmate population. The report's only reference to general population diets is a notation regarding the Lovelock Correctional Center indicating that a dietician "had never been to the [Lovelock] correctional center and [had] only reviewed menus for nutritional adequacy." And as previously noted, the report seems to suggest that this menu-based review was carried out at the direction of the correctional center, rather than as part of Green's examination of inmate diets.

Although the report does not include a copy of these or any other menus, Stockmeier provided the district court with a February 2010 menu from Lovelock Correctional Center. This menu contains no information regarding the nutritional value of the menu items being offered, and in some instances, it does not even describe the type of food being served. For example, every lunch entry on the menu simply describes the lunch offering as "Sacks," while certain dinner offerings are identified as "Chefs Choice." Thus, even if this menu-based review had formed a part of Green's examination of inmate diets, such menus could not possibly provide a basis for sufficiently examining their nutritional adequacy.

And while Green's report also contains some notations regarding the diets provided to Lovelock inmates receiving medical treatment, this information is limited to a yes or no check sheet on which an individual carrying out an inspection of the facility marked "yes" for items such as "[t]he menu for a patient must meet the nutritional needs of the patient" and "[a] hospital shall provide each patient with a nourishing, palatable balanced diet that meets the daily nutritional and dietary needs of the patient." This section of the report, however, provides no indication as to what Green or her staff reviewed in making these findings and contains no information regarding what these inmates were being served or how these meals satisfied the aforementioned requirements.

Altogether, the minimal discussion of the general population and medical diets detailed above, which comprises the totality of the information regarding inmate diets provided in the report, demonstrates Green's failure to faithfully execute the duties imposed upon her by NRS 209.382(1)(b). By its plain language, this statute requires Green, as the Chief Medical Officer, to "periodically examine" and provide semiannual reports to the Board regarding the nutritional adequacy of inmate diets. NRS 209.382(1)(b); *see also Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 370, 252 P.3d 206, 209 (2011) (stating that, when interpreting a statute, this court first looks to the statute's plain language). But Green's report does

not detail what foods are being served to inmates at Nevada's various correctional facilities, much less provide any explanation of how these unidentified foods provide inmates with a nutritionally adequate diet. Further, the limited diet-related information included in the report addresses only the Lovelock Correctional Center, and thus, no information at all is provided regarding inmate diets at any of Nevada's other correctional facilities. And finally, the report fails to offer any explanation of how the examinations were conducted, what standards were used to determine the adequacy of the inmate diets and identify any deficiencies in those diets, or how issues related to inmates' religious and medical dietary needs and their age, sex, and activity levels were accounted for. Even if, as Green asserts on appeal, her office only documents deficiencies discovered in inmate diets, the only information this report could be construed as providing, given the absence of any noted dietary deficiencies in the report, is that the inmates were not malnourished. In this regard, Green maintains that documenting the fact that inmates are not malnourished is enough to comply with NRS 209.382(1)(b). We address this contention next.

Assessing nutritional adequacy requires more than merely ensuring inmates are not malnourished

Stockmeier argues that Green improperly interprets the requirement that she examine the nutritional adequacy of inmate diets as requiring her only to determine whether these diets will cause the inmate population to become malnourished. Green, however, asserts that she is not required to ensure that inmates receive an optimal diet, but rather, need only determine that the diets served do not result in malnutrition or vitamin deficiencies. The district court accepted Green's position on this issue. For the reasons set forth below, we disagree with this conclusion.

[Headnote 4]

While NRS 209.382 does not set forth the specific process required for evaluating the nutritional adequacy of inmate diets, and we in no way imply that inmate diets must be a perfect example of nutritional balance, the language of NRS 209.382(1)(b) demonstrates that merely ensuring that inmate diets do not cause malnutrition or vitamin deficiencies is not sufficient. This statute requires the Chief Medical Officer to "examine" the "nutritional adequacy" of the inmate diets in light of any "religious or medical dietary needs" and the "age, sex and activity level" of the inmates. NRS 209.382(1)(b). Although, as noted above, we decline to set forth additional parameters to guide the Chief Medical Officer in assessing the nutritional adequacy of inmate diets, the Legislature's inclusion of these specific requirements in the otherwise broad language of NRS 209.382(1)(b) convinces us that Green must do something

more than merely look for signs of malnutrition or vitamin deficiency in the inmates in order to comply with the requirements imposed by that statute.[3] And contrary to Green's assertion on appeal, NRS 209.381(1)'s requirement that inmates be fed "a healthful diet" further supports our conclusion that Green's efforts must go beyond merely ensuring that inmates are not malnourished. *See Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009) (holding that statutes should be interpreted in harmony with their statutory scheme). Moreover, as NRS 209.382(2) makes clear, the Chief Medical Officer's examination and report must, at a minimum, provide sufficient information regarding the nutritional adequacy of inmate diets to allow the Board to take "appropriate action to remedy any deficiencies reported."

In sum, the 2011 report and Green's own arguments demonstrate the inadequacy of her efforts to comply with NRS 209.382(1)(b). And while Green submitted a declaration asserting that she and her staff had "regularly inspected the correctional facilities and periodically examined 'the nutritional adequacy'" of inmate diets in accordance with NRS 209.382(1)(b), there is nothing in her declaration, the report, or any other portion of the record to support this statement. Thus, in the absence of any implication in Green's report to the Board to demonstrate that she or her staff actually examined inmate diets, we cannot conclude that she satisfied the minimal requirements of NRS 209.382(1)(b) that she examine and report to the Board regarding the nutritional adequacy of inmate diets.

Writ relief was warranted

[Headnote 5]

Stockmeier's final appellate assertion is that Green has failed to appear and report to the Board every six months as NRS 209.382(1)(b) requires. In responding to this argument, Green does not dispute that she must report to the Board twice a year and expresses her intent to comply with this requirement. In essence then, Green concedes that she has not complied with the statute's semiannual reporting requirement by providing the mandated two reports per year, a position that is supported both by the record and the district court's order, which noted Green's noncompliance with the

[3]To the extent that Stockmeier asserts that Green was required to submit a report from a Department of Corrections dietician stating that inmate diets were high in sodium, cholesterol, and protein, which could lead to obesity, heart disease, and diabetes, to the Board, we reject that assertion, as NRS 209.382(1)(b) does not impose specific requirements on how Green is to report to the Board. Nevertheless, the findings in the dietician's report were relevant evidence demonstrating that Green was not fully complying with the requirement that she examine inmate diets for nutritional adequacy and report her findings to the Board.

reporting requirement, even while denying Stockmeier's petition.[4] Under these circumstances, we must conclude that Green has not complied with the semiannual reporting duties imposed by NRS 209.382(1)(b). Nonetheless, in the absence of any evidence regarding the frequency or scheduling of the Board's meetings, we decline Stockmeier's request to declare that the semiannual reporting requirement necessitates that Green provide reports to the Board at strict six-month intervals.

[Headnote 6]

As detailed above, the record on appeal clearly demonstrates that Green has failed to fulfill the duties imposed on her by NRS 209.382(1)(b). We therefore conclude that Stockmeier has demonstrated that a writ of mandamus was warranted to compel Green to carry out the duties articulated by that statute, NRS 34.160 (providing that mandamus relief is appropriate "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station"); *Mineral Cnty. v. State, Dep't of Conservation & Natural Res.*, 117 Nev. 235, 242-43, 20 P.3d 800, 805 (2001) (holding that, in order for mandamus relief to be appropriate, "the action being compelled must be one already required by law"), and that the district court abused its discretion in denying Stockmeier's petition for a writ of mandamus.[5] *See Reno Newspapers*, 126 Nev. at 214, 234 P.3d at 924 (providing that this court reviews the district court's denial of a petition for a writ of mandamus for an abuse of discretion).

CONCLUSION

For the reasons set forth above, we reverse the district court's denial of Stockmeier's petition and remand this matter to the district court. On remand, the district court shall issue a writ of mandamus ordering Green to comply with the requirements of NRS 209.382(1)(b) in line with this opinion.[6]

HARDESTY and DOUGLAS, JJ., concur.

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[4]Among other things, the district court pointed out that the Governor had actually admonished Green for failing to provide the required reports on a semiannual basis.

[5]In light of the deficiencies identified in Green's report and her failure to comply with the semiannual reporting requirement, the district court's conclusion that Green's mere submission of the 2011 report rendered Stockmeier's petition moot was improper. As a result, we reject Green's assertion that this appeal should likewise be dismissed on mootness grounds.

[6]Because we direct the district court to grant Stockmeier's petition for a writ of mandamus, we do not address the denial of his request for injunctive relief.

CITY OF RENO, APPELLANT, *v.* INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 731; JOHN BECK; JOSHUA BELL; JAMES BIDDLE; MICHAEL BREWER; MATAE CASTILLO; JASON EASTMAN; BENJAMIN ENGLAND; JORDAN HARRIS; TACY KELLY; MATTHEW LUJETIC; KENNETH MCLELLAN; SHAWN PRICE; GEORGE SEARCY; SONNY SNODGRASS; TRAVIS BERTRAND; WESLEY BOATMAN; RICHARD CANADAY; WALTER CORDOVA; JUSTIN GALLI; JOHN GERBATZ; NATHAN GOINS; TREVOR HALL; SEAN O'BRIEN; JESSE WASHINGTON; JEREMY BERNINSKI; MARSHALL BRIN; ALBERT COREA; JACOB LIGHTFOOT; LEONARD MUOZ; TEGG ORDUNO; CHRISTOPHER PEARSON; AND JAMES SCHMIDT, INDIVIDUALLY, RESPONDENTS.

No. 65934

December 31, 2014 340 P.3d 589

Appeal from a district court order granting a preliminary injunction in a labor dispute. Second Judicial District Court, Washoe County; Lidia Stiglich, Judge.

Firefighters union brought action against City, alleging anticipatory breach of contract, breach of the implied covenant of good faith and fair dealing, injunctive relief, and declaratory relief and asserted that planned layoffs violated the collective bargaining agreement (CBA). The district court granted union's request for a preliminary injunction and enjoined City from proceeding with layoffs while union exhausted its contractual grievance and administrative remedies. City appealed. The supreme court, HARDESTY, J., held that: (1) City's decision to layoff union firefighters was not subject to arbitration under the CBA's grievance procedures, and (2) question of whether the CBA created a duty for the parties to arbitrate was not an issue for an arbitrator, subject to judicial review.

Reversed.

John J. Kadlic, City Attorney, and *Mark W. Dunagan* and *William E. Cooper, Jr.*, Deputy City Attorneys, Reno; *Fisher & Phillips LLP* and *Mark J. Ricciardi* and *Whitney J. Selert*, Las Vegas, for Appellant.

Dyer, Lawrence, Penrose, Flaherty, Donaldson & Prunty and *Thomas J. Donaldson, Sandra G. Lawrence*, and *Sue S. Matuska*, Carson City, for Respondents.

Neil A. Rombardo, District Attorney, and *Randal R. Munn*, Chief Deputy District Attorney, Carson City, for Amicus Curiae City of Carson City.

Steven B. Wolfson, District Attorney, and *Mary Anne Miller*, County Counsel, Clark County, for Amicus Curiae Clark County.

Mark B. Jackson, District Attorney, and *Douglas V. Ritchie*, Chief Civil Deputy District Attorney, Douglas County, for Amicus Curiae Douglas County.

Josh M. Reid, City Attorney, and *F. Travis Buchanan*, Assistant City Attorney, Henderson, for Amicus Curiae City of Henderson.

Holley, Driggs, Walch, Puzey & Thompson and *Clark V. Vellis*, Las Vegas, for Amicus Curiae Nevada League of Cities and Municipalities.

Bradford R. Jerbic, City Attorney, and *Morgan Davis*, Chief Deputy City Attorney, Las Vegas, for Amicus Curiae City of Las Vegas.

McDonald Carano Wilson LLP and *Jeff A. Silvestri* and *Seth T. Floyd*, Las Vegas, for Amicus Curiae Nevada Taxpayers Association.

Sandra Douglass-Morgan, City Attorney, and *Claudia E. Aguayo*, Senior Deputy City Attorney, North Las Vegas, for Amicus Curiae City of North Las Vegas.

Brian T. Kunzi, District Attorney, Nye County, for Amicus Curiae Nye County.

William A. Maddox, District Attorney, Storey County, for Amicus Curiae Storey County.

1. Labor and Employment.
   City's decision to layoff union firefighters due to a purported lack of funds necessary to retain the firefighters did not fall within the scope of the collective bargaining agreement (CBA) and, thus, was not subject to arbitration under the CBA's grievance procedures; arbitration, as the last step of the grievance process in the CBA, was limited to disputes that fell within the scope of the CBA, and a reduction in force due to lack of funds is excluded from mandatory bargaining and reserved to the local government employer without negotiation by statute. NRS 288.150(3)(b).
2. Labor and Employment.
   Arbitration is a favored means of resolving labor disputes.
3. Alternative Dispute Resolution; Labor and Employment.
   Disputes concerning the arbitrability of a subject matter are resolved under a presumption in favor of arbitration; courts should therefore order arbitration of particular grievances unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.
4. Labor and Employment.
   In cases involving broadly worded arbitration clauses, when there is no express provision excluding a particular grievance from arbitration, only

the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.

5. Labor and Employment.
   Labor arbitration is a product of contract, and therefore, its legal basis depends entirely upon the particular contracts of particular parties; and as a matter of contract, a party cannot be required to submit to arbitration any dispute that the party has not agreed so to submit.
6. Labor and Employment.
   An arbitrator's jurisdiction to resolve a dispute concerning the interpretation of a collective bargaining agreement derives from the parties' advance agreement to submit the disputed matter to arbitration; thus, despite the presumption of arbitrability, the arbitrator's jurisdiction derives from contract, and the arbitrator is limited to resolving disputes over the terms of that contract.
7. Labor and Employment.
   In action by firefighter's union, in which it asserted planned budget-related layoffs by City violated the collective bargaining agreement (CBA), the question of whether the CBA created a duty for the parties to arbitrate was not an issue for an arbitrator, subject to judicial review; the very language of the CBA contained forceful language that the matter of budget-related layoffs was excluded from bargaining and therefore not subject to arbitration.
8. Labor and Employment.
   The question of whether a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance is generally an issue for judicial determination, except when the parties clearly and unmistakably provide otherwise.

Before the Court En Banc.

OPINION

By the Court, Hardesty, J.:

Appellant laid off certain firefighters claiming that it lacked the money necessary to continue paying their salaries and benefits. The district court enjoined appellant from implementing its decision while respondents pursued arbitration of their grievance disputing that appellant lacked the money to support the positions. In this appeal, we must determine whether respondents' grievance is arbitrable where the parties recited in their collective bargaining agreement appellant's statutory right to lay off any employee due to a lack of funds. Because we conclude that the underlying grievance is not arbitrable under the parties' collective bargaining agreement and thus, there is no authority under NRS Chapter 38 for the district court's injunctive relief decision, we reverse the district court's order.

FACTS AND PROCEDURAL HISTORY

In May 2014, the City of Reno decided to lay off 32 firefighters after the City learned that its application to renew a federal grant,

which had funded those positions, had been denied. Pursuant to Article 2 of the collective bargaining agreement (CBA) between the City and the International Association of Firefighters, Local 731, the City based its decision on its budget shortfalls—a "lack of funds"—and the need to allocate money to other areas. Article 2 of the CBA provides that certain rights, including the right to lay off any employee due to lack of work or lack of funds, are not subject to mandatory bargaining and are reserved to the City without negotiation. Before the layoffs occurred, the International Association of Firefighters, Local 731, and the 32 firefighters who would be laid off (collectively, IAFF) challenged the City's decision by filing a grievance using the grievance procedure of the CBA, asserting that there was no lack of funds to support the City's decision to lay off the firefighters.[1] The grievance was denied, and the IAFF requested that the matter be submitted to arbitration.

Recognizing that the layoffs were set to occur and that the arbitrator lacked authority to enjoin the layoffs pending arbitration, the IAFF filed the underlying complaint in the district court, alleging four claims for relief: anticipatory breach of contract, breach of the implied covenant of good faith and fair dealing, injunctive relief, and declaratory relief. The complaint asserted that the layoffs violate the CBA, which governs the terms and conditions of the firefighters' employment, and that the City had sufficient discretionary funds and revenue to continue the firefighters' employment. The IAFF also filed a motion for preliminary injunctive relief under NRS Chapter 38. The City moved to dismiss the complaint for lack of jurisdiction due to the IAFF's failure to exhaust contractual and administrative remedies.

The district court concluded that it was empowered to rule on the request for injunctive relief to ensure that the arbitration of the IAFF's grievance was not frustrated pursuant to its statutory authority under NRS 38.222 and its authority to administer equity in civil actions under Article 6, Section 14 of the Nevada Constitution. Based on that conclusion, the district court granted the IAFF's request for a preliminary injunction and enjoined the City from proceeding with the layoffs while the IAFF exhausts its contractual grievance and administrative remedies.

The City filed this appeal from the district court's preliminary injunction order, and concurrently moved the district court to stay the preliminary injunction pending resolution of the appeal. The district court denied the City's request to stay the injunction while the City

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[1]Although it is difficult to discern the specific nature of the grievance because it generally alleges violations of numerous articles of the CBA, NRS Chapter 288, "and other agreements and documents," the grievance specifically states that the violations arose when the City "gave layoff notices to Local 731 members when there is no lack of funds or lack of work."

pursued this appeal, but granted without prejudice the City's motion to dismiss the IAFF's breach of contract and declaratory relief claims based on the IAFF's failure to exhaust its administrative remedies. The district court did not dismiss the injunctive relief claim, however, and the preliminary injunction remains in effect.

DISCUSSION

[Headnote 1]

To resolve this appeal, we must address whether the district court had jurisdiction to grant the injunctive relief requested by the IAFF. The City contends that the district court lacked jurisdiction to grant injunctive relief because the underlying dispute regarding the propriety of the layoffs is governed by NRS Chapter 288 and thus, falls within the exclusive jurisdiction of the Employee-Management Relations Board (EMRB).[2] The IAFF rejects this contention and instead defines its claim as a breach of the CBA, asserting that arbitration of its grievance is therefore the appropriate remedy and that the district court correspondingly had authority to enter a preliminary injunction.

In its order granting injunctive relief, the district court focused on the contractual remedies sought by the IAFF and concluded that it had authority under NRS 38.222 to grant a preliminary injunction while the parties pursued arbitration of the dispute. That statute, part of the Uniform Arbitration Act of 2000, provides that before an arbitrator is authorized and able to act in a dispute, the district court "may enter an order for provisional remedies to protect the effectiveness of the arbitral proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action." NRS 38.222(1). The IAFF initiated arbitration under Article 24 of the CBA, which allows the IAFF to submit a grievance to arbitration if that grievance is not settled with the City Manager.[3]

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[2]Although not dispositive of this appeal, to the extent that the IAFF's grievance can be read to seek relief under NRS Chapter 288, it does not provide a basis for the district court's preliminary injunction because the EMRB has exclusive jurisdiction over such matters and the district court would be required to dismiss the underlying claims as nonjusticiable for failure to exhaust administrative remedies. *See City of Henderson v. Kilgore*, 122 Nev. 331, 336-37 & n.10, 131 P.3d 11, 14-15 & n.10 (2006) (explaining that the failure to exhaust administrative remedies renders the matter unripe for court review, and that the EMRB must decide the complaint before any basis will exist for injunctive relief).

[3]Subsection (a) of Article 24 provides that "[a] grievance is a disagreement between an individual, or the Union, and the City concerning interpretation, application or enforcement of the terms of this Agreement." And subsection (b) outlines the grievance process, which begins with a discussion between the individual and his or her supervisor, then continues with presenting a written grievance to the Fire Chief, submitting the grievance to the City Manager, and finally, if still unresolved, submitting the grievance to arbitration.

The IAFF contends that the arbitrator should determine whether the City lacked the funds necessary to retain the firefighters so as to properly lay off those employees pursuant to Article 2 of the CBA. Before that question can be addressed, however, we must first determine whether the City's budget-related layoff decision is actually subject to arbitration under the terms of the CBA. As discussed below, we conclude that by its language reserving the non-negotiable right, Article 2 of the CBA exempts the City's layoff decision due to lack of funds from arbitration.

[Headnotes 2-4]

Arbitration is a favored means of resolving labor disputes. *Port Huron Area Sch. Dist. v. Port Huron Educ. Ass'n*, 393 N.W.2d 811, 814 (Mich. 1986). In Nevada, disputes concerning the arbitrability of a subject matter are resolved under a presumption in favor of arbitration. *Clark Cnty. Pub. Emps. Ass'n v. Pearson*, 106 Nev. 587, 591, 798 P.2d 136, 138 (1990). Courts should therefore "order arbitration of particular grievances 'unless it may be said with *positive assurance* that the arbitration clause is not susceptible of *an* interpretation that covers the asserted dispute.'" *Id*. (quoting *Int'l Ass'n of Firefighters, Local # 1285 v. City of Las Vegas*, 104 Nev. 615, 620, 764 P.2d 478, 481 (1988)). In cases involving broadly worded arbitration clauses, when there is no express provision excluding a particular grievance from arbitration, only the "most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id*. (internal quotation omitted).

[Headnotes 5, 6]

Nevertheless, "[l]abor arbitration is a product of contract, and, therefore, its legal basis depends entirely upon the particular contracts of particular parties." *Port Huron*, 393 N.W.2d at 814. And as a matter of contract, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (internal quotation omitted). An arbitrator's jurisdiction to resolve a dispute concerning the interpretation of a collective bargaining agreement derives from the parties' advance agreement to submit the disputed matter to arbitration. *Id*. at 648-49; *see also Port Huron*, 393 N.W.2d at 814-15 (explaining that an arbitrator possesses no general jurisdiction to resolve disputes concerning the interpretation of a collective bargaining agreement independent of the terms of the contract itself). Thus, despite the presumption of arbitrability, the arbitrator's jurisdiction derives from contract and the arbitrator is limited to resolving disputes over the terms of that contract. We must, therefore, look to the language of the CBA between the City and the IAFF to determine whether the dispute here is subject to arbitration. *See Port Huron*, 393 N.W.2d at 815 ("Parties consenting to

arbitration pursuant to written agreements consent to arbitrate within the framework of the terms and conditions of such agreements.").

Article 24 sets forth the grievance procedure by which an individual or the union may seek resolution of a dispute "concerning [the] interpretation, application, or enforcement of the terms of this Agreement." By its very language, the grievance procedure only applies to the terms of the CBA, and therefore it cannot apply to matters outside the CBA's scope. Arbitration, as the last step of the grievance process in the CBA, is similarly limited to disputes that fall within the scope of the CBA. *See City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 894, 59 P.3d 1212, 1216 (2002) (noting that when a collective bargaining agreement is at issue, the arbitrator's award must be based on that agreement); *see also United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960) (explaining that if an act is specifically excluded from the grievance procedure in the collective bargaining agreement or from arbitration in any other agreement, then a grievance based solely on that subject matter would not be arbitrable).

The IAFF's grievance asserts that the City violated the CBA when it "gave layoff notices to Local 731 members when there is no lack of funds or lack of work." That action is discussed in Article 2 of the CBA. Article 2 concerns "Management Rights" that "are not within the scope of mandatory bargaining and which are reserved to the local government employer without negotiation." Included in these rights is the local government employer's "right to reduce in force or lay off any employee because of lack of work or lack of funds, subject to paragraph (v) of subsection 2, of NRS 288.150." The fact that the parties expressly agreed in Article 2 to reserve that right to the City *without negotiation* is the most forceful evidence that layoffs for lack of funds is not a decision subject to mandatory bargaining and therefore falls outside the scope of the CBA, which encompasses the bargained-for terms between the parties. To interpret Article 2 otherwise and require arbitration over the City's decision to lay off employees based on a lack of funds would be inconsistent with the language of the provision, and would render meaningless the City's agreed upon reservation of that right. The language of Article 2 itself provides the requisite evidence of the parties' intent to exclude from arbitration the IAFF's grievance challenging the City's layoff decision. *Pearson*, 106 Nev. at 590, 798 P.2d at 137 ("Whether a dispute is arbitrable is essentially a question of construction of a contract."); *State v. Second Judicial Dist. Court*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009) (explaining that "[i]n interpreting a contract, we construe a contract that is clear on its face from the written language, and it should be enforced as written").

We further note that the reduction in force due to lack of funds is excluded from mandatory bargaining and reserved to the lo-

cal government employer without negotiation by law. *See* NRS 288.150(3)(b) (reserving to the local government employer "[t]he right to reduce in force or lay off any employee because of lack of work or lack of money" subject to mandatory bargaining over the procedures for reduction in workforce as delineated in NRS 288.150(2)(v)); *see also Grievance Arbitration Between Haw. Org. of Police Officers v. Haw. Cnty. Police Dep't*, 61 P.3d 522, 529-31 (Haw. Ct. App. 2002). The IAFF argues that by merely incorporating language almost identical to NRS 288.150(3) in Article 2 of the CBA, the parties subjected the City's decision to lay off employees due to a lack of funds to arbitration. We do not agree. Because the arbitration clause does not encompass the matters listed in Article 2, it would exceed the arbitrator's powers under the CBA to assume arbitral jurisdiction over the IAFF's grievance challenging the City's determination that a lack of funds required the reduction in force, which the parties agreed was a reserved management right not subject to negotiation. *See Int'l Ass'n of Firefighters, Local 1285 v. City of Las Vegas*, 107 Nev. 906, 910, 823 P.2d 877, 879 (1991) (recognizing that if an arbitrator's award relies on an interpretation that contradicts the express language of the collective bargaining agreement, the arbitrator's action exceeds his or her authority); *see also Port Huron*, 393 N.W.2d at 814-15 (noting that an arbitrator's jurisdiction to resolve a dispute over a collective bargaining agreement is derived exclusively from the agreement itself). Thus, the IAFF's grievance is not subject to arbitration under Article 24 and the reduction in force due to lack of funds instead remains within the City's sole discretion in the first instance.[4]

Here, the district court erroneously rejected the City's contractual non-negotiable right to make budget-related reduction in force decisions by concluding that such an interpretation of Article 2 "would essentially mean public employees subject to NRS 288.150 have no ability to bargain over the procedures for reduction in the workforce" because any such bargaining over procedures "would be trumped by the City's exclusive ability to determine a lack of work or funds exists." The district court appears to conflate *the right* to reduce the workforce with *the procedures* for carrying out such a reduction. NRS 288.150(2)(v) requires mandatory bargaining over the "[p]rocedures for reduction in workforce consistent with the provisions of [NRS Chapter 288]." The parties' bargained-for terms of personnel reduction are contained in Article 35, and require only that "reductions in force shall be in accordance with departmental seniority" and "[n]o new employee shall be hired until all laid off employees have been given a reasonable opportunity to be

[4]The IAFF's grievance did not allege that the City's layoff decision was made in bad faith, and thus, this opinion does not address any other possible challenges to the City's decision.

rehired." Based on the record before us, the IAFF did not specifically allege that the City violated these bargained-for procedures, which, if grieved, would be subject to arbitration under the CBA as a violation of its terms. Furthermore, even the district court recognized that aside from bargaining over the procedure for reducing the workforce, "[n]o greater limitation on the City's ability to lay off [the firefighters] could have been agreed upon due to the statutory restriction" under NRS 288.150(3).[5] *See City of Phila. v. Int'l Ass'n of Firefighters, Local 22*, 999 A.2d 555, 571 (Pa. 2010) (explaining that the exercise of nonbargainable managerial prerogatives of a public employer lies beyond the scope of collective bargaining and cannot be infringed upon).

[Headnotes 7, 8]

Having concluded that the IAFF's grievance alleging a violation of Article 2 is not a dispute that the parties agreed to submit to arbitration pursuant to the terms of the CBA, *see AT&T*, 475 U.S. at 651 (noting that if an arbitrator was free to impose obligations outside the collective bargaining agreement, the result would be "antithetical to the function of a collective-bargaining agreement as setting out the rights and duties of the parties"), we now address the IAFF's argument that the question of arbitrability should be left to the arbitrator to decide, subject to judicial review.[6] It is well established that the question of whether a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance is generally an issue for judicial determination, except when the parties clearly and unmistakably provide otherwise. *See AT&T*, 475 U.S. at 649. Although this court in *International Ass'n of Firefighters, Local # 1285 v. City of Las Vegas* determined that a general collective bargaining agreement provision directing the arbitrator to determine the issue of arbitrability—similar to the broadly worded arbi-

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[5]The district court's order also concludes that "[f]irefighter safety is subject to collective bargaining pursuant to NRS 288.150(2)(r)," and that the IAFF's evidence that firefighter safety would be jeopardized by the layoffs demonstrated a "reasonable probability of success on the merits." Article 12 of the CBA sets forth the bargained-for provisions for firefighter safety and health, but the IAFF's grievance itself does not list Article 12 as one of the provisions it alleged the City violated. Furthermore, by challenging the layoff decision itself, the IAFF has not alleged a violation of any of the terms of Article 12, which includes the process for determining safety hazards and sets forth the protective equipment the City is required to provide.

[6]Appellate courts generally do not construe collective bargaining agreements and arbitration clauses in the first instance; an initial determination of arbitrability is usually made by the district court. *See AT&T*, 475 U.S. at 651-52 (remanding for the trial court to determine whether a particular grievance was subject to arbitration). As a practical matter, however, the district court referred the case to the arbitrator to determine whether the City actually lacked the funds so as to properly lay off the firefighters. Because the district court impliedly reached the question of arbitrability, we review that determination on appeal.

tration clause in Article 24(h)—is clear and unmistakable evidence that arbitrability is not to be decided by the court absent forceful evidence otherwise, 112 Nev. 1319, 1324, 929 P.2d 954, 957 (1996), the very language of the CBA here contains forceful evidence that the matter of budget-related layoffs is excluded from bargaining and is therefore not subject to arbitration. *See IBEW Local 396 v. Cent. Tel. Co.*, 94 Nev. 491, 493, 581 P.2d 865, 867 (1978) (explaining that on judicial review of an arbitration award, the reviewing court determines whether "the party seeking arbitration is making a claim which on its face is governed by the contract" (internal quotation omitted)). Consequently, we do not defer to the arbitrator to determine arbitrability. Additionally, resolving the question of arbitrability at this stage of the dispute furthers judicial economy and the need to provide guidance to the parties on the important and time-sensitive budgetary issues concerning the City and other local government employers who may be affected by the decision set forth herein.[7]

Accordingly, we conclude that the district court lacked authority to rule on the request for injunctive relief and the preliminary injunction was thus entered in error. We therefore reverse the district court's order.[8]

GIBBONS, C.J., and PICKERING, PARRAGUIRRE, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

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[7]The cities of Henderson, Las Vegas, and North Las Vegas, Clark County, and Nye County filed an amicus curiae brief in support of the City of Reno's position, expressing their concerns about the effect that the disposition of this appeal may have on all local government employers in Nevada. Douglas County, Storey County, Carson City, the Nevada Taxpayer's Association, and Nevada League of Cities and Municipalities also joined in the amicus curiae brief.

[8]In light of this opinion and given the district court's order dismissing all of the IAFF's other claims, the district court's alternate ground for granting injunctive relief based on its authority under the Nevada Constitution to administer equity has no foundation and we need not address it further here. This court's decision necessarily renders moot the City's motion to stay the district court's preliminary injunction pending resolution of this appeal.