Rentals, Inc., 124 Nev. 272, 278, 182 P.3d 764, 768 (2008) (affirming the district court's treatment of the opposing party's failure to oppose a motion for attorney fees as an admission that the moving party's motion was meritorious). We therefore affirm the district court's award of attorney fees to Helmut.

Because Kinion and Elfriede are no longer prevailing parties on Spencer's defamation claim, we vacate the awards of attorney fees in their favor

Because we reverse the district court's order granting summary judgment to Kinion and Elfriede on the defamation counterclaims, the district court's characterization of these respondents as the prevailing parties under NRS 18.010(2)(b) might change on remand. We therefore vacate both awards of attorney fees.

Consistent with the foregoing, we affirm in part, reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

Parraguirre and Hardesty, JJ., concur.

LYNITA SUE NELSON, Appellant, *v.* ERIC L. NELSON, Individually and in His Capacity as Investment Trustee of the Eric L. Nelson Nevada Trust Dated May 30, 2001; and MATT KLABACKA, as Distribution Trustee of the Eric L. Nelson Nevada Trust Dated May 30, 2001, Respondents.

No. 77473

July 9, 2020 466 P.3d 1249

Appeal from a district court order denying a request for a joint preliminary injunction in a family law matter. Eighth Judicial District Court, Family Court Division, Clark County; Frank P. Sullivan, Judge.

Appeal dismissed.

The Dickerson Karacsonyi Law Group and *Robert P. Dickerson* and *Josef M. Karacsonyi*, Las Vegas, for Appellant.

Solomon Dwiggins & Freer, Ltd., and *Jeffrey P. Luszeck* and *Mark A. Solomon*, Las Vegas, for Respondent Matt Klabacka.

Throne & Hauser and *Dawn R. Throne*, Henderson, for Respondent Eric L. Nelson.

Before the Supreme Court, Gibbons, Stiglich and Silver, JJ.

OPINION

By the Court, Stiglich, J.:

In this appeal, we consider whether this court has jurisdiction to review a district court order denying a request for a joint preliminary injunction pursuant to EDCR 5.517 in a family law matter. While joint preliminary injunctions under EDCR 5.517 are injunctions, we hold that NRAP 3A(b)(3) permits appeals only from injunctions pursuant to NRCP 65, and joint preliminary injunctions under EDCR 5.517 are not subject to NRCP 65. We therefore conclude that we do not have jurisdiction to review such an order under NRAP 3A(b)(3). Because no court rule or statute permits an appeal of a district court order denying a request for a joint preliminary injunction pursuant to EDCR 5.517, we dismiss this appeal.

PROCEDURAL BACKGROUND

Appellant Lynita Nelson and respondent Eric Nelson, while married, both signed a separate property agreement that transmuted their community property into two separate property trusts. They then created two other separate self-settled spendthrift trusts, the Eric L. Nelson Nevada Trust (ELN Trust) and the Lynita S. Nelson Nevada Trust (LSN Trust), which were funded by their separate property trusts. Respondent Matt Klabacka later became distribution trustee of the ELN Trust. After Eric filed for divorce in 2009, the clerk of the court issued a joint preliminary injunction pursuant to EDCR 5.85,[1] which prohibited the parties and the trusts from disposing of any property subject to any community interest claim. The district court issued a divorce decree that equalized the trust assets and ordered some assets in the ELN Trust to be transferred to the LSN Trust. On appeal, we vacated the decree in part and remanded. *See Klabacka v. Nelson*, 133 Nev. 164, 182, 394 P.3d 940, 954 (2017). We concluded that the ELN Trust and LSN Trust were funded with separate property and therefore remanded for the district court to conduct proper tracing to determine community interests. *Id.* at 165, 171-73, 394 P.3d at 943, 947-48.

On remand, Lynita moved for the district court to reaffirm its prior joint preliminary injunction pursuant to EDCR 5.517. However, the district court issued a preliminary injunction for only two assets subject to community property claims and, in an October 16, 2018,

[1]EDCR 5.517 replaced EDCR 5.85 in 2017. *See In re Proposed Amendments to Part V of the Rules of Practice for the Eighth Judicial Dist. Court*, ADKT 0512 (Order Amending the Rules of Practice for the Eighth Judicial District Court Part V, Dec. 28, 2016). The Eighth Judicial District Court rules were again amended effective January 1, 2020, and EDCR 5.517 was renumbered as EDCR 5.518. *See In re Proposed Amendments to the Rules of Practice for the Eighth Judicial Dist. Court*, ADKT 0545 (Order Amending the Rules of Practice for the Eighth Judicial District Court, Nov. 27, 2019).

order, declined to extend the injunction to other assets in the ELN Trust. Lynita appealed the district court order declining to extend the injunction. Klabacka and Eric argued that the district court's order was not appealable. Our review of the case revealed a potential jurisdictional defect, and we directed Lynita to show cause why the appeal should not be dismissed for lack of jurisdiction. *See Nelson v. Nelson*, Docket No. 77473 (Order to Show Cause, January 27, 2020). All parties filed briefs in response.

DISCUSSION

This court has jurisdiction to consider an appeal only when the appeal is authorized by statute or court rule. *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 444, 874 P.2d 729, 732 (1994). "No order of the lower court, no sanction, or permit, can authorize this court to take cognizance of a matter on appeal unless the right of appeal clearly appears as a matter of law." *State v. State Bank & Tr. Co*., 36 Nev. 526, 538, 137 P. 400, 403 (1913). Lynita argues that this court has jurisdiction to review her appeal under NRAP 3A(b)(3). We disagree.

NRAP 3A(b)(3) grants jurisdiction only to review orders granting or denying injunctions pursuant to NRCP 65

NRAP 3A(b) provides that "[a]n appeal may be taken from the following judgments and orders of a district court in a civil action," including "[a]n order granting or refusing to grant an injunction or dissolving or refusing to dissolve an injunction." *See* NRAP 3A(b)(3). In interpreting NRAP 3A(b)(3), we have held that "injunctions are governed by NRCP 65, which sets forth the procedure for seeking an injunction and the form that an order granting an injunction must take." *Peck v. Crouser*, 129 Nev. 120, 124, 295 P.3d 586, 588 (2013). Accordingly, we have held that post-judgment vexatious litigant orders restricting a party's court access were not subject to NRCP 65 and therefore were not appealable under NRAP 3A(b)(3). *Id*.

Joint preliminary injunctions pursuant to EDCR 5.517 are not governed by NRCP 65

EDCR 5.517 provides that

> (a) Upon the request of any party at any time prior to the entry of a decree of divorce or final judgment, a preliminary injunction will be issued by the clerk against the parties to the action enjoining them . . . from:
>
> (1) Transferring, encumbering, concealing, selling, or otherwise disposing of any of the joint, common, or community property of the parties or any property that is the subject of a claim of community interest. . . .

A joint preliminary injunction prevents both parties from taking certain actions while the divorce proceeding is pending and "remain[s] in effect until a decree of divorce or final judgment is entered or until modified or dissolved by the court." *See* EDCR 5.517(d).

Joint preliminary injunctions issued pursuant to EDCR 5.517, however, are not subject to NRCP 65. NRCP 65(e) explicitly provides that "[t]his rule is not applicable to actions for divorce, alimony, separate maintenance, or custody of children." *See City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989) (providing that when the language of a statute is plain and unambiguous, this court shall "give [the] language its ordinary meaning and not go beyond it"); *see also Weddell v. Stewart*, 127 Nev. 645, 651, 261 P.3d 1080, 1084 (2011) ("[R]ules of statutory construction apply to court rules."). Because NRCP 65 excludes family division matters and EDCR 5.517 contains its own procedure for joint preliminary injunctions in family division matters, such preliminary injunctions under EDCR 5.517 are not governed by NRCP 65. *See* EDCR 5.101. As such, orders granting or denying injunctions pursuant to EDCR 5.517 are not appealable under NRAP 3A(b)(3). *See Peck*, 129 Nev. at 124, 295 P.3d at 588.

We treat injunctions in family law matters differently because they differ procedurally from those governed by NRCP 65. For example, to obtain a preliminary injunction under NRCP 65, "the moving party must show that there is a likelihood of success on the merits and that the nonmoving party's conduct, should it continue, would cause irreparable harm for which there is no adequate remedy at law." *Dep't of Conservation & Nat. Res., Div. of Water Res. v. Foley*, 121 Nev. 77, 80, 109 P.3d 760, 762 (2005). Under NRCP 65, a court may issue a preliminary injunction only upon notice to the adverse party and security from the moving party. NRCP 65(a)(1), (c).

Joint preliminary injunctions issued pursuant to EDCR 5.517, on the other hand, require no showing of probable success or harm. Rather, the clerk of the court must issue such injunction upon the request of either party. EDCR 5.517(1); *see Natural Res. Def. Council, Inc. v. Perry*, 940 F.3d 1072, 1078 (9th Cir. 2019) ("The word 'will,' like the word 'shall,' is a mandatory term, unless something about the context in which the word is used indicates otherwise." (internal citation omitted)). Joint preliminary injunctions issued pursuant to EDCR 5.517 also do not require any bond. *See* EDCR 5.517; NRCP 65(e)(1) (indicating that in actions for divorce, alimony, separate maintenance, or custody of children, "the court may make prohibitive or mandatory orders, with or without notice or bond"). Because of the greater flexibility and ability for the district court to modify or dissolve joint preliminary injunctions, those injunctions also do not invoke the same finality as injunctions under NRCP 65. *See Turner v. Saka*, 90 Nev. 54, 63 n.10, 518 P.2d 608, 614 n.10 (1974) (noting that NRCP 65(e) (formerly subsection f) "may be read to envision

somewhat greater flexibility and less formality in domestic matters than in other litigation"). We therefore conclude that orders granting or denying injunctions pursuant to EDCR 5.517 are not appealable under NRAP 3A(b)(3).

Writ relief is appropriate

Lynita argues that if we decline to review this appeal, she will have no adequate remedy at law. Even so, Lynita may file a writ petition. *See Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 649, 5 P.3d 569, 571 (2000) (concluding that where no rule or statute provides jurisdiction for the court to entertain an appeal, relief must be sought by an original writ petition pursuant to NRS Chapter 34). Given the mandatory language in EDCR 5.517, a writ petition would be the appropriate vehicle to seek review of the district court's order for an arbitrary or capricious exercise of its discretion. *See Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) ("A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." (footnote omitted)).

CONCLUSION

We hold that joint preliminary injunctions under EDCR 5.517 are not subject to NRCP 65 and therefore orders denying or granting injunctions under EDCR 5.517 are not appealable under NRAP 3A(b)(3). The district court's order regarding the joint preliminary injunction was accordingly not appealable, and we dismiss this appeal for lack of jurisdiction.

Gibbons and Silver, JJ., concur.

THE STATE OF NEVADA, DEPARTMENT OF CORRECTIONS, Appellant, *v.* PATRICIA DeROSA, an Individual, Respondent.

No. 77704

July 9, 2020 466 P.3d 1253

Appeal from a district court order dismissing a petition for judicial review. First Judicial District Court, Carson City; James Todd Russell, Judge.

Reversed and remanded.

Aaron D. Ford, Attorney General, *Cameron P. Vandenberg*, Chief Deputy Attorney General, *Jeffrey M. Conner*, Deputy So-

licitor General, and *Scott H. Husbands*, Deputy Attorney General, Carson City, for Appellant.

Patricia DeRosa, Carson City, in Pro Se.

Before the Supreme Court, Parraguirre, Hardesty and Cadish, JJ.

OPINION

By the Court, Parraguirre, J.:

NRS 233B.130, part of the Nevada Administrative Procedure Act, provides for judicial review of a final judgment in an administrative proceeding. A petition for judicial review "must be served upon the agency and every party," NRS 233B.130(5), but the statute does not specify the method of service. In this appeal, we consider whether service of a petition for judicial review of an agency's decision requires personal service under NRCP 4.2(a), or whether some alternative method of service under NRCP 5(b) will suffice.[1] We conclude that it does not require personal service. A petition for judicial review is best construed in this context as a post-complaint filing, so personal service is unnecessary and an alternative method of service under NRCP 5(b) will instead suffice.

FACTS

This dispute arose when appellant Nevada Department of Corrections (NDOC) fired respondent Patricia DeRosa. DeRosa requested a hearing, and the hearing officer reversed NDOC's decision, restoring DeRosa's employment. NDOC petitioned the district court for judicial review and served the petition on DeRosa by mailing it to her counsel under NRCP 5(b). One week later, DeRosa filed a notice of intent to participate in the proceedings.

Four months later, and nearly a month after NDOC filed its opening brief in the judicial review proceedings, DeRosa moved the district court to dismiss the petition for lack of personal service. She argued that NRS 233B.130(5) requires personal service and that NDOC had failed to properly serve her because it served only her counsel, and only by mail.

Two days later, NDOC mailed the petition to DeRosa. Then it filed an opposition to DeRosa's motion to dismiss, citing two un-

[1]We recently amended both rules. When the district court issued the order on appeal, NRCP 4.2(a)'s provisions were in NRCP 4(d)(6) (amended eff. March 1, 2019), and NRCP 5(b)(2)(C)'s service-by-mail provisions were in NRCP 5(b)(2)(B) (amended eff. March 1, 2019). Because the amendments do not affect the outcome of this appeal, we refer to both rules by their amended rule and subsection numbers.

published dispositions in which we held that personal service of a petition for judicial review is unnecessary and that service by mail is sufficient. Alternatively, it requested an extension of the 45-day service deadline, which had passed several months earlier, so that it could personally serve DeRosa.

The district court granted dismissal, concluding that NRS 233B.130(5) requires personal service and denying NDOC an extension because it failed to show good cause. NDOC now appeals, challenging the district court's conclusion that personal service is necessary.

DISCUSSION

NRS Chapter 233B provides for judicial review of an administrative agency's decision but does not specify a method of service for a petition for judicial review. Without specific guidance from the statutes, one of two service rules must apply here. NRCP 4.2(a) requires personal service of a complaint or other document that initiates a civil action, and the district court concluded that this rule applies to petitions for judicial review. NRCP 5(b) allows for other methods of service for post-complaint filings, and NDOC argues the district court erred by not applying this rule to the petition for judicial review. We agree with NDOC that the district court erred by requiring personal service of the petition and that NDOC properly served DeRosa by simply mailing the petition to her counsel under NRCP 5(b), so we reverse and remand for further proceedings.

We review issues of statutory construction de novo. *Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 64, 412 P.3d 56, 59 (2018). NRS 233B.130(5) provides that a "petition for judicial review . . . must be served upon" opposing parties but does not specify a method of service. Because "the NRCP govern proceedings under [NRS Chapter 233B]" when not in conflict with the statutes, *Prevost v. State, Dep't of Admin.*, 134 Nev. 326, 328 n.3, 418 P.3d 675, 676 n.3 (2018), one of two rules provides the method of service: either NRCP 4.2(a), which requires personal service of a summons and complaint; or NRCP 5(b), which allows other methods of service, including mail, for post-complaint pleadings and other papers. So the essential question is whether a petition for judicial review is best construed as a complaint or instead as a post-complaint pleading.

The primary purpose of requiring personal service of a summons and complaint is ensuring that a party has actual notice of a suit and an opportunity to defend. *Orme v. Eighth Judicial Dist. Court*, 105 Nev. 712, 715, 782 P.2d 1325, 1327 (1989). But a petition for judicial review involves ongoing proceedings, like an appeal, and only parties to those proceedings may be named as respondents. NRS 233B.130(2)(a); *see also Fitzpatrick v. State ex rel. Dep't of Commerce, Ins. Div.*, 107 Nev. 486, 488, 813 P.2d 1004, 1005 (1991) (describing judicial review as "taking an administrative appeal");

Crane v. Cont'l Tel. Co. of Cal., 105 Nev. 399, 401, 775 P.2d 705, 706 (1989) (explaining that district courts have statutory "appellate jurisdiction over official acts of administrative agencies"). The advisory committee note on NRCP 3, which addresses a petition that "initiates a civil action," and which DeRosa cites to support her argument that personal service is required, is inapplicable for this reason. Because all the parties are already aware of the underlying matter, a petition for judicial review is best construed as a post-complaint pleading in this context and a more relaxed standard of service is appropriate. *Cf.* NRAP 25(c)(1)(B) (providing that an appellant may serve a notice of appeal by mail). Personal service of a petition for judicial review is therefore unnecessary, and NRCP 5(b)'s alternative methods of service will instead suffice.[2]

CONCLUSION

We conclude that NRS 233B.130(5) does not require personal service. A petition for judicial review is best construed in this context as a post-complaint pleading, so personal service is unnecessary and an alternative method of service under NRCP 5(b) will instead suffice. NDOC complied with NRS 233B.130(5) by mailing a copy of its petition to DeRosa's attorney under NRCP 5(b). Because the district court erred by determining otherwise, we reverse its dismissal order and remand for further proceedings.[3]

Hardesty and Cadish, JJ., concur.

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[2]Other jurisdictions agree. *See Hilands Golf Club v. Ashmore*, 922 P.2d 469, 474 (Mont. 1996) (holding for similar reasons that a rule analogous to NRCP 5(b) is "the more logical choice for effecting service" of a petition for judicial review under the Montana Administrative Procedure Act); *accord Douglas Asphalt Co. v. Ga. Pub. Serv. Comm'n*, 589 S.E.2d 292, 293-94 (Ga. Ct. App. 2003) (holding that because the Georgia Administrative Procedure Act does not expressly require personal service or otherwise specify how to perfect service, service by mail suffices); *Jaco v. Dep't of Health, Bureau of Medicaid*, 950 S.W.2d 350, 352 (Tenn. 1997) (holding that petitioners for judicial review need not serve summonses).

[3]We need not reach NDOC's argument that the district court abused its discretion by denying its motion for an extension.

JEMAR DEMON MATTHEWS, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 77751

July 9, 2020 466 P.3d 1255

Appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of attempted murder with the use of a deadly weapon, two counts each of robbery with the use of a deadly weapon and assault with the use of a deadly weapon, and one count each of conspiracy to commit murder, first-degree murder with the use of a deadly weapon, possession of a short-barreled rifle, and conspiracy to commit robbery. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Reversed and remanded.

Leventhal & Associates, PLLC, and *Todd M. Leventhal*, Las Vegas for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Charles W. Thoman*, Chief Deputy District Attorney, and *John L. Giordani, III*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, Gibbons, Stiglich and Silver, JJ.

OPINION

By the Court, Silver, J.:

This court has repeatedly emphasized the importance of the district court clearly explaining its determinations and reasoning under the framework set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986), when ruling on an equal protection objection to the use of a peremptory challenge to remove a veniremember. A clear record of the district court's determinations and reasoning is particularly important when the explanation for the peremptory challenge depends on the veniremember's demeanor, as the district court is uniquely positioned to observe that demeanor. While this court is primed to afford the district court's decision great deference, we cannot do so if the district court does not engage in the sensitive inquiry required under *Batson* and explain its conclusions. That is the case here. We are faced with a record that is devoid of any findings regarding the credibility of the State's demeanor-based explanation for its peremptory challenge of an African-American veniremember. Although the State also offered nondemeanor explanations for the peremptory challenge, those explanations are belied by the record. Under these circumstances, we cannot help but conclude that, based on the re-

cord, it is more likely than not that the State used the peremptory challenge for impermissible reasons. We therefore must reverse the judgment of conviction and remand for a new trial.

FACTS

Appellant Jemar Matthews faced multiple charges related to a 2006 shooting. During jury selection, the State exercised one of its peremptory challenges to remove prospective Juror No. 342, an African-American woman. Matthews made a *Batson* objection, claiming that the peremptory challenge was based on Juror 342's race. The State then proffered its reasons for the challenge, referring to Juror 342's demeanor in responding to certain questions and the substance and forcefulness of her answers to certain questions:

> [Prosecutor #1]: She gave very tenuous responses when asked about being fair and impartial. And I don't know if she verbally came across that way, but [Prosecutor #2] and I noted on at least two occasions that she kind of hesitated and rolled her eyes, and I think I even commented about that and tried to dig in a little further. Do you have more?
>
> [Prosecutor #2]: And in comparison to the people who are in the 14 right now, even a comparison to [prospective Juror No. 348] who said unequivocally on two or three separate occasions that he could be fair they're very forceful in their answers.
>
> I noted that she hesitated when you asked, Your Honor, if there was any reason she could be—she could not be fair or impartial. And also during [Prosecutor #1's] questioning she hesitated, and then during, I believe it was [defense counsels'] questioning, concerning about the criminal justice system she was just very—she equivocated a lot, so.

Matthews' counsel responded that he had noticed a lot of venire-members rolling their eyes, looking down, nodding in agreement or disagreement, and the State countered that Juror 342's demeanor was more concerning:

> [Prosecutor #1]: I look for those things too, and I clearly saw those with [Juror 342] in our questioning. I have a—when asked, any reason why you wouldn't be fair or impartial, she kind of sighed and said, no, dot dot dot dot dot and I saw that on numerous occasions.
>
> So although I bantered with her and tried to get more out of her, I don't think I actually did get more explanation as to why she sighed so much, but I just don't want her on the jury for that reason because there is some hesitation about fairness which is the only thing that matters at this point.

The district court summarily overruled Matthews' objection, without making any specific findings or explaining its reasoning.

DISCUSSION

It is well-established that the use of a peremptory challenge to remove a veniremember based on race violates the Equal Protection Clause of the United States Constitution. U.S. Const. amend. IV; Nev. Const. art. 4, § 21; *Batson*, 476 U.S. at 86; *see also Diomampo v. State*, 124 Nev. 414, 422, 185 P.3d 1031, 1036 (2008). Courts evaluate an objection to a peremptory challenge under *Batson* using a three-step framework. *See Batson*, 476 U.S. at 93-100; *see also Kaczmarek v. State*, 120 Nev. 314, 332-35, 91 P.3d 16, 29-30 (2004). Those steps consist of (1) the opponent of the peremptory challenge making a prima facie showing that the challenge was based on race; (2) if the prima facie showing is made, the proponent presenting a race-neutral explanation for the peremptory challenge; and (3) the district court hearing argument and determining whether the opponent has proven purposeful discrimination. *Williams v. State*, 134 Nev. 687, 689, 429 P.3d 301, 305-06 (2018).

Matthews and the State concede that steps one and two are not at issue. Step one is moot because the State gave its race-neutral reasons for the peremptory challenge before the district court determined whether Matthews made a prima facie showing of discrimination. *Id*. at 690-91, 429 P.3d at 306-07. And the State asserted race-neutral reasons for the peremptory challenge, thus satisfying step two. *See id*. at 691, 429 P.3d at 307 (recognizing that explanations for the peremptory challenge do not need to be persuasive or plausible at step two, just race-neutral). We therefore focus on step three.

At step three, a "district court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available and consider all relevant circumstances before ruling on a *Batson* objection and dismissing the challenged juror." *Id*. (internal quotation marks omitted). "The court should evaluate all the evidence introduced by each side on the issue of whether race was the real reason for the challenge and then address whether the defendant has met his burden of persuasion." *Kaczmarek*, 120 Nev. at 334, 91 P.3d at 30. Because the district court's decision at step three "often turns upon the demeanor of the prosecutor exercising the strike, and the demeanor of the juror being struck—determinations that lie uniquely within the province of the district judge," *Williams*, 134 Nev. at 693, 429 P.3d at 308, this court has "repeatedly implored district courts to . . . *clearly spell out their reasoning and determinations*." *Id*. at 689, 429 P.3d at 306 (emphasis added). When the district court fails to do so, this court may not be able to give the district court's decision the deference that it would normally receive. *See id*. at 688, 429 P.3d at 305 (explaining that this court generally gives "great deference to the district court's finding" that "no unlawful discrimination occurred" but cannot do so when "the [district] court fails to properly engage [the three-step *Batson*] inquiry"); *Kaczmarek*, 120 Nev. at 334, 91 P.3d at 30 ("At the third step, espe-

cially, an adequate discussion of the district court's reasoning may be critical to our ability to assess the district court's resolution of any conflict in the evidence regarding pretext.").

The record before us does not show an analysis that comports with the requirements of step three. After allowing both sides to argue, with very little input from the bench, the district court simply said, "So at this time, the objection's overruled." When faced with a similarly concise conclusion in *Williams*, this court found that "the district court never conducted the sensitive inquiry required by step three." 134 Nev. at 693, 429 P.3d at 308 (quoting the district court as saying, "I don't find the State based it on race"). Without an adequate step-three analysis, we held that the "record [did] not allow meaningful, much less deferential review." *Id*. Instead, we examined the record without any deference to the district court to determine whether the State's race-neutral explanations appeared pretextual. *Id*. at 693-96, 429 P.3d at 308-10. As in *Williams*, the district court's failure to articulate its reasoning or to make findings regarding demeanor or credibility makes it impossible for us to give its decision deference. We therefore are left to examine the cold record to determine whether the State's peremptory challenge of Juror 342 was more likely than not motivated by race. *See id.* at 688, 429 P.3d at 305 ("[W]here, as here, the court fails to properly engage [the three-step] inquiry, and it appears more likely than not that the State struck the juror because of her race, we must reverse and remand for a new trial.").

The parties appear to agree that the State provided both demeanor and nondemeanor explanations for the peremptory challenge. "[W]here only part of the basis for a peremptory strike involves the demeanor of the struck juror, and the district court summarily denies the *Batson* challenge without making a factual finding as to the juror's demeanor, [this court] cannot assume that the district court credited the State's demeanor argument." *Id*. at 693, 429 P.3d at 308 (citing *Snyder v. Louisiana*, 552 U.S. 472, 479 (2008)). That is the case here.[1] Accordingly, we must focus on the State's nondemeanor

[1]Without a finding by the district court, the cold record does not support the State's demeanor argument. *See Graves v. State*, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996) ("The cold record is a poor substitute for demeanor observation."). In particular, the demeanor argument is based on physical cues and responses that are not apparent from the written record before us. And during the examination of Juror 342, the only mention of her demeanor was when one of the prosecutors said he observed her smirking in response to a question about the criminal justice system. But even that observation does not support the State's later explanation of its peremptory challenge—that Juror 342 rolled her eyes, hesitated, and sighed during questioning. *See Snyder*, 552 U.S. at 477 (requiring an evaluation of "whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor").

During oral argument, the State asked this court to review the juror's demeanor as depicted in the video recording by the JAVS system. The State's

explanations for the peremptory challenge in determining whether Matthews demonstrated purposeful discrimination. *See id.* at 694-96, 429 P.3d at 309-10 (focusing on the State's nondemeanor explanation for a peremptory challenge when the State also offered a demeanor explanation but the record did not allow the court to assume that the district court had credited the demeanor argument or based its decision on that argument). And as we have held, "[a] race-neutral explanation that is belied by the record is evidence of purposeful discrimination." *Conner v. State*, 130 Nev. 457, 466, 327 P.3d 503, 510 (2014).

The first part of the State's nondemeanor explanation was that Juror 342 gave tenuous responses about being fair and impartial. Juror 342 answered "[n]o" to the district court's general question asking if there was any reason she could not be fair and impartial. Twice the district court asked if anything from Juror 342's previous experiences—her serving as a juror in a civil trial or her father's murder—would affect her ability to be fair and impartial, to which she responded "[n]o." When the State asked if her father's murder caused her concern or should cause either side concern, she answered "[n]o." When defense counsel asked Juror 342 how her experiences would make her a good juror, she said, "Well, I know I'll be fair. I'll be fair to all the information I receive." Lastly, defense counsel asked Juror 342 if she would want herself as a juror if she were a defendant, and she responded "[y]es." This record belies the State's explanation that Juror 342's responses were tenuous.

The second part of the State's nondemeanor explanation was that Juror 342 answered questions about her ability to be fair and impartial less forcefully than other veniremembers.[2] But Juror 342's response to the court's general question about there being any

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request was improper for two reasons. First, neither party moved to transmit the JAVS recording and make it a part of the record on appeal. *See generally* NRAP 10(b)(2). We remind counsel that this court "cannot consider matters not properly appearing in the record on appeal" and that "[w]e have no power to look outside of the record of a case." *Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (internal quotation marks omitted). Second, the State's request asks this court to place itself in the role of the district court and to make a credibility determination the district court did not make, on an issue that "lies peculiarly within a trial judge's province." *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (internal quotation marks omitted); *see also Snyder*, 552 U.S. at 477 (recognizing the lower court's "pivotal role in evaluating *Batson* claims" and the significance of the lower "court's firsthand observations" regarding demeanor).

[2]The State's explanation invites comparative juror analysis. Unfortunately, neither side dove into a detailed, specific comparative juror analysis in the district court. Although doing so for the first time on appeal presents some difficulties and limitations, *Nunnery v. State*, 127 Nev. 749, 784 n.17, 263 P.3d 235, 258 n.17 (2011), we find it appropriate to conduct that analysis in considering whether the record supports the State's nondemeanor explanation for the peremptory challenge.

reason why she could not be fair and impartial—a simple "no"—was identical to the responses given by 10 other veniremembers who were eventually seated on the jury, while 2 others answered, "[n]ot at all" and "I do not. I'm good . . . ." As to specific inquiries into relationships or previous experiences that could affect the ability to be fair and impartial, many of the seated jurors answered exactly as Juror 342 did. For example, Juror 354 answered "[n]o" after disclosing his brother was a corrections officer and after revealing previous jury experience, Juror 246 answered "[n]o" after revealing previous jury experience, Juror 271 answered "[n]o" after revealing a previous conviction, and Juror 381 answered "[n]o" after revealing he was the victim of a previous home invasion. Some seated jurors arguably offered more detailed answers about their ability to be fair,[3] but the substance of those answers appears very similar to Juror 342's response—"[w]ell, I know I'll be fair. I'll be fair to all the information I receive." We conclude the State's argument that Juror 342 gave tenuous responses about being fair and impartial, answering less forcefully than others, is not supported by the record and thus appears pretextual.

The State also suggested that Juror 342 equivocated in her answers about the criminal justice system. The following exchange between the prosecutor and Juror 342 provides the relevant context:

> [Prosecutor #1]: Okay. What is your feeling, ma'am, on the [criminal justice] system in general? You've heard all of the questions I've asked.
>
> [Juror 342]: Well, yeah, somebody—a jury trial, I think it's fair.
>
> [Prosecutor #1]: Okay.
>
> [Juror 342]: A jury trial.
>
> [Prosecutor #1]: All right. What about the—the entire system? Uh-oh. Was that a loaded question?
>
> [Juror 342]: Yes.
>
> [Prosecutor #1]: All right.
>
> [Juror 342]: I thought we were going to stick to the jury trial.
>
> [Prosecutor #1]: Well, no. Because you gave that smirk when I did it, so now I knew I had to ask. So I have to know.
>
> [Juror 342]: No, I—I was just teasing. Yeah. I think it's pretty fair.

[3]For example, Juror 266 said, "I just want to hear the facts and make a decision based off of that." Juror 271 commented, "I think I can be fair. Absolutely. I'd be fair to everybody." "I'm very open-minded." Juror 284 proclaimed, "I'm fair. . . . I'm open-minded. I don't lean towards one side. When I'm presented the facts I'll make my decision based on the facts." And Juror 299 explained, "I would be fair. . . . [And fair means] [t]hat you listen to all aspects of the case and then you judge it by everything you've seen."

[Prosecutor #1]: Okay. Pretty fair, not perfect?

[Juror 342]: Pretty fair.

Defense counsel asked Juror 342 to explain what she meant by "pretty fair," and she explained, "I mean that I'm a little shaky about the system, you know, I just feel like there's—sometimes it's good sometimes it's bad some—you know, it's—it is what it is." Defense counsel asked if the system was "still the best," and Juror 342 answered "[y]es."

The State argues Juror 342's response shows she was doubtful as to the fairness of the criminal justice system and points to the responses of other veniremembers who were seated to demonstrate the uncertainty. However, others expressed similar observations: one commented that he would "probably say [the system is fair] 80 percent of the time"; another said, "Yeah, [the system is fair] for the most part."; yet another described the system as "about as good as it can get, you know. It's not 100 percent, of course." "But you know, overall, it's well."; and still another opined that the system is "[k]ind of fair. It just depends on the situation I would say." "[B]ut I feel like minorities have it a lot worse than white people" when it comes to sentencing. Juror 342's response does not read as distinguishable from others who were not challenged; therefore, we conclude the State's explanation that Juror 342 equivocated in her answers about the criminal justice system suggests pretext.

Because the record significantly belies the State's nondemeanor explanations for using a peremptory challenge on Juror 342, thus indicating the explanations were pretextual, and because the district court did not fully engage in the sensitive inquiry and consideration required at step three in the *Batson* analysis, we conclude the district court clearly erred in denying Matthews' *Batson* objection. This constitutes structural error, *Williams*, 134 Nev. at 696, 429 P.3d at 310, and we therefore are left with no choice but to reverse the judgment of conviction and remand this matter for a new trial.[4]

Gibbons and Stiglich, JJ., concur.

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[4]Given our disposition, we do not reach the merits of Matthews' remaining claims.

ESTATE OF MARY CURTIS, Deceased; LAURA LATRENTA, as Personal Representative of THE ESTATE OF MARY CURTIS; and LAURA LATRENTA, Individually, Appellants, *v.* SOUTH LAS VEGAS MEDICAL INVESTORS, LLC, dba LIFE CARE CENTER OF SOUTH LAS VEGAS, fka LIFE CARE CENTER OF PARADISE VALLEY; SOUTH LAS VEGAS INVESTORS LIMITED PARTNERSHIP; LIFE CARE CENTERS OF AMERICA, INC.; and CARL WAGNER, Administrator, Respondents.

No. 77810

July 9, 2020 466 P.3d 1263

Appeal from a district court order granting summary judgment in a tort action. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Affirmed in part, reversed in part, and remanded.

Saltzman Mugan Dushoff and *Michael D. Davidson*, Las Vegas; *Bossie, Reilly & Oh, P.C.*, and *Melanie L. Bossie*, Scottsdale, Arizona; *Wilkes & McHugh, P.A.*, and *Bennie Lazzara, Jr.*, Tampa, Florida, for Appellants.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, Joel D. Henriod, Abraham G. Smith*, and *Matthew R. Tsai*, Las Vegas; *Lewis Brisbois Bisgaard & Smith* and *S. Brent Vogel*, Las Vegas, for Respondents.

Before the Supreme Court, Gibbons, Stiglich and Silver, JJ.

OPINION

By the Court, Silver, J.:

NRS 41A.071 provides that if a party files an action for professional negligence against a provider of health care without a supporting medical expert affidavit, the district court must dismiss the action. In *Szydel v. Markman*, 121 Nev. 453, 459, 117 P.3d 200, 204 (2005), we adopted the "common knowledge" exception to the affidavit requirement for claims falling under NRS 41A.100 (the *res ipsa loquitur* statute). The common knowledge exception provides that where lay persons' common knowledge is sufficient to determine negligence without expert testimony, the affidavit requirement does not apply. For the reasons stated below, we conclude that the common knowledge exception can also be applied to determine whether a claim that appears to sound in professional negligence, and does not fall under NRS 41A.100, actually sounds in ordinary negligence and is therefore not subject to NRS 41A.071.

In this appeal, we consider whether a nurse's mistake in administering a drug to one patient, when the drug was prescribed to a different patient, as well as the alleged failure to thereafter monitor the patient, are matters of professional negligence subject to NRS 41A.071's affidavit requirement or matters of ordinary negligence that would not require a supporting affidavit under the common knowledge exception. We conclude that the exception applies in this case to the drug's administration, as lay jurors could understand that mistakenly administering a drug to the wrong patient is negligent without the benefit of expert testimony. Thus, any claim based solely on that act would not be subject to dismissal under NRS 41A.071 for failing to attach a supporting medical expert affidavit. But we conclude that the other allegation of failing to monitor the patient after administering the drug is subject to NRS 41A.071's affidavit requirement. We therefore affirm in part and reverse in part the district court's dismissal order and remand for further proceedings in line with this decision.

FACTS AND PROCEDURAL HISTORY

Respondent Life Care Center of South Las Vegas (LCC) is a nursing home. Licensed nurse Ersheila Dawson worked at LCC during the time Mary Curtis, appellant Laura Latrenta's mother, was a resident at LCC. Curtis was admitted as a patient to LCC, and LCC was to render professional services necessary to maintain Curtis's physical and mental health. While taking care of multiple patients, Nurse Dawson mistakenly administered to Curtis 120 milligrams of morphine that had been prescribed for another patient. Nurse Dawson soon realized her mistake and reported it to her supervisor. Acting on a physician's orders, LCC administered Narcan, another drug, to Curtis to counteract the morphine. But LCC decided not to send Curtis to the hospital at that time. LCC monitored Curtis's vital signs and recorded Curtis as "alert and verbally responsive" at 5 p.m. the day the morphine was administered. The following morning at 11 a.m., when Latrenta arrived to check on Curtis, she found Curtis unresponsive. Curtis was transported to the hospital and passed away three days later. Her death certificate lists morphine intoxication as the cause of death.

Latrenta, as both Curtis's heir and the personal representative of Curtis's estate (collectively, the Estate), sued LCC. The Estate asserted claims against LCC for (1) abuse and neglect of an older person, (2) wrongful death (brought by Curtis's estate), (3) wrongful death (brought by Latrenta), and (4) tortious breach of the implied covenant of good faith and fair dealing. The Estate did not explicitly assert any claim for professional negligence, did not name Nurse Dawson as a defendant, and did not file an expert affidavit under NRS 41A.071.

The complaint alleges that Nurse Dawson administered the wrong medication to Curtis and thereafter failed to properly monitor or treat Curtis, both of which led to Curtis's death. The Estate alleges that LCC's negligent mismanagement, understaffing, and operation of the nursing home led to the erroneous administration of morphine and the failure to treat and monitor Curtis as the morphine took her life. The complaint specifically alleges that LCC had a duty to properly train and supervise its staff to act with the level of knowledge, skill, and care ordinarily used under similar circumstances by similarly trained and experienced licensed nurses.

LCC moved for summary judgment, and the district court granted the motion, finding that even though the Estate made direct claims against LCC and otherwise borrowed language from the elder abuse statute, the gravamen of the complaint's allegations sounded in professional negligence. Accordingly, the district court concluded that the Estate was required to file an expert affidavit and its failure to do so rendered the complaint void ab initio. The Estate appeals, arguing (1) it is excused from complying with NRS 41A.071 because it asserted claims directly against LCC; (2) it is excused from complying with NRS 41A.071 because the allegations in the complaint sound in ordinary negligence, not professional negligence; (3) that requiring an expert affidavit here defeats the purpose of Nevada's elder abuse statute, NRS 41.1395; and (4) that the allegations in the complaint fall within Nevada's *res ipsa loquitur* statute, thereby avoiding the affidavit requirement.

DISCUSSION

We "review a district court order granting summary judgment de novo." *Boesiger v. Desert Appraisals, LLC*, 135 Nev. 192, 194, 444 P.3d 436, 439 (2019). Similarly, we review issues of statutory construction de novo. *Pub. Agency Comp. Tr. v. Blake*, 127 Nev. 863, 866, 265 P.3d 694, 696 (2011).

NRS 41A.015 defines professional negligence as "the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care."[1] In turn, NRS 41A.071 provides that "[i]f an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without [a supporting] affidavit" from a medical expert. NRS 41A.071 was intended "to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion." *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006) (quoting *Szydel v. Markman*, 121 Nev. 453, 459, 117 P.3d 200, 204 (2005)).

[1]NRS 41A.017 establishes that a licensed nurse falls within the definition of "provider of health care."

Direct liability claims against a nursing home facility do not excuse compliance with NRS 41A.071's affidavit requirement

As a preliminary matter, the Estate claims that LCC's direct managerial decisions were the real cause behind both nurse Dawson administering an incorrect medication and LCC's failure to monitor Curtis thereafter. The Estate argues that these allegations do not require an expert affidavit, as the allegations constitute a direct liability claim against LCC, not Nurse Dawson, and they sound in ordinary negligence, not professional negligence. We disagree.

A claim of negligent hiring, supervision or training escapes NRS 41A.071's affidavit requirement "where the underlying facts of the case do not fall within the definition of [professional negligence]."[2] *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 647, 403 P.3d 1280, 1288 (2017). In determining whether such a claim sounds in ordinary or professional negligence, we "must look to the gravamen or substantial point or essence of each claim rather than its form." *Id.* at 643, 403 P.3d at 1285 (internal quotation marks omitted). Where the allegations underlying negligent hiring claims are inextricably linked to professional negligence, courts have determined that the negligent hiring claim is better categorized as vicarious liability rather than an independent tort. *See, e.g.*, *Am. Registry of Pathology v. Ohio Cas. Ins. Co.*, 461 F. Supp. 2d 61, 70 (D.D.C. 2006) (addressing claims that an entity negligently hired a medical professional based on allegations that the professional negligently administered medical tests and concluding that, "[i]n that sense, the negligent hiring claims are similar to the vicarious liability claims because they seek to hold the employer responsible for the negligent acts of the employee"); *Holmes Reg'l Med. Ctr., Inc. v. Dumigan*, 151 So. 3d 1282, 1285 (Fla. Dist. Ct. App. 2014) (citing *Martinez v. Lifemark Hosp. of Fla., Inc.*, 608 So. 2d 855, 856-57 (Fla. Dist. Ct. App. 1992), for the proposition that "the case should be handled under the [Florida Medical Malpractice Act] because the plaintiff's asserted claims of negligent hiring and retention, fraud and misrepresentation, and intentional tort were necessarily and inextricably connected to negligent medical treatment").

This reasoning is convincing, and we therefore clarify that negligent hiring, training, and supervision claims cannot be used to circumvent NRS Chapter 41A's requirements governing professional negligence lawsuits when the allegations supporting the claims sound in professional negligence.[3] *See Am. Registry of Pathology*,

[2]The 2015 Legislature amended NRS 41A.071 to substitute "professional negligence" for "medical malpractice" and repealed NRS 41A.009 (defining medical malpractice). *See* 2015 Nev. Stat., ch. 439, §§ 6, 12, at 2527, 2529. Thus, for consistency, we use the term "professional negligence."

[3]We have previously recognized this, albeit in an unpublished order. *See Zhang v. Barnes*, Docket No. 67219, at *17-18 (Order Affirming in Part, Reversing in Part, and Remanding, Sept. 12, 2016).

461 F. Supp. 2d at 70; *Holmes*, 151 So. 3d at 1285; *Martinez*, 608 So. 2d at 856-57. Applying that rule here, the Estate's complaint alleged that LCC "had a duty to properly train and supervise [its] staff and employees," i.e., that LCC negligently trained and supervised its nurses, and it further alleged that the breach of that duty caused Curtis's death. Thus, critically, if the underlying negligence did not cause Curtis's death, no other factual basis was alleged for finding LCC liable for negligent staffing, training, and budgeting. We conclude that the Estate's claims are inextricably linked to the underlying negligence, and if the underlying negligence is professional negligence, as addressed below, the Estate's complaint is subject to NRS 41A.071's affidavit requirement.

Whether the allegations in the complaint sound in ordinary negligence or professional negligence

The Estate argues that accidentally administering a drug to the wrong patient and the subsequent failure to monitor the patient are matters of ordinary negligence, not professional negligence. First we address the difference between the two in the context of NRS Chapter 41A, and we adopt the common knowledge exception to the medical affidavit requirement in NRS 41A.071. Then we address each claim in turn.

In order to determine whether a claim sounds in "professional negligence," courts must evaluate whether the claim "involve[s] medical diagnosis, judgment, or treatment, or [is] based on [the] performance of nonmedical services." *Szymborski*, 133 Nev. at 641, 403 P.3d at 1284. If the alleged breach involves "medical judgment, diagnosis, or treatment," it is likely a claim for medical malpractice. *Id.* at 642, 403 P.3d at 1284. Thus, "if the jury can only evaluate the plaintiff's claim after presentation of the standards of care by a medical expert, then it is a [professional negligence] claim." *Id.* "If, on the other hand, the reasonableness of the health care provider's actions can be evaluated by jurors on the basis of their common knowledge and experience, then the claim is likely based in ordinary negligence." *Id.* at 642, 403 P.3d at 1285. The distinction between professional and ordinary negligence can be subtle, and we look to the "gravamen or substantial point or essence" of each claim to make the necessary determination. *Id.* at 642-43, 403 P.3d at 1285 (internal quotation marks omitted).

Szymborski does not address foreseeable situations where the negligence alleged involves a medical diagnosis, judgment, or treatment but the jury is capable of evaluating the reasonableness of the health care provider's actions using common knowledge and experience. This gap hints at a narrow exception to the medical affidavit requirement in professional negligence cases: that an affidavit may not be required if the alleged negligence does not require expert testimony

to evaluate. In other jurisdictions, this "common knowledge" exception applies where the carelessness of the defendant is readily apparent to anyone of average intelligence and ordinary experience, and the claim can be resolved without expert testimony. *See, e.g.*, *Trowell v. Providence Hosp. & Med. Ctrs., Inc.*, 918 N.W.2d 645, 651 (Mich. 2018) (explaining that a hospital employee's failure to take corrective action in response to a known danger was an allegation of ordinary negligence that a jury, relying only on common knowledge and experience, could assess); *Dailey v. Methodist Med. Ctr.*, 790 So. 2d 903, 918 (Miss. Ct. App. 2001) ("Generally, a plaintiff must have shown medical negligence by expert testimony, unless the negligence is within the common knowledge of a layperson."); *Bowman v. Kalm*, 179 P.3d 754, 756 (Utah 2008) (recognizing a limited "common knowledge exception" to the general requirement that medical malpractice complaints must be supported with medical expert testimony that applies where the causal link between the injury and the negligence is apparent to a person with no medical training); *Beverly Enters.-Va., Inc. v. Nichols*, 441 S.E.2d 1, 3 (Va. 1994) ("In certain rare instances, . . . expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience."). The narrow exception applies only to situations involving negligence that is apparent without *any* expert testimony and does not apply to situations where the professional exercises medical judgment. *See Smith ex rel. Smith v. Gilmore Mem'l Hosp., Inc.*, 952 So. 2d 177, 180-82 (Miss. 2007) (addressing a nurse's failure to inform a patient's family that the doctor had operated on the wrong body part and concluding expert testimony was required to determine whether the nurse's judgment call breached the standard of care).

For example, the Superior Court of New Jersey, Appellate Division, held that a pharmacist filling a prescription with the wrong drug falls within the "common knowledge" exception to that state's expert affidavit requirement. *Bender v. Walgreen E. Co.*, 945 A.2d 120, 122-23 (N.J. Super. Ct. App. Div. 2008); *see also Walter v. Wal-Mart Stores, Inc.*, 748 A.2d 961, 972 (Me. 2009) (holding expert testimony was not necessary to show professional negligence where a pharmacist filled a prescription with the wrong drug). That court explained, "[i]t does not take an expert to know that filling a prescription with the wrong drug . . . is negligence." *Bender*, 945 A.2d at 124 (quoting *Walter*, 748 A.2d at 972); *see also Hubbard ex rel. Hubbard v. Reed*, 774 A.2d 495, 500-01 (N.J. 2001) (applying the common knowledge exception to claims based on a dentist's extraction of the wrong tooth); *Estate of Chin v. Saint Barnabas Med. Ctr.*, 734 A.2d 778, 786-87 (N.J. 1999) (utilizing the exception where pumping gas into a patient caused a fatal air embolism).

We agree with these courts: the common knowledge exception provides sound guidance to distinguish between ordinary and pro-

fessional negligence in order to determine whether a party's claim is subject to NRS 41A.071's affidavit requirement.[4] When determining whether to apply the exception, we adopt the framework set forth by the Supreme Court of Michigan:

> [A] court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or [professional negligence]: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern [professional negligence] actions.

Bryant v. Oakpointe Villa Nursing Ctr., Inc., 684 N.W.2d 864, 871 (Mich. 2004). We reiterate that the exception's application is extremely narrow and only applies in rare situations. *See Smith*, 952 So. 2d at 181 (limiting the exception to situations of blatant negligence and declining to extend it to situations that involve professional judgment).

Here, the Estate's complaint focused on management and staffing issues at LCC. But the Estate ultimately based its theory on two underlying allegations against LCC: (1) Nurse Dawson administered morphine to Curtis that was prescribed for another patient, and (2) LCC thereafter failed to properly monitor and care for Curtis. For the following reasons, we conclude that the latter allegation is based in professional negligence, while the former sounds in ordinary negligence.

Nurse Dawson administering morphine to Curtis is a matter of ordinary negligence

The threshold issue here is whether Nurse Dawson's negligence in administering morphine to Curtis that was prescribed to another patient constitutes professional negligence that would trigger NRS 41A.071's affidavit requirement. The California Court of Appeal, addressing a case where the plaintiff fell off an unsecured, unattended x-ray table, held that small instances of ordinary negligence may still fall under professional negligence if it is an integral part of the medical service. *Bellamy v. Appellate Dep't*, 57 Cal. Rptr. 2d 894, 895, 900-01 (Ct. App. 1996). The court noted that although some "tasks may require a high degree of skill and judgment, but others do not," in that instance, each task the x-ray technician performed

[4]We have addressed this exception before, in *Szydel v. Markman*, and concluded that an expert affidavit is unnecessary in *res ipsa loquitur* cases under NRS 41A.100(1). 121 Nev. 453, 459, 117 P.3d 200, 204 (2005). Here, we recognize the common knowledge exception's applicability to professional negligence claims that do not fall under NRS 41A.100.

was "an integral part of the professional service being rendered." *Id.* at 900. And the Court of Appeals of Georgia has concluded that a nurse administering the wrong medicine to a patient can potentially be an act of professional judgment. *Grady Gen. Hosp. v. King*, 653 S.E.2d 367, 367 (Ga. Ct. App. 2007). In *Grady*, however, the patient told the nurse the medication was incorrect, which then required the nurse to use her professional judgment to determine whether to continue to administer the medication. *See id.* (stating that the nurse should have "call[ed] the physician's attention to any question that [arose]" regarding a prescribed medication).

Unlike those cases, however, the Estate's claim that Nurse Dawson administered morphine that was not prescribed to Curtis does not raise any questions of medical judgment beyond the realm of common knowledge or experience. Nurse Dawson used no professional judgment in administering the morphine—she simply gave Curtis the wrong drug because she had mixed up the prescriptions. In contrast to *Bellamy*, the negligent action here occurred when Nurse Dawson administered the medication, whereas in *Bellamy*, the negligence occurred during the course of the health care professional performing a variety of tasks, some of which required professional judgment and some of which did not, making it impossible in that case to separate the ordinary negligence from the professional negligence. *Id.* at 900. And, in contrast to *Grady*, Nurse Dawson simply administered the wrong medication without any intervening issues that required her to exercise her professional judgment.

Thus, although administering medication constitutes medical treatment, *see Szymborski*, 133 Nev. at 641-42, 403 P.3d at 1284-85, an allegation that a health care professional administered a patient's medicine to a different patient is an allegation of ordinary negligence that requires no expert testimony to assess. Indeed, in this case, the prescribing physician made the medical decision that required professional judgment as to what medication Curtis required, but Nurse Dawson's administration of another patient's prescribed medication did not require any similar judgment call. Importantly, *Szymborski* clarifies that a claim is for professional negligence "if the jury can only evaluate the plaintiff's claims after presentation of the standards of care by a medical expert," *id.* at 642, 403 P.3d at 1284; yet here, any lay juror could evaluate the negligence based on their own common knowledge and experience, *see id*. at 642, 403 P.3d at 1285 (recognizing that being able to evaluate a claim based on common knowledge and experience means "the claim is likely based in ordinary negligence"). Accordingly, we reverse the district court with respect to the allegations based upon Nurse Dawson's administration of another patient's morphine to Curtis, as this sounds in ordinary negligence, and the Estate was therefore not required to submit an expert affidavit under NRS 41A.071 to pursue a negligence claim based solely on that act.

LCC's failure to monitor Curtis is a matter of professional negligence

The next issue is whether the Estate's allegation that LCC's staff failed to monitor Curtis after administering morphine is a matter of professional negligence. We conclude that it is.

The gravamen of this allegation is that LCC failed to monitor Curtis. *See Szymborski*, 133 Nev. at 643, 403 P.3d at 1285 (explaining a court must look to the gravamen of the claim to determine the type of negligence). This allegation raises questions beyond the realm of common knowledge and experience. *See id.* at 642, 403 P.3d at 1285. Namely, after Nurse Dawson's alleged mistake, the Estate alleges that LCC's staff contacted a physician who prescribed Narcan to counteract the morphine, that LCC decided not to transfer Curtis to the hospital, and that LCC placed Curtis on a monitoring order but did not monitor her or check her vitals between 5 p.m. that day and 11 a.m. the next morning. We conclude each of these decisions required some degree of professional judgment or skill. Indeed, a lay juror could not properly evaluate the failure-to-monitor allegations by relying merely on common knowledge and experience; the juror would have to make judgment calls on what constitutes proper supervision for a patient who was incorrectly administered morphine, whether LCC took adequate remedial measures upon realizing the mistake including giving Curtis Narcan, and whether LCC should have transferred Curtis to a hospital for further intervention and/or monitoring. *See id.* Thus, the failure-to-monitor allegation is an allegation of professional negligence and, as such, it is subject to NRS 41A.071's affidavit requirement. Accordingly, we affirm summary judgment as to this claim.[5]

Res ipsa loquitur does not relieve the Estate of its duty to file an expert affidavit

The Estate contends that, as an alternative, it is excused from complying with NRS 41A.071 because its claim falls within the *res ipsa loquitur* exception to the affidavit requirement. We disagree.[6]

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[5]We are not persuaded that requiring compliance with NRS 41A.071 eviscerates the protections of NRS 41.1395, Nevada's elder abuse statute. First, the record does not support an elder abuse claim here, where Nurse Dawson's actions were grounded in negligence, rather than in willful abuse or the failure to provide a service. *See* NRS 41.1395(4)(a) (defining abuse) and (4)(c) (defining neglect). Moreover, this statute neither prevents application of the affidavit requirement in professional negligence cases nor suggests the Legislature intended for this statute to circumvent that requirement where the elder abuse claim is rooted in professional negligence.

[6]The Estate also argues negligence per se based on LCC's violations of its own regulations and NRS 41A.100. That argument fails, as negligence per se arises when a duty is created by statute, *see Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 828, 221 P.3d 1276, 1283 (2009), not when a company allegedly violates self-imposed rules, and NRS 41A.100 does not place any duty on health

NRS 41A.100(1) provides several *res ipsa loquitur* exceptions to NRS 41A.071's expert affidavit requirement in an action against a health care provider. *See Peck v. Zipf*, 133 Nev. 890, 892, 407 P.3d 775, 778 (2017) (discussing NRS 41A.100(1)). The Estate raises only the exception enumerated in NRS 41A.100(1)(d), namely, that the "injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto," and we therefore only address that subsection. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (stating that issues not raised in an appellant's opening brief are waived).

NRS 41A.100 does not exempt the Estate from the affidavit requirement in this case. The injury the Estate alleges does not fit within the NRS 41A.100(1)(d) exception, as Curtis suffered no injury "to a part of the body not directly involved in the treatment"—rather, the treatment itself was injurious. Thus, the doctrine of *res ipsa loquitur* does not excuse compliance with NRS 41A.071 in this case.

CONCLUSION

The mistaken administration of another patient's morphine in this case constitutes ordinary negligence that a lay juror could assess without expert testimony, and a claim predicated solely upon such ordinary negligence is not subject to NRS 41A.071's medical expert affidavit requirement. The district court therefore erred in granting summary judgment as to this allegation. However, the district court correctly granted summary judgment as to the remaining allegations regarding the failure to monitor, as those allegations challenge whether the health care provider's medical judgment violated the established duty of care and require expert testimony to support. Accordingly, we affirm in part, reverse in part, and remand this matter to the district court for further proceedings consistent with this opinion.

Gibbons and Stiglich, JJ., concur.

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care providers. And to the extent the Estate argues that violation of LCC's regulations without accompanying expert testimony can be used to prove a professional negligence claim, that reading is irreconcilable with the specific affidavit requirement set out in NRS 41A.071. If the claim alleging professional malpractice does not fall under NRS 41A.100 and the common knowledge exception does not apply, NRS 41A.071 requires a supporting affidavit.

TRISHA KUPTZ-BLINKINSOP, NKA TRISHA MARGOLIS, APPELLANT, v. THOMAS R. BLINKINSOP, RESPONDENT.

No. 78284

July 9, 2020 466 P.3d 1271

Appeal from a district court summary judgment in an action concerning the partition of real property. Eighth Judicial District Court, Clark County; J. Charles Thompson, Senior Judge.

Affirmed.

Benjamin B. Childs, Las Vegas, for Appellant.

Law Offices of George O. West III and *George O. West III*, Las Vegas, for Respondent.

Before the Supreme Court, GIBBONS, STIGLICH and SILVER, JJ.

OPINION

By the Court, STIGLICH, J.:

Nevada's statute of limitations for actions on judgment, NRS 11.190(1)(a), generally provides that "an action upon a judgment or decree of any court of the United States" must be commenced within six years. We held in *Davidson v. Davidson*, 132 Nev. 709, 718, 382 P.3d 880, 886 (2016), "that the six-year statute of limitations in NRS 11.190(1)(a) applies to claims for enforcement of a property distribution provision in a divorce decree." In the underlying action, appellant sought to partition real property that a divorce decree from nine years prior awarded to respondent as separate property, since appellant never executed a quitclaim deed to remove her name therefrom. Appellant claims that the decree expired pursuant to *Davidson*, which precluded respondent from enforcing his real property distribution rights under the decree and rendered the property still held in joint tenancy subject to partition.

In this appeal, we clarify that our holding in *Davidson* does not apply to claims for enforcement of real property distribution in divorce decrees because NRS 11.190(1)(a) unambiguously excludes from its purview actions for recovery of real property. We also hold that respondent was not required to renew the divorce decree pursuant to NRS 17.214 to enforce his real property rights and that appellant's partition action is barred by claim preclusion. We therefore affirm the district court's grant of summary judgment and quiet title in favor of respondent.

FACTS AND PROCEDURAL BACKGROUND

Appellant Trisha Kuptz-Blinkinsop and respondent Thomas Blinkinsop owned real property located at 2042 Deer Springs Drive in Henderson, Nevada (Deer Springs property), as joint tenants prior to their divorce. In the divorce proceedings, Trisha sought "an equitable distribution and division of all community property assets and debts and separate property and debts of the parties." The parties obtained a divorce decree in 2009 that awarded the Deer Springs property to Thomas "as his sole and separate property" and ordered that Trisha execute a quitclaim deed removing her name from the title within ten days of entry of the divorce decree. However, Trisha never executed any quitclaim deed removing her name from the Deer Springs property, and Thomas never demanded that Trisha do so or brought action to enforce the decree.

In 2018, Trisha sought to partition the Deer Springs property, claiming that she remained a 50-percent owner because neither party renewed the divorce decree as required by NRS 17.214 and *Davidson* and, therefore, the decree expired under NRS 11.190. Thomas counterclaimed for quiet title and declaratory relief, seeking a judicial declaration that he was the sole owner of the Deer Springs property and that Trisha was judicially estopped from claiming any interest in the property. Thomas also countermoved for summary judgment, arguing that NRS 17.214 and *Davidson* did not apply and that Trisha's partition action was barred by claim preclusion. The district court granted summary judgment in favor of Thomas, determining that NRS 11.190(1)'s limitation did not apply, *Davidson* did not require renewal, and Trisha's partition action was barred by claim preclusion. The district court subsequently quieted title in favor of Thomas, declaring that he was the sole owner of the Deer Springs property and that any of Trisha's interests were extinguished. Trisha appeals.

DISCUSSION

We review a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence in the record demonstrate that no genuine issue of material fact exists "and that the moving party is entitled to a judgment as a matter of law." *Id*. (internal quotation marks omitted). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Id*. at 730, 121 P.3d at 1030 (emphases and internal quotation marks omitted).

The parties do not dispute the material facts in this matter, including that Thomas did not renew the divorce decree. Rather, the relevant inquiry is whether Thomas was entitled to summary judgment as a matter of law because (1) *Davidson* does not apply here, (2) Thomas was not required to renew the decree under NRS 17.214 to enforce his real property rights, and (3) Trisha's partition action was barred by claim preclusion.

Whether Davidson applies to the facts of this case

NRS 11.190 provides in part the following:

> [A]ctions other than those for the recovery of real property, unless further limited by specific statute, may only be commenced as follows:
>
> 1. Within 6 years:
>
> (a) Except as otherwise provided in NRS 62B.420 and 176.275, an action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, or the renewal thereof.

In *Davidson*, 132 Nev. at 711-12, 382 P.3d at 881-82, we held that an ex-wife's motion in 2014 to enforce part of her 2006 divorce decree requiring her ex-husband to pay her one-half of the marital home equity was time-barred under NRS 11.190(1)(a). In concluding that the ex-wife's motion was untimely, we held as follows:

> [T]he six-year statute of limitations in NRS 11.190(1)(a) applies to claims for enforcement of a property distribution provision in a divorce decree entered in the family divisions of the district courts. Like any other claim "upon a judgment or decree of any court of the United States, or of [any court of] any state or territory within the United States," *see* NRS 11.190(1)(a), actions to enforce the provisions of a divorce decree must be initiated within six years.

Id. at 718, 382 P.3d at 886 (second alteration in original). We further concluded that if the ex-wife wanted to prevent her husband from receiving a windfall by not having to pay the equity amounts, she could have renewed her judgment pursuant to NRS 17.214, but she did not do so. *Id.* at 715, 382 P.3d at 884.

Trisha accordingly argues that Thomas's quiet title and declaratory relief counterclaims regarding his interest in the Deer Springs property were time-barred because NRS 11.190 requires actions upon a judgment to be commenced within six years, and under *Davidson*, all aspects of divorce decrees are subject to NRS 11.190(1)(a)'s period of limitations. Reviewing questions of statutory construction de novo, *I. Cox Constr. Co. v. CH2 Invs., LLC*, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013), we disagree.

NRS 11.190 unambiguously excludes actions for recovery of real property. It provides that "actions *other than those for the recovery of real property*, unless further limited by specific statute, may only be commenced as follows." *Id*. (emphasis added). "When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989). Because the limitations of NRS 11.190 plainly apply to actions "other than those for the recovery of real property," we conclude that Thomas's quiet title and declaratory relief counterclaims regarding the Deer Springs property were not time-barred under NRS 11.190(1)(a).[1] Likewise, our holding in *Davidson* that NRS 11.190(1)(a) applies to claims to enforce a property distribution provision in a divorce decree does not apply to this case because NRS 11.190(1)(a) is not implicated.

Whether Thomas was required to renew the divorce decree pursuant to NRS 17.214

Trisha further argues that the divorce decree expired and was void because Thomas did not renew it as required by NRS 17.214. Again, we disagree.

NRS 17.214(1) indicates the procedure by which "[a] judgment creditor or a judgment creditor's successor in interest may renew a judgment which has not been paid by" timely filing, recording, and servicing an affidavit. In *Leven v. Frey*, 123 Nev. 399, 409-10, 168 P.3d 712, 719 (2007), we held that such procedures for judgment renewal required strict compliance. However, the plain and unambiguous language of NRS 17.214 applies only to a "judgment creditor" or his or her successor attempting to renew an unpaid judgment, clearly contemplating a monetary judgment or type of indebtedness—not enforcement of a quitclaim deed or decree regarding ownership of real property.

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[1]The applicable limitations period for Thomas's quiet title and declaratory relief claims would have been five years that began when Trisha began her partition action claiming interest in the property. *See* NRS 11.070 (providing that no cause of action founded upon the title to real property is effective unless the person bringing such action "was seized or possessed of the premises in question within 5 years before the committing of the act in respect to which said action is prosecuted or defense made"); NRS 11.080 (providing that no action for the recovery of real property is effective unless the plaintiff "was seized or possessed of the premises in question, within 5 years before the commencement thereof"); *Berberich v. Bank of Am., N.A*, 136 Nev. 93, 97, 460 P.3d 440, 443 (2020) (noting that the limitations period for a quiet title action "is triggered when the plaintiff is ejected from the property or has had the validity or legality of his or her ownership or possession of the property called into question"). Having brought his counterclaim one week after Trisha's partition action, Thomas's counterclaims were not time-barred.

Here, Thomas is merely trying to enforce his ownership rights to the Deer Springs property pursuant to the divorce decree, where no unpaid judgment is involved. Thus, NRS 17.214 is not implicated. We do not intend today to read into the statute a requirement that property owners must renew their judgments every six years in order to enforce their ownership rights when the statute clearly applies to renewal of monetary judgments. *See City Council of Reno*, 105 Nev. at 891, 784 P.2d at 977 (providing that this court will not go beyond the ordinary meaning of an unambiguous statute). We conclude that Thomas was not required to renew the divorce decree pursuant to NRS 17.214 to enforce his real property rights.

Whether Trisha's partition action was barred by claim preclusion

In granting summary judgment, the district court concluded that Trisha's partition action was barred by claim preclusion. The application of claim preclusion is a question of law that we review de novo. *G.C. Wallace, Inc. v. Eighth Judicial Dist. Court*, 127 Nev. 701, 705, 262 P.3d 1135, 1137 (2011). "Summary judgment is appropriate when [claim or] issue preclusion bars a claim." *Bonnell v. Lawrence*, 128 Nev. 394, 401, 282 P.3d 712, 716 (2012) (alteration in original) (internal quotation marks omitted).

"Generally, the doctrine of res judicata precludes parties or those in privity with them from relitigating a cause of action or an issue which has been finally determined by a court of competent jurisdiction." *Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994), *holding modified on other grounds by Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 963 P.2d 465 (1998)[2] "The doctrine is intended to prevent multiple litigation causing vexation and expense to the parties and wasted judicial resources by precluding parties from relitigating issues they could have raised in a prior action concerning the same controversy." *Id*. While issue preclusion is implicated when the parties to an earlier suit are involved in a subsequent litigation on a different claim, claim preclusion applies when "[a] valid and final judgment on a claim precludes a second action on that claim or any part of it." *Id.* at 598-99, 879 P.2d at 1191. In *Five Star Capital Corp. v. Ruby*, we adopted a three-part test for claim preclusion: "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could

[2]We are not persuaded by Trisha's arguments that *Tarkanian* cannot be relied upon because it was implicitly overruled by *Davidson* and *Leven*. *Tarkanian* dealt with attorney fees and the issue of claim preclusion, not a statute of limitations—as in *Davidson*—or a judgment renewal—as in *Leven*. *See* 110 Nev. at 589, 599, 879 P.2d at 1185, 1191. Therefore, *Davidson* and *Leven* do not implicitly overrule our holdings in *Tarkanian.* Similarly, we reject Trisha's argument that *Davidson* and *Leven* implicitly overruled *Terrible v. Terrible*, 91 Nev. 279, 534 P.2d 919 (1975), which concerned equitable estoppel and waiver.

have been brought in the first case." 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008) (footnotes omitted), *holding modified by Weddell v. Sharp*, 131 Nev. 233, 350 P.3d 80 (2015).

Reviewing the record and the briefs, we determine that Thomas demonstrated that Trisha's partition action was claim precluded by the divorce decree, which adjudicated the Deer Springs property as Thomas's sole and separate property. First, the parties were the same in the divorce proceeding and the partition action: Trisha and Thomas. Second, the divorce decree was a final judgment pursuant to the summary proceedings for divorce detailed in NRS Chapter 125, which provides that "[e]ntry of the final judgment upon a petition for a summary proceeding for divorce constitutes a final adjudication of the rights and obligations of the parties with respect to the status of the marriage and the property rights of the parties" except where there is "fraud, duress, accident, mistake or other grounds recognized at law or in equity." NRS 125.184. Third, Trisha's partition action seeking equitable distribution of the Deer Springs property was based on a part of her claim in the prior divorce action. Trisha's action for divorce sought "an equitable distribution and division of all community property assets and debts and separate property and debts of the parties." A determination of the ownership distribution of the Deer Springs property was thus placed at issue and subsequently adjudicated. We therefore conclude that Trisha's partition action was barred by claim preclusion.

CONCLUSION

We conclude that *Davidson*'s holding that NRS 11.190(1)(a) applies to claims to enforce a property distribution provision in a divorce decree does not apply to the distribution of real property because NRS 11.190(1)(a) does not apply to actions for recovery of real property. We also conclude that Thomas was not required to renew the divorce decree under NRS 17.214 to enforce his real property rights. Lastly, we conclude that Trisha's partition action was barred by claim preclusion. Accordingly, we affirm the district court's grant of summary judgment and quiet title in favor of Thomas.[3]

Gibbons and Silver, JJ., concur.

[3]Because we conclude that Trisha's partition action was already barred by claim preclusion, we need not reach the parties' arguments on equitable principles, including equitable estoppel, waiver, laches, and unclean hands. To the extent that there are any factual disputes regarding equitable defenses, none are material facts barring summary judgment. *See Wood*, 121 Nev. at 730, 121 P.3d at 1030.