ALFRED C. HARVEY, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 72829

ALFRED C. HARVEY, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 75911

October 1, 2020 473 P.3d 1015

Consolidated appeals from a judgment of conviction, pursuant to a jury verdict, of robbery and from a district court order denying postconviction motions for a new trial and to reconstruct the record. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Affirmed in part, reversed in part, and remanded with instructions.

Darin F. Imlay, Public Defender, and *Sharon G. Dickinson*, Chief Deputy Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Alexander G. Chen*, Chief Deputy District Attorney, and *Jonathan VanBoskerck*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Cadish, J.:

This case presents an issue of first impression before this court—whether NRS 175.101 precludes a judge other than the trial judge from deciding post-trial motions when there is no evidence that the trial judge is absent, deceased, sick, or disabled. After a jury found appellant Alfred Harvey guilty of robbery, Harvey discovered a jury note that the trial judge, Senior Judge James Bixler, did not discuss in the presence of counsel. Harvey moved for a new trial and to reconstruct the record, requesting that Judge Bixler preside over the motions. Instead, Judge Douglas Smith heard the motions and denied them, finding that Judge Bixler did not remember the jury question or whether he presented the jury question to counsel.

We hold that Judge Smith improperly denied Harvey's request to have Judge Bixler decide the merits of his motions. Nevada caselaw and NRS 175.101 clearly provide that the trial judge must preside over post-trial motions unless the trial judge is absent, deceased, sick, or disabled. There is no evidence in the record that any of those reasons prevented Judge Bixler from deciding the motions. Furthermore, we decline to interpret the term "disability" under NRS 175.101 to include a trial judge's inability to remember a particular event that occurred during the at-issue proceeding. We therefore reverse Judge Smith's order denying Harvey's post-trial motions and remand for Judge Bixler to hear and decide the motions.

FACTS AND PROCEDURAL HISTORY

The State charged Harvey by information with robbery with the use of a deadly weapon. After presiding over preliminary matters, the district court assigned Harvey's trial to overflow, and the Honorable Senior Judge Bixler presided over it. During deliberations, the jury sent a note to Judge Bixler requesting elaboration on the element of force or violence or fear of injury necessary for a robbery conviction. Judge Bixler sent a note back that stated, "The Court is not at liberty to supplement the evidence." Judge Bixler did not inform the parties about the note. Ultimately, the jury found Harvey guilty of robbery but declined to convict him on the deadly weapon enhancement.

While preparing for the appellate process, Harvey's counsel discovered the jury note. Harvey moved for a new trial and to reconstruct the record. Both motions requested that Judge Bixler decide the motions. Instead, Judge Smith presided over the motions and declined Harvey's request to have Judge Bixler decide the motions. Judge Smith stated that he "talked to Judge Bixler about [the motions] and [Judge] Bixler doesn't remember."[1] Ultimately, Judge Smith denied both of Harvey's motions.

Harvey appealed his conviction and the postconviction orders and presented numerous legal arguments to the court of appeals. *See Harvey v. State*, Docket Nos. 72829-COA & 75911-COA (Order of Affirmance, Sept. 18, 2019). The court of appeals rejected Harvey's arguments and affirmed his conviction and the denial of his postconviction motions. *Id*. at *22. Harvey subsequently filed a petition for review, arguing that NRS 175.101 requires the trial judge to decide post-trial motions.[2] We granted Harvey's petition and limited our review to the issues addressed in this opinion. *See* NRAP 40B(g) (providing this court "may limit the question(s) on review").

DISCUSSION

We review questions of statutory construction de novo. *Jackson v. State*, 128 Nev. 598, 603, 291 P.3d 1274, 1277 (2012). Our inquiry starts with the statute's text. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). We will not go beyond the plain language of a statute when, as here, the meaning is clear on its face. *Id*.

NRS 175.101 states as follows, in relevant part:

> If by reason of absence from the judicial district, death, sickness or other disability the judge before whom the defendant

[1]Judge Smith's decision to personally contact the trial judge and ask him about the jury note was improper, and we discourage judges from engaging in this behavior. *See* NCJC Canon 2, Rule 2.9(A)(3) (precluding judges from "receiving factual information that is not part of the record" from other judges); NCJC Canon 2, Rule 2.9(C) (precluding judges from independently investigating facts and mandating that judges consider only evidence presented by the parties).

[2]Harvey also argued that a material variance between the State's charging documents and the State's proffered evidence rendered his conviction unconstitutional. A material variance "exists only where the variance between the charge and proof was such as to affect the substantial rights of the accused." *State v. Jones*, 96 Nev. 71, 73-74, 605 P.2d 202, 204 (1980) (citing *Berger v. United States*, 295 U.S. 78, 82 (1935)). A charging document affects a defendant's substantial rights when it does not adequately inform the defendant of the charges such that the defendant cannot prepare for trial or the State's proffered evidence surprises the defendant. *Id*. at 74, 605 P.2d at 204. Here, the information properly identifies Harvey, the crime alleged, the victim, and the date of the alleged robbery. During oral argument, Harvey's counsel admitted that the State's proffered evidence did not surprise him. Accordingly, any variance between the information and the State's proffered evidence did not affect Harvey's substantial rights. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

> has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilty or guilty but mentally ill, any other judge regularly sitting in or assigned to the court may perform those duties . . . .

Judge Bixler was not absent from the judicial district or sick when Harvey filed his post-trial motions and Judge Smith heard and decided them. However, the parties dispute whether Judge Bixler's inability to remember the jury note qualifies as a disability under the statute.

The State argues that Judge Bixler's inability to remember the juror note qualifies as a disability under NRS 175.101, thereby allowing Judge Smith to preside over Harvey's post-trial motions. The State cites no authority in support of such a construction. Relying on the canon of statutory construction *noscitur a sociis*, *see Ford v. State*, 127 Nev. 608, 622 n.8, 262 P.3d 1123, 1132 n.8 (2011) (noting that "words are known by—acquire meaning from—the company they keep" (citation omitted)), Harvey argues that the term "disability" under NRS 175.101 must be a physical disability that impairs the ability of the trial judge to perform his or her judicial duties. We decline to adopt either interpretation for the reasons set forth below.

The plain language of NRS 175.101 states that a trial judge's "sickness or other disability" must render him or her "*unable* to perform the duties to be performed by the court . . . ." (Emphasis added.) A "disability" is "[t]he inability to perform some function" or "[a]n objectively measurable condition of impairment, physical or mental, [especially] one that prevents a person from engaging in meaningful work." *Disability*, *Black's Law Dictionary* (11th ed. 2019). Both NRS 175.101 and a legal dictionary definition of "disability" turn upon whether the individual can perform some function or duty. Therefore, we reject the State's interpretation because Judge Bixler's inability to remember a particular event that occurred over the course of a trial did not impair his ability to perform his duties by considering and deciding Harvey's motions.[3]

Similarly, we reject Harvey's interpretation of "disability" because it places a limitation in the statute that goes beyond the plain meaning of the statute's language. Had the Legislature meant to include such a limitation, it would have done so expressly. Limiting the meaning of "disability" under NRS 175.101 to just physical disabilities, thereby excluding mental disabilities or other impairments that could render a trial judge unable to perform his or her duties, would require us to revise the statute, which is not the judiciary's role.

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[3]Indeed, reviewing the briefing and the court file may very well refresh Judge Bixler's recollection of the pertinent events.

Alternatively, the State argues that NRS 175.101 did not preclude Judge Smith from hearing Harvey's post-trial motions. The State further contends that the term "[i]f" that begins NRS 175.101 should be read "inclusively"—meaning that NRS 175.101 merely provides a mechanism for substituting judges when one of the statutorily defined conditions is present but does not preclude substitution in other circumstances. *Harvey*, Docket Nos. 72829 & 75911 at *20. Therefore, the State urges this court to conclude that NRS 175.101 did not require the trial judge to preside over post-trial motions. *Id*. We decline the State's invitation to adopt such an interpretation.

We follow "the maxim 'expressio unius est exclusio alterius,' the expression of one thing is the exclusion of another." *State v. Javier C.*, 128 Nev. 536, 541, 289 P.3d 1194, 1197 (2012) (citation omitted). Additionally, we construe the words in a statute as a whole, such that no words or phrases become superfluous or nugatory. *Mangarella v. State*, 117 Nev. 130, 133, 17 P.3d 989, 991 (2001). The term "[i]f"at the beginning of NRS 175.101 makes the statute's first clause conditional. By its terms, the statute precludes a judge other than the trial judge from hearing post-trial motions unless one of the statutorily defined conditions is present. To read the statute otherwise renders the conditional clause at the beginning of NRS 175.101 nugatory.

Finally, the State argues that Nevada caselaw precludes the application of NRS 175.101 to the post-trial motions and cites *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 440 (2007). The State's reliance on *Halverson* is misplaced. We decided *Halverson* in the context of a *quo warranto* petition challenging a chief district judge's authority over another district judge's action, observing that the judiciary has broad inherent authority to administer its own affairs. *Id.* However, in the context of a trial judge's duty to hear and decide a case assigned to him or her, we have held that "[a] trial judge has a duty to preside to the conclusion of all proceedings, in the absence of some statute, rule of court, ethical standard, or other compelling reason to the contrary." *Ham v. Eighth Judicial Dist. Court*, 93 Nev. 409, 415, 566 P.2d 420, 424 (1977). NRS 175.101 codifies this rule by requiring a trial judge to preside over post-trial motions unless one of the disqualifying statutory conditions is present.[4] Accordingly, we hold that Nevada caselaw and NRS 175.101 require a trial judge to preside over post-trial motions unless one of

[4]The State's reliance on *Dieudonne v. State*, 127 Nev. 1, 245 P.3d 1202 (2011), is similarly unavailing. In *Dieudonne*, we held that a defendant had no due-process right to demand that the judge who accepted the defendant's guilty plea also sentence him or her. *Id*. at 7, 245 P.3d at 1206. By its own terms, NRS 175.101 only applies when a judge *tries* a case. NRS 175.101 does not apply where a defendant waives his or her right to a trial and enters into a guilty plea agreement. Therefore, our holding in *Dieudonne* is inapplicable here.

the statutory conditions is present. None of the conditions listed in NRS 175.101 were present here. Therefore, Judge Smith erred when he declined Harvey's request for Judge Bixler to decide his motion for a new trial and his motion to reconstruct the record.[5]

CONCLUSION

Nevada caselaw and NRS 175.101 clearly provide that the trial judge must preside over post-trial motions unless the trial judge is absent, deceased, sick, or disabled. The term "disability" under NRS 175.101 contemplates some type of impairment—physical, mental, or otherwise—that prevents the trial judge from performing his or her duties. Because there is no evidence in the record that Judge Bixler was disabled, we hold that Judge Smith erred when he declined Harvey's request for Judge Bixler to decide his post-trial motions. Accordingly, we reverse Judge Smith's order denying Harvey's motions and remand for Judge Bixler to consider and decide both post-trial motions.[6] Additionally, we conclude that Harvey's material variance argument is without merit and we decline to overturn his conviction on those grounds.

Pickering, C.J., and Gibbons, Hardesty, Parraguirre, Stiglich, and Silver, JJ., concur.

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[5]Because we are remanding for the trial judge to consider and decide both motions, we decline to address the merits of Harvey's motion to reconstruct the record.

[6]Because the issue was passed upon below and will need to be addressed anew on remand, we take this opportunity to remind the district court that a trial judge has a duty to give further instructions to the jury when a jury question suggests a lack of understanding about a significant element of the applicable law. *Gonzalez v. State*, 131 Nev. 991, 996, 366 P.3d 680, 683-84 (2015). When this occurs, the defendant "has the right to have his or her attorney present to provide input in crafting the court's response to a jury's inquiry." *Manning v. State*, 131 Nev. 206, 211, 348 P.3d 1015, 1019 (2015). A trial judge's failure to notify the parties about a juror note is a constitutional error and is subject to reversal unless the error was harmless beyond a reasonable doubt. *Id*. at 212, 348 P.3d at 1019.

STEVEN TURNER, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 76465

October 1, 2020 473 P.3d 438

Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit burglary, attempted burglary while in possession of a firearm or deadly weapon, two counts of attempted murder with use of a deadly weapon, and battery with use of a deadly weapon resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Mark B. Bailus, Judge.

Affirmed.

[Rehearing denied November 13, 2020]

Darin F. Imlay, Public Defender, and *Deborah L. Westbrook*, Chief Deputy Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *John T. Niman*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Silver, J.:

Under *Bruton v. United States*, the admission of a nontestifying codefendant's inculpatory statement that expressly implicates the defendant violates the Confrontation Clause. 391 U.S. 123, 135-36 (1968). In this case, we are faced with an issue of first impression regarding the preservation of a *Bruton* challenge—appellant asserts that his Confrontation Clause rights under *Bruton* were violated when the district court admitted his codefendant's statements, but the State contends that the appellant waived any *Bruton* challenge. We agree that under these particular facts, appellant waived the *Bruton* challenge. Appellant's actions of cooperating to redact the statements, agreeing to the redacted statements' admission, indicating an intent to no longer pursue the *Bruton* challenge, and failing to thereafter object to the statements showed a lack of intention to preserve the argument for appeal. And although we agree with some of appellant's other points of error, we ultimately affirm the verdict, as those errors were harmless and do not amount to cumulative error warranting reversal.

FACTS

Eric Clarkson heard noises on his back patio, just outside his bedroom window, around 3:30 a.m. That patio was covered and screened, and separated from the rest of the backyard. The lights inside his house were off, and through the window, Clarkson was able to see a young man, although he could not see the intruder's face. Clarkson called 9-1-1 and alerted his housemate, Willoughby Potter de Grimaldi. Grimaldi looked out the window and, like Clarkson, saw a man on the patio but could not see his face. Grimaldi noted the intruder was wearing a cap and appeared to be cocking a shotgun. Someone then began to beat on the front door, and Grimaldi looked out a window to see another man, who ran away down the street. Grimaldi also thought he saw a third man pass by his bedroom window.

Officers Robertson and Grego-Smith arrived approximately five minutes after receiving the call from dispatch and approached the house quietly. They briefly checked the sides of the house before Clarkson let them inside. Leaving the lights off, the officers moved through the home and opened the back door to check the backyard. The intruders immediately opened fire. At least two bullets flew into the home before the officers could react, narrowly missing Grimaldi and Clarkson. One shot crossed the room while the other exploded mid-air, blowing shrapnel throughout the area. Grimaldi described one shot as appearing as a "shooting star" while the other exploded like "fireworks." The officers could hear that one of the shots was from a high-powered rifle. Another bullet hit Officer Robertson in the upper thigh, severely damaging his femur. Officer Robertson collapsed while Officer Grego-Smith returned fire.

Additional officers arrived on the scene with a K-9, who located Clemon Hudson in the backyard. Officers approached to find Hudson lying on the ground, injured, with a shotgun between his legs. Officers also began patrolling a mile-wide perimeter around Clarkson's home, looking for other suspects. After someone reported a suspicious person traveling through a backyard, officers located appellant Steven Turner walking down a street within the perimeter. He was bleeding and had what appeared to be a bullet wound to his leg, although Turner told officers he had been injured while jumping over a fence. Officers transported him to UMC, where doctors, including Dr. Amy Urban, examined him for a possible gunshot wound. Doctors found shrapnel in Turner's leg and noted the presence of "stippling" on his leg, foot, and ankle.

Back at Clarkson's home, officers found a damaged 12-gauge Mossberg pump-action shotgun, an SKS Yugo Rifle, and a Beretta handgun in the patio area. Officers also located Hudson's vehicle, with the keys in the ignition, outside Clarkson's home. Inside the car they found two cell phones, a gun magazine, a loose round cartridge, and Turner's two dogs. A later trace of one of the phones

led to Turner's residence. Officers also recovered surveillance video showing Turner traversing yards, parking lots, and fences on foot immediately after the incident.

Turner and Hudson each gave voluntary statements to police, admitting to going to the home to steal marijuana. Each blamed the other for contriving to burglarize the home and for bringing the guns.[1] Turner told detectives he followed Hudson over the wall, through the yard, and up to the patio area. The shooting then broke out, and Turner claimed he fled the yard and waited on a couch in a nearby backyard for a time before setting out for a friend's house, at which point he was apprehended. Turner admitted seeing the SKS in Hudson's car. He told detectives the SKS had previously been stolen from his uncle and accurately described the gun to detectives, but he denied bringing the gun. Turner claimed the burglary was Hudson's idea, and Hudson carried both the SKS and the shotgun. Turner denied ever holding or firing a weapon at the scene. He also denied working with a third person during the crime. Hudson, meanwhile, blamed Turner for contriving to burglarize the home and stated they both fired the weapons at police.

Turner and Hudson were indicted and tried jointly. The State charged them under three alternate theories: directly committing the crimes, aiding or abetting, and conspiracy. Turner conceded to committing conspiracy and attempted burglary but contested the remaining charges. At trial, he argued that he merely went to the house and stayed at the back of the yard, and that he ran when the shooting broke out. Turner also argued that three or more people had been in the yard that night, that he did not match the descriptions of the intruders, and that the State failed to connect him to the crimes.

Hudson and Turner filed a pretrial motion to sever, arguing that their statements to detectives inculpated each other such that a joint trial would violate *Bruton v. United States*, 391 U.S. 123 (1968). The district court initially denied the motion without prejudice, and the State redacted the statements to remove names and, to the extent possible, references to other persons. At subsequent status checks, Turner agreed with the State's redactions but proffered additional redactions, and later he stated "we've submitted our proposed redactions. If Your Honor is inclined to not sever the case we would . . . I guess not renew." The court indicated it would review the redacted statements, and Turner and the State continued to work toward satisfactory redactions.

At a later status check, Turner acknowledged receiving and reviewing the redacted statements and stated that while he no longer challenged the admission of his own statements, he "may have some

[1]Although Turner and Hudson each referred to the other by his street name when speaking to police, the parties do not contest that each was referencing the other, and we therefore use their given names.

additional motion practice in the case" regarding his *Bruton* challenge to the admission of Hudson's statements.

Turner did not renew the motion to sever. At trial Turner requested a limiting instruction, and the district court accordingly instructed the jury to use Hudson's statements only as evidence against Hudson. Turner did not object to the statements' admission. Turner's redacted statements were likewise admitted into evidence.

State witnesses could not link the DNA or fingerprint evidence recovered from the scene to Turner. However, they found Hudson's DNA on blood splatters and a beanie hat found at the scene, as well as his right-hand fingerprints on the Mossberg shotgun. Firearms and toolmark expert Anya Lester compared the guns to evidence found at the scene and described her process for test firing a gun: shooting the gun into a water tank and then examining the fired bullets and ejected cartridges. She determined that the Mossberg shotgun had been fired at the scene but was unable to test that gun because it had been damaged. While Lester could not conclusively establish that someone fired the SKS at the scene, she testified the cartridge and ammunition evidence was consistent with the SKS having been fired. Lester also opined that both guns would require two hands to fire, and explained the SKS had a trigger pull of approximately five pounds. Lester further addressed skin stippling from a gunshot, as did Dr. Amy Urban. Dr. Urban also testified to Turner's injury and the skin stippling on his leg.

The State used the stippling evidence during closing argument to counter Turner's defense that he had stayed in the back of the yard away from the shooting, by arguing that the stippling placed Turner closer to the gunfire. The State used Turner's and Hudson's statements to argue that only two people committed the crime and that Turner was the other person mentioned in Hudson's redacted statements.

The jury convicted Turner and Hudson on all counts, and the court sentenced Turner to an aggregate total of 480 months in prison with parole eligibility after 168 months. Turner moved for a new trial, in relevant part on grounds that the district court should have severed the trial and that the joint trial violated *Bruton*, but the court denied the motion. Turner appeals.[2]

DISCUSSION

In this opinion, we first address the circumstances under which a party preserves a *Bruton* challenge for appeal, and we conclude Turner waived those arguments here. We next consider whether the district court improperly admitted Lester's and Dr. Urban's expert testimony regarding stippling. We agree that the district court

[2]This case is before this court on a petition for review of a decision by the court of appeals.

abused its discretion by admitting Lester's unnoticed stippling testimony, but the error was harmless in light of Dr. Urban's testimony and the medical records, and Turner fails to show plain error as to Dr. Urban's testimony. Finally, we address whether the State engaged in prosecutorial misconduct and conclude that while there were several instances of misconduct, it was ultimately harmless in light of the evidence adduced at trial.[3] For those same reasons, we conclude cumulative error does not warrant reversal.

Whether Turner waived his Bruton argument

Bruton provides that the admission of a nontestifying codefendant's inculpatory statement that expressly implicates the defendant violates the Confrontation Clause. 391 U.S. 123, 135-36 (1968). Turner argues that allowing Hudson's redacted statements at the joint trial violated his constitutional rights pursuant to *Bruton*. The State counters that Turner waived his *Bruton* challenge by stating, before trial, that he had no objections and then failing to object during trial to the statements' admission. Turner contends that he preserved the *Bruton* challenge by filing a motion to sever, expressly reserving the right to re-raise the argument later, and moving for a new trial.

The arguments raise a novel issue for this court. Namely, whether a defendant waives or forfeits a *Bruton* argument where the defendant moves to sever the trial on *Bruton* grounds but thereafter cooperates to redact the statements and neither objects to the statements at trial nor renews the *Bruton* argument before the admission of the statements to the jury. The United States Court of Appeals for the Tenth Circuit addressed a similar situation in *United States v. Sarracino*, 340 F.3d 1148 (10th Cir. 2003). There, three defendants were jointly tried. *Id.* at 1158. One defendant moved for severance before trial under *Bruton*, which the court denied. *Id.* The defendant thereafter agreed to cooperate with the other defendants and the State to redact the challenged statements and did not object to the statements' admission at trial. *Id.* at 1159. But when agreeing to cooperate with the efforts to redact the statements prior to trial, the defendant clarified on the record that he did not waive his objection to the joint trial by cooperating. *Id.* The Tenth Circuit concluded that, under these facts, the defendant's pretrial "position was clear" and that counsel did not waive the severance issue before trial. *Id.* As to whether failure to object at trial caused waiver, the court called

[3]Turner also argues that the presence of uniformed officers in the courtroom prejudiced the proceedings and warrants reversal. However, the mere presence of officers in a courtroom does not demonstrate prejudice, and the record is insufficient for us to determine whether prejudice otherwise resulted here. *See Jones v. Davis*, 890 F.3d 559, 571 (5th Cir. 2018). We therefore do not reach this issue. *See Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) ("We cannot properly consider matters not appearing in [the] record.").

the issue "close" but ultimately concluded the argument was "sufficiently preserved" without further explanation. *Id.*

Similarly, the California Court of Appeal considered whether a defendant waived a *Bruton* challenge by failing to object at trial. *People v. Archer*, 99 Cal. Rptr. 2d 230, 233 (Ct. App. 2000). There, the prosecutor moved to enter the codefendant's redacted statement into evidence. *Id.* Defense counsel objected prior to trial and unsuccessfully moved to sever the trial. *Id.* While the appeals court did not provide a detailed explanation, the court concluded "in the context of the pretrial proceedings" that counsel's pretrial actions sufficiently preserved the argument for appeal. *Id.* Conversely, in *United States v. Kaatz*, the Court of Appeals for the Tenth Circuit concluded the admission of a codefendant's incriminating statement did not warrant reversal where no defendant objected before or during trial or moved for severance. 705 F.2d 1237, 1243-44 (10th Cir. 1983).

From these cases, we conclude that cooperating with efforts to redact inculpatory statements and thereafter failing to raise an objection at trial does not per se waive a *Bruton* argument. However, as addressed in *Sarracino*, the record must show that the defendant intended to preserve the argument for appeal despite the cooperation and lack of an objection at trial. 340 F.3d at 1159. It follows then, that if the record does not show the defendant intended to preserve the argument, the argument is forfeited or waived. *See id.* For example, in *Sayedzada v. State*, the court of appeals considered waiver in the context of juror challenges for cause. 134 Nev. 283, 286, 419 P.3d 184, 189 (Ct. App. 2018). There, the defendant initially challenged a juror for cause but thereafter did not renew the challenge, and the court considered the issue waived on appeal. *Id.* at 286, 288, 419 P.3d at 189, 190. In addressing the policy concerns supporting waiver under those facts, the court explained that "[p]arties should not be able to strategically place questionable jurors on the jury as a means of cultivating grounds for reversal should the verdict be unfavorable." *Id.* at 287, 419 P.3d at 190.

Our decision in *Jeremias v. State* offers additional guidance. 134 Nev. 46, 412 P.3d 43 (2018). There, the defendant argued that the district court's decision to exclude his family members from the courtroom during voir dire prejudiced him. *Id.* at 49, 412 P.3d at 47. But the defendant did not object to the decision in the district court, and we construed that failure as intentional. *Id.* at 52, 412 P.3d at 50. In so doing, we distinguished between invited error (an affirmative action by the defendant that introduces the error), waiver (an intentional relinquishment of a known right), and forfeiture, which from *Jeremias* can be described as the intentional failure to object, having full knowledge of the relevant facts. *Id.* at 52-53, 412 P.3d at 50. Specifically, we explained that the defendant forfeited his argument where the subject events happened in open court; the prosecutor relayed the reasons for his actions to the defense attorney; the defen-

dant said nothing; and the decision to not object appeared, from the circumstances, to be intentional. *Id.* at 52, 412 P.3d at 50. Similar to *Sayedzada*, we warned against correcting errors on appeal where to do so, under the circumstances, "would encourage defendants who are aware their rights are being violated to do nothing to prevent it, knowing that they can obtain a new trial as a matter of law in the event they are convicted." *Id.*

From these cases, we extract the following rule: where the defendant moves to sever trial on *Bruton* grounds but the district court determines the statements can be sufficiently redacted, the defendant does not necessarily waive the *Bruton* challenge by thereafter participating in the efforts to redact the statements. Nevertheless, to clearly preserve a *Bruton* challenge for appellate review in this context, a defendant must formally object, on the record, after the parties have agreed upon redactions and prior to the district court's admission of a codefendant's statement. We note that determining whether a defendant preserves a *Bruton* argument for appeal is a highly fact-based inquiry that must be considered under the totality of the circumstances. Yet clarifying the objection on the record after a statement has been redacted by the court adequately preserves the objection for appellate review, as it clarifies that the defendant does not waive the argument and prevents unnecessary confusion. *Cf. BMW v. Roth*, 127 Nev. 122, 136-38, 252 P.3d 649, 658-59 (2011) (holding that the mere filing of a motion in limine does not serve as a continuing objection to an attorney's violation of an order in limine and that a contemporaneous objection is required at trial "to prevent litigants from wasting judicial, party, and citizen-juror resources").

Our holding here resolves two concerns. First, it recognizes that the law favors joint trials, *Jones v. State*, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995), and encourages defendants to collaborate in redacting statements. Second, our holding prevents defendants from strategically withholding a *Bruton* argument in the hopes that, if the defendant is convicted, *Bruton* will provide grounds for a new trial following a reversal on appeal. *See, e.g.*, *Sayedzada*, 134 Nev. at 287, 419 P.3d at 190; *Jeremias*, 134 Nev. at 52, 412 P.3d at 50; *BMW*, 127 Nev. at 137, 252 P.3d at 659 ("The courts cannot adopt a rule that would permit counsel to sit silently when an error is committed at trial with the hope that they will get a new trial because of that error if they lose." (quoting *U.S. Aviation Underwriters v. Olympia Wings, Inc.*, 896 F.2d 949, 956 (5th Cir. 1990))).

Turning to the case at hand, we conclude the record shows Turner waived his *Bruton* argument. Although Turner moved to sever trial and raised the *Bruton* argument below, Turner did not clarify, on the record, that he wished to preserve that argument for appeal after satisfactory redactions had been made by the parties. To the contrary, after Turner and the State agreed upon redactions, defense counsel acknowledged that Turner had no further challenge to the redacted

statements, and nothing in the record shows that Turner renewed his objection before the admission of Hudson's statements. Under these particular facts, we decline to consider Turner's arguments or correct any *Bruton* error.

Whether the district court erroneously admitted unnoticed expert testimony

Turner next argues that the district court improperly admitted firearm and toolmark expert Anya Lester's unnoticed expert testimony regarding stippling. He further argues that the district court also improperly allowed Dr. Amy Urban, Turner's treating physician at UMC, to testify, where the State did not notice that expert. We generally review a district court's decision to admit expert testimony for an abuse of discretion. *Mathews v. State*, 134 Nev. 512, 514, 424 P.3d 634, 637 (2018). However, we address for plain error alleged errors raised for the first time on appeal. *See Browning v. State*, 124 Nev. 517, 533, 188 P.3d 60, 71 (2008) (holding that the failure to object below generally waives an argument on appeal, absent plain error).

We explained in *Hallmark v. Eldridge*, 124 Nev. 492, 498-99, 189 P.3d 646, 650-51 (2008), that district courts must ensure experts are sufficiently qualified before permitting the witness to testify as an expert:

> To testify as an expert witness under NRS 50.275, the witness must satisfy the following 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).

Id. at 498, 189 P.3d at 650 (alteration in original) (quoting NRS 50.275).

Our statutes also require parties to disclose expert witnesses and provide a brief statement of the expected substance of the expert's testimony at least 21 days before trial. NRS 174.234(2). Further, each party has a continuing duty under NRS 174.234 to provide written notice of any expert or expert testimony the party intends to call or introduce during its case-in-chief "as soon as practicable after the party determines that the party intends to call an additional witness." NRS 174.234(3). Although the law favors allowing even late-disclosed witnesses to testify in criminal cases, *Sampson v. State*, 121 Nev. 820, 827, 122 P.3d 1255, 1260 (2005), courts should exclude an undisclosed witness if the State's failure to notice that witness or the content of the witness's testimony constitutes bad faith, NRS 174.234(3).

By mandating that parties disclose both the expert witness and the content of the witness's testimony, NRS 174.234 also serves to prevent trial by ambush. "Trial by ambush traditionally occurs where a party withholds discoverable information and then later presents this information at trial, effectively ambushing the opposing party through gaining an advantage by the surprise attack." *Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P'ship*, 131 Nev. 686, 701 n.14, 356 P.3d 511, 522 n.14 (2015). We note NRS 174.234 is the criminal procedural rule equivalent to NRCP 16.1(a), which requires civil litigants to disclose expert witnesses and the content of the experts' testimony at least 30 days before trial. Such rules "serve[ ] to place all parties on an even playing field and to prevent trial by ambush or unfair surprise." *Sanders v. Sears-Page*, 131 Nev. 500, 517, 354 P.3d 201, 212 (Ct. App. 2015); *cf. R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 271 (6th Cir. 2010) (addressing the federal procedural rule requiring parties to disclose expert witness opinions and explaining that the reports must explain how and why the expert reached the opinion the expert intends to testify to, to avoid an ambush at trial).

Anya Lester's stippling testimony

During the State's case-in-chief, the prosecutor asked Lester "[w]hat is stippling?" She answered that stippling is "small marks that you could get on your skin if—if you're shot, you have a gunshot wound. And powder stippling in particular is if that powder hits your skin. You get, like, little scratches or bruises where that powder would impact your skin." The State then asked whether there was a particular range or distance associated with stippling, and Lester stated that it was difficult to give an exact number because of the variables involved. When the State asked whether she had ever seen a case of stippling from more than 24 inches away, Lester began to answer with "[i]n my limited experience with stippling," and Turner objected on grounds that Lester was not noticed or qualified to "talk about medical terminology and what may occur when a bullet impacts a human being."

Voicing concern over Lester's limited experience, the court conducted voir dire outside the jury's presence. Lester stated she had training on stippling and "distance determination from gunshot residue," primarily from a 2011 training that was not disclosed on her curriculum vitae (CV). She admitted to having limited experience with stippling and acknowledged the State asked her to look into stippling the day before she testified. Turner protested that Lester was only disclosed as a firearm and toolmark expert, not an expert on soft tissue damage to skin resulting from a gunshot. Turner asked for a continuance, which the court denied. The district court then allowed the prosecutor to ask Lester to define and explain stippling. Lester also opined that stippling happens at a close-to-intermediate

range, and on redirect, she clarified that, in her experience, she had seen stippling occur "from a near-contact shot out to approximately 36 inches."

We agree with Turner that the district court abused its discretion in admitting Lester's stippling testimony. The prosecutor elicited the stippling testimony during the State's case-in-chief in violation of NRS 174.234(2)'s requirement that the State disclose the substance of any expert testimony it will offer during the case-in-chief. While the State noticed Lester as an expert in firearms and toolmarks, it did not notice her as an expert on stippling on human skin. Lester's CV did not mention that her training included stippling, instead focusing on her expertise in analyzing guns and matching expended bullets to firearms.[4] Accordingly, while the defense was on notice that Lester would try to match expended bullets to firearms from the crime scene, the defense was not on notice that Lester would testify regarding any type of stippling on human skin from gunshot residue.

Moreover, we believe that the record shows Lester was unqualified as an expert under *Hallmark* to testify to the substance of the effect of stippling on skin. Lester explained that she had training regarding gunfire and gunshot residue. Lester's training with firearms and gunshot residue may have qualified her as an expert for purposes of defining stippling as it pertained to firing a bullet from a distance into a wall or other such surface as she testified to on voir dire; however, she was clearly unqualified as an expert in the area of testifying as to stippling of human skin from a gunshot wound. Here, the only relevance called into question by the defense was skin stippling as to Turner's gunshot wound. Because Lester admitted she had only limited experience in that area—and did not explain how her firearms training qualified her as an expert as to skin stippling—we conclude the district court erred by allowing Lester to testify as an expert as to skin stippling from gunshot wounds.

The problematic aspects of Lester's testimony do not end based on her being unqualified, however, as this situation can be fairly characterized as trial by ambush. Notice of the stippling evidence was important to the defense's preparation, where Turner's theory of the case was that Hudson alone was responsible for bringing the weapons to Clarkson's house and that no evidence placed any of the guns in Turner's hands during the crime. The skin stippling evidence, viewed in light of the other evidence, strongly suggested Turner shot the SKS.[5] Allowing Lester to testify to skin stippling without notice effectively prevented Turner from preparing for cross-examination. It also prevented Turner from obtaining—or even consulting—a rebuttal expert.

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[4]The record shows that the State first mentioned the stippling issue to Lester the day before she testified.

[5]Namely, other evidence showed that both the SKS and the Mossberg were shot at the same time, that Hudson shot the Mossberg, and that only Turner and Hudson were present during the crime.

Although Lester's stippling testimony is deeply troubling, we nevertheless conclude the error does not warrant reversal. Turner's own inculpatory statements placed him on or near the patio when the shooting started, and the unobjected-to medical records of Turner established the presence of skin stippling. Moreover, Dr. Urban's testimony, discussed further below, that stippling is caused by "gas and debris" from a gunshot, independently suggested Turner was close to one of the firearms at the time the shooting broke out. Accordingly, the errors here were ultimately harmless. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); *see also Leonard v. State*, 117 Nev. 53, 69-70, 17 P.3d 397, 407-08 (2001) (reviewing improperly admitted testimony for harmless error where that testimony was "supported by other credible evidence").

Dr. Amy Urban's testimony

We next consider whether the district court abused its discretion by admitting Dr. Urban's testimony. Turner did not object below, and accordingly we review for plain error. *See Browning*, 124 Nev. at 533, 188 P.3d at 71 ("Generally, the failure to object precludes appellate review absent plain error.").

The State called Dr. Urban after Turner asked the court to take judicial notice of the medical dictionary definition of stippling and the State disagreed with that definition.[6] Dr. Urban defined stippling and testified to Turner's medical treatment. Dr. Urban testified that Turner's wound showed stippling, which she defined as "little black marks that go around the skin of a wound from a gunshot wound. It's from high-pressure gas and debris." Turner's medical records, which the parties stipulated to admit, noted stippling to his lower leg, ankle, and foot, as well as shrapnel in his leg.

We conclude Turner fails to show plain error here. Turner's medical records were admitted into evidence before Dr. Urban testified, and those records listed Dr. Urban as Turner's treating physician and detailed the presence of skin stippling on Turner. Because Dr. Urban testified to medical records that were already admitted into evidence, her testimony relaying what was already in the medical records did not affect Turner's substantial rights. *Cf. Mitchell v. State*, 124 Nev. 807, 818-19, 192 P.3d 721, 729 (2008) (concluding the State's failure to notice an expert was not plain error where appellant did not show the testimony prejudiced his substantial rights); *Jones v. State*, 113 Nev. 454, 467-68, 937 P.2d 55, 63-64 (1997) (agreeing the prosecutor improperly questioned an expert against

[6]We note Deputy District Attorney Giordani misrepresented to the district court judge that "we have our doctor [Urban], she's noticed." This was false. Although the State noticed Officer Robertson's treating doctors, the State never noticed Turner's treating doctors, nor did the State detail pursuant to statute Dr. Urban's expected testimony or that she would testify to the appearance of stippling around Turner's gunshot wound.

the court's directive, but concluding the improper questions did not result in unfair prejudice in light of the evidence).

Whether prosecutorial misconduct warrants reversal

Turner raises numerous instances of alleged prosecutorial misconduct during closing arguments, which he argues cumulatively warrant reversal.[7] In evaluating claims of prosecutorial misconduct, we use a two-step analysis and determine, first, if the conduct was improper, and second, if the improper conduct warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Harmless error does not warrant reversal, and if the defendant fails to object below, we review only for plain error. *Id.* at 1188, 1190, 196 P.3d at 476, 477. Even if the errors individually do not warrant reversal, the cumulative effect of the errors may warrant reversal if they collectively violated the defendant's right to a fair trial. *See id*. at 1195, 196 P.3d at 481. "When evaluating a claim of cumulative error, we consider the following factors: (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Id.* (internal quotation marks omitted).

We have carefully reviewed the record and agree there were multiple instances of misconduct.[8] First, the prosecutor invited the jurors to feel "good" about convicting defendants who shoot police officers. Although Turner did not object to the prosecutor's argument, we agree it was improper, as these comments "appealed to juror sympathies by diverting their attention from evidence relevant to the elements necessary to sustain a conviction." *See, e.g.*, *Pantano v. State*, 122 Nev. 782, 793, 138 P.3d 477, 484 (2006) (concluding that it was misconduct for the prosecutor to argue for the jury to find the defendant guilty in order to make the parents of the victim feel better, as making the parents feel better was not an element of the crimes charged). Furthermore, the prosecutor also improperly invited the jury to consider issues not in evidence by arguing the State could have charged Turner with additional crimes and implying the prosecutor believed Turner was guilty of additional, uncharged crimes. *See id*. (holding that it is "always improper" for the prosecutor to give a personal opinion regarding the defendant's guilt); *see also Valdez*, 124 Nev. at 1192, 196 P.3d at 478 (recognizing a prosecutor must "not inject his personal opinion or beliefs" into the trial).

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[7]Because Turner does not argue that the errors individually warrant reversal, we do not consider them individually for harmless or plain error. We note, however, that Turner failed to object to several of these errors below. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (explaining the standard of review).

[8]We address only the statements that we conclude constituted misconduct. As to the remaining allegations of misconduct, we have reviewed the record and conclude the prosecutors' arguments were not improper in light of the evidence adduced at trial and Turner's admissions.

Next, the prosecutor disparaged defense counsel and the defense by arguing that there was no evidence of a third intruder and that Turner's defense that a third person committed the crimes simply "came into [defense counsel's] head," where eyewitness Grimaldi testified that he observed a possible third intruder. *See, e.g.*, *Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004) (explaining that "[d]isparaging remarks directed toward defense counsel have absolutely no place in a courtroom, and clearly constitute misconduct," and that disparaging legitimate defense tactics is also misconduct (internal quotation marks omitted)). Finally, the prosecutor's argument that Turner knew Clarkson and Grimaldi were unarmed and therefore vulnerable amounts to prosecutorial misconduct because that argument was not supported by evidence.[9] *See Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) ("A prosecutor may not argue facts or inferences not supported by the evidence.").

Reviewing the above errors cumulatively, under these specific facts, we conclude that the errors do not warrant reversal. Substantial evidence implicated Turner. First, Turner admitted going to the residence with Hudson to do a "lick," i.e., to steal marijuana. He also admitted that guns were in the car, including the SKS, which he recognized as his uncle's gun, and he accurately described the SKS to detectives, although he denied using the firearm. Turner's dogs and cellular phone were found in the car located at the crime scene. The victims' detailed testimonies regarding the gunfire showed that two weapons were fired simultaneously. Significantly, despite the locations where both firearms were discovered, we note that the SKS had a trigger pull of approximately five pounds, and testimony adduced at trial sufficiently established that one person could not have fired both the automatic weapon and the rifle simultaneously. Evidence linked Hudson to the Mossberg,[10] supporting that Turner had fired the SKS. When officers found Turner nearby, he had shrapnel in his leg and stippling wounds.[11] Finally, in Turner's statement to the police, he denied working with a third person, and his own statements placed him on or near the patio when the shooting broke out.

This evidence collectively supports that Turner intentionally went to the crime scene with the SKS to commit a violent crime and that

[9]We also note the prosecutor's argument that the "only result" that can come from "shooting at two human beings" "is death" was inarticulate to the extent it suggested that shooting a gun could have no outcome other than murder.

[10]Hudson's fingerprints were on the Mossberg, Hudson's DNA was on a bloodied beanie found at the scene, and a victim testified that the person cocking the Mossberg was wearing a hat.

[11]While we acknowledge that the improperly admitted evidence was used to establish the distance at which stippling may occur, other properly admitted evidence nevertheless established the link between a gunshot and skin stippling, and the jury could infer from that evidence that the stippling occurred because Turner was in close proximity to a gun when it fired.

he shot the SKS before dropping the gun and fleeing the scene. Accordingly, although there were several instances of flagrant prosecutorial misconduct, and although the charges here are grave, we conclude reversal is not warranted.[12] *See Valdez*, 124 Nev. at 1195, 196 P.3d at 480 ("This error . . . did not infect the trial with unfairness so as to affect the verdict and deny [appellant] his constitutional right to a fair trial.").

CONCLUSION

Turner waived his *Bruton* argument below, and we therefore decline to address that argument on appeal. We agree the district court improperly admitted Anya Lester's expert testimony regarding skin stippling, but we conclude that error was ultimately harmless. Similarly, we agree that the prosecutor advanced several improper arguments during closing, but we conclude those statements do not rise to cumulative error warranting reversal under the particular facts of this case. Accordingly, we affirm the verdict.

Pickering, C.J., and Gibbons, Hardesty, Parraguirre, Stiglich, and Cadish, JJ., concur.

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[12]For the same reasons, we reject Turner's argument that the cumulative effect of all errors at trial warrants reversal. While we are deeply troubled by those errors, most notably the admission of Lester's testimony regarding skin stippling, and while the charges here are serious, we conclude cumulative error does not warrant reversal in light of the evidence against Turner. *See Valdez*, 124 Nev. at 1195, 196 P.3d at 481.

JAMES J. COTTER, JR., Derivatively on Behalf of READING INTERNATIONAL, INC., Appellant, *v.* EDWARD KANE; DOUGLAS McEACHERN; MARY ANN GOULD; JUDY CODDING; MICHAEL WROTNIAK; and READING INTERNATIONAL, INC., a Nevada Corporation, Respondents.

No. 75053

JAMES J. COTTER, JR., Derivatively on Behalf of READING INTERNATIONAL, INC., Appellant, *v.* EDWARD KANE; DOUGLAS McEACHERN; MARY ANN GOULD; JUDY CODDING; MICHAEL WROTNIAK; and READING INTERNATIONAL, INC., a Nevada Corporation, Respondents.

No. 76981

JAMES J. COTTER, JR., Derivatively on Behalf of READING INTERNATIONAL, INC., Appellant, *v.* EDWARD KANE; DOUGLAS McEACHERN; JUDY CODDING; MICHAEL WROTNIAK; and READING INTERNATIONAL, INC., a Nevada Corporation, Respondents.

No. 77648

READING INTERNATIONAL, INC., a Nevada Corporation; MARGARET COTTER; ELLEN COTTER; GUY ADAMS; EDWARD KANE; DOUGLAS McEACHERN; JUDY CODDING; and MICHAEL WROTNIAK, Appellants, *v.* JAMES J. COTTER, JR., Derivatively on Behalf of READING INTERNATIONAL, INC., Respondent.

No. 77733

October 1, 2020 473 P.3d 451

Consolidated appeals from district court orders granting summary judgment, awarding costs, and denying attorney fees. Eighth Judicial District Court, Clark County; Elizabeth Gonzalez, Judge.

Reversed in part, vacated in part, and remanded in Docket Nos. 75053 & 76981; affirmed in part, reversed in part, and remanded in Docket No. 77648; and affirmed in Docket No. 77733.

[Rehearing denied November 6, 2020]

Morris Law Group and *Steve L. Morris*, Las Vegas, for Appellant/Respondent James J. Cotter, Jr.

Greenberg Traurig, LLP, and *Tami D. Cowden, Mark E. Ferrario*, and *Kara B. Hendricks*, Las Vegas, for Respondent/Appellant Reading International, Inc.

Cohen Johnson Parker Edwards and *H. Stan Johnson*, Las Vegas; *Quinn Emanuel Urquhart & Sullivan, LLP*, and *Marshall M. Searcy* and *Christopher Tayback*, Los Angeles, California, for Respondents/Appellants Guy Adams, Judy Codding, Ellen Cotter, Margaret Cotter, Mary Ann Gould, Edward Kane, Douglas McEachern, and Michael Wrotniak.

Before the Supreme Court, EN BANC.[1]

OPINION

By the Court, GIBBONS, J.:

James Cotter, Jr. (Cotter Jr.) filed a derivative action on behalf of Reading International, Inc. (RDI), challenging conduct by RDI's board of directors. Both RDI and the directors moved to dismiss the action and later challenged the merits of the action. We conclude that a corporation, as a nominal defendant, is precluded from challenging the merits of a derivative action, but may challenge a shareholder plaintiff's standing in such action. Additionally, we adopt the factors set forth by the Ninth Circuit Court of Appeals in *Larson v. Dumke*, 900 F.2d 1363, 1367 (9th Cir. 1990), for determining whether a shareholder plaintiff in a derivative action fairly and adequately represents the interests of the shareholders under NRCP 23.1. Because Cotter Jr. lacks standing as an adequate representative of shareholders, we reverse the district court's summary judgment orders, vacate the orders denying the motions to dismiss, and remand. Further, we affirm in part, reverse in part, and remand the district court's award of costs in Docket No. 77648 and affirm the denial of attorney fees in Docket No. 77733.

FACTS AND PROCEDURAL HISTORY

RDI is a publicly traded Nevada corporation engaged in the development, ownership, and operation of multi-complex cinemas and other retail and commercial real estate in the United States, Australia, and New Zealand. James Cotter, Sr. (Cotter Sr.) was RDI's controlling stockholder, controlling approximately 70% of RDI's Class B voting stock. Cotter Sr.'s children—Cotter Jr., Ellen Cotter (EC), and Margaret Cotter (MC)—all served on RDI's board of directors.[2] In August 2014, Cotter Sr. resigned from his positions with RDI

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

[2]The remaining directors included Edward Kane, a longtime friend of Cotter Sr. and a quasi-member of the Cotter family referred to as "Uncle Ed"; Guy Adams, a registered investment advisor; Douglas McEachern, a former partner at the accounting firm of Deloitte & Touche; and William Gould, a corporate attorney. In 2015, after Cotter Jr. filed the underlying derivative action, and during

due to health reasons and Cotter Jr. was appointed CEO. Cotter Sr. passed away one month after his resignation.

Shortly after Cotter Sr. passed away, tensions amongst the Cotter siblings began to arise, stemming from the Cotter Sr. trust and estate litigation, which would determine control over RDI, as the majority of the Class B voting stock was at issue.[3] In June 2015, the Board terminated Cotter Jr. as CEO and president. Thereafter, the Board appointed EC as CEO and president.

Derivative litigation

On the same day Cotter Jr. was terminated, he filed his initial complaint in the district court. RDI and the directors moved to dismiss Cotter Jr.'s derivative claims on grounds that Cotter Jr. (1) failed to adequately plead demand futility; (2) lacked standing and was not an appropriate plaintiff under NRCP 23.1; and (3) failed to adequately plead damages. The district court denied the motion in part but granted it in part, finding that Cotter Jr. failed to adequately plead damages. The district court did not specifically address the challenge to Cotter Jr.'s standing as an adequate representative of shareholders under NRCP 23.1.

In the second amended complaint, the operative complaint in this action, Cotter Jr. sought a finding that his termination was void and requested reinstatement to his positions as president and CEO. Further, in addition to asserting the directors were interested and/or lacked independence, Cotter Jr. specifically challenged five courses of Board conduct: (1) his termination; (2) the Board's failure to accept a third party's offer to purchase RDI; (3) the revitalization of the Board's hiring executive committee; (4) the appointment of EC as CEO and MC as the senior executive responsible for RDI's New York real estate holdings and their compensation packages; and (5) the approval of the EC and MC's exercise of an option held by Cotter Sr.'s estate to purchase 100,000 shares of Class B voting stock, which was purchased with Class A nonvoting stock.

The district court granted summary judgment

The district court granted partial summary judgment, finding that there was no genuine issue of material fact as to the disinterestedness of Kane, McEachern, Gould, Codding, and Wrotniak. Thus,

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the ongoing proceedings, two other directors were appointed: Judy Codding, a friend of Cotter Sr.'s wife who resides with EC; and Michael Wrotniak, husband of MC's best friend. Timothy Storey was originally a director and a named defendant in the derivative action, but after Storey resigned as a director, Cotter Jr. agreed to dismiss the action against him.

[3]As the factual background surrounding the Board's challenged conduct is contested, we set forth these facts as Cotter Jr. alleges. We also note that because these appeals have a complex procedural history, we provide that history only as necessary to this disposition.

the district court dismissed the action against those directors on the ground they were protected by the Business Judgment Rule (BJR), leaving only EC, MC, and Adams in the case. The district court order was certified as final, and Cotter Jr. appealed that decision in Docket No. 75053.

Shortly thereafter, the Board ratified the remaining challenged board conduct. The district court granted the directors' motion for summary judgment, concluding Cotter Jr. had no remaining actionable claims, as all challenged board conduct had been ratified by disinterested directors and was protected by the BJR. Cotter Jr. appealed this ruling in Docket No. 76981.

After judgment was entered, RDI sought costs on behalf of itself and the directors, which it had a duty to indemnify. The district court awarded RDI $1,554,319.74 in costs, which included $853,000 for the directors' expert witness fees. Cotter Jr. appealed that ruling in Docket No. 77648. RDI also sought attorney fees for itself and the directors. The district court denied the motion, concluding that Cotter Jr.'s claims were not vexatious. RDI challenges that ruling in Docket No. 77733.

DISCUSSION

Docket Nos. 75053 and 76981

Before we can consider Cotter Jr.'s challenges to the district court's summary judgment, we must initially consider whether RDI, as a nominal defendant, can oppose the underlying action or present argument on appeal. Then we must consider whether Cotter Jr. represents the shareholders adequately enough to have standing under NRCP 23.1.

Nominal defendant RDI cannot challenge the merits of the underlying derivative action but can challenge Cotter Jr.'s standing in bringing this suit

Cotter Jr. argues that RDI, as a nominal defendant, does not have standing to oppose these appeals, and since RDI lacks standing, this court need not consider RDI's arguments. We have not previously addressed a corporation's standing as a nominal defendant in a derivative action.[4]

When a derivative action is brought, it is brought on *behalf* of the corporation. *Ross v. Bernhard*, 396 U.S. 531, 538-39 (1970). If the suing shareholder obtains any recovery, that recovery goes to the corporation. *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1307 n.4 (3d Cir. 1993). "Although the corporation is named in the complaint as

[4]In *In re Amerco Derivative Litigation*, 127 Nev. 196, 218, 252 P.3d 681, 697 (2011), this court noted that the corporation in that matter filed a motion to dismiss the action in the district court, but this court did not address whether the corporation, as a nominal defendant, had standing to do so.

a defendant, its interests are not necessarily adverse to those of the plaintiff since it will be the beneficiary of any recovery." *Sobba v. Elmen*, 462 F. Supp. 2d 944, 947 (E.D. Ark. 2006) (internal quotations omitted).

Because of the nature of a derivation action, where it is the corporation that stands to benefit, other jurisdictions have concluded that a corporation is required to take a neutral position in a derivative action and cannot oppose or defend such action on the merits. *See Swenson v. Thibaut*, 250 S.E.2d 279, 293-94 (N.C. App. 1978) (providing that a corporation in a derivative action "is required to take and maintain a wholly neutral position taking sides neither with the complainant nor with the defending director"); *Rowen v. Le Mars Mut. Ins. Co. of Iowa*, 282 N.W.2d 639, 645 (Iowa 1979) (providing that a corporation in a derivative action is required to maintain a role of neutrality); *Patrick v. Alacer Corp.*, 84 Cal. Rptr. 3d 642, 652 (Ct. App. 2008) ("[T]he corporation has no ground to challenge the merits of a derivative claim filed on its behalf and from which it stands to benefit."). In fact, "the overwhelming weight of authority supports this rule of corporate neutrality," which precludes a corporation from defending a derivative action on the merits. *Sobba*, 462 F. Supp. 2d at 947-48 & n.4. In line with the majority of jurisdictions, we conclude that a nominal corporate defendant cannot oppose a derivative action on the merits.

Nevertheless, while a corporation cannot oppose the merits of a derivative action, it may still challenge a shareholder plaintiff's ability to bring the underlying derivative action. California permits a corporation to assert certain defenses, such as the shareholder plaintiff's lack of standing. *Patrick*, 84 Cal. Rptr. 3d at 652 (stating that while a nominal defendant corporation generally may not defend a derivative action filed on its behalf, it "may assert defenses contesting the plaintiff's right or decision to bring suit, such as asserting the shareholder plaintiff's lack of standing . . . ."). California courts have noted a corporation cannot file the underlying action because its directors disagree with the necessity of bringing the action. *Id.* at 651-52. Thus, "[i]n a real sense, the only claim a shareholder plaintiff asserts against the nominal defendant corporation in a derivative action is the claim the corporation has failed to pursue the litigation." *Id.* Therefore, if the nominal defendant corporation has a valid reason for not pursuing the litigation, such as when the shareholder plaintiff lacks standing, the corporation should be permitted to raise such a defense.

We determine California's precedent is persuasive, and we conclude a corporation should be able to defend itself from an erroneously brought derivative action. If a corporation may have to later indemnify directors who defend against the derivative action, the corporation should have the ability to stop an unlawfully brought action before excessive costs and attorney fees are incurred. Thus, we

hold that a nominal defendant corporation in a derivative action may not challenge or defend the merits of such action, but may challenge a shareholder's standing in bringing a derivative action.

Based on the foregoing, we conclude that to the extent RDI challenges Cotter Jr.'s standing to bring the underlying action or presents arguments on appeal about Cotter Jr.'s standing, it is permitted to do so and we will consider such arguments on appeal. RDI, however, may not challenge the underlying merits of the derivative action either below or on appeal.

Cotter Jr. lacks standing to bring the derivative suit because he does not adequately represent shareholders

The Directors argue that the district court abused its discretion in denying their motion to dismiss the derivative action because Cotter Jr. did not have standing, as he does not adequately represent the shareholders as required under NRCP 23.1. Cotter Jr. contends the district court did not abuse its discretion in concluding that he had standing to bring the suit because many factors weighed in favor of Cotter Jr. being able to adequately represent the shareholders' interest.

Because Cotter Jr.'s standing to bring the underlying claims affects the district court's jurisdiction over this matter, and accordingly this court's jurisdiction, we must address this issue before we can consider the challenges to the order granting summary judgment. *Heller v. Legislature of State of Nev.*, 120 Nev. 456, 460, 93 P.3d 746, 749 (2004) (providing that "[s]tanding is the legal right to set judicial machinery in motion" and recognizing that this court can *sue sponte* address standing). "Standing is a question of law reviewed de novo." *Logan v. Abe*, 131 Nev. 260, 263, 350 P.3d 1139, 1141 (2015). When standing arises out of a statute or rule, like it does here, this court will examine the language of the statute or rule to determine if that language provides the plaintiff with standing to sue. *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 630, 218 P.3d 847, 850 (2009). NRCP 23.1 provides, in relevant part, "[t]he derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association."

In order for a shareholder plaintiff to be an adequate representative of shareholders in a derivative action, the shareholder plaintiff "must have the capacity to vigorously and conscientiously prosecute a derivative suit and be free from economic interests that are antagonistic to the interests of the class." *Larson*, 900 F.2d at 1367. We take this opportunity to clarify what a district court must consider in evaluating a challenge to a plaintiff's standing to bring a derivative suit on the ground that he or she does not adequately represent shareholders.

The Ninth Circuit has set forth eight factors for determining adequacy of representation:

> (1) indications that the plaintiff is not the true party in interest; (2) the plaintiff's unfamiliarity with the litigation and unwillingness to learn about the suit; (3) the degree of control exercised by the attorneys over the litigation; (4) the degree of support received by the plaintiff from other shareholders; . . . (5) the lack of personal commitment to the action on the part of the representative plaintiff; (6) the remedy sought by plaintiff in the derivative action; (7) the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; and (8) plaintiff's vindictiveness toward the defendants.

Id. (citing to factors enumerated in *Rothenberg v. Sec. Mgmt. Co.*, 667 F.2d 958, 961 (11th Cir. 1982), and *Davis v. Comed, Inc.*, 619 F.2d 588, 593-94 (6th Cir. 1980)). The Ninth Circuit further provided that because these factors are intertwined, "it is frequently a combination of factors which leads a court to conclude that the plaintiff does not" adequately represent shareholders.[5] *Id.* We adopt the *Larson* factors. Accordingly, we hold that a district court evaluating a challenge regarding a plaintiff's standing to bring a derivative suit on the ground that he or she does not adequately represent shareholders must consider the *Larson* factors.

Some of the *Larson* factors weigh in favor of Cotter Jr. as an adequate representative of shareholders. Cotter Jr. is familiar with the litigation, is a true party of interest, is personally committed to the action, and does not appear to be under the control of an attorney pursuing this litigation. However, the remaining *Larson* factors weigh against Cotter Jr. as an adequate shareholder representative. For example, while Cotter Jr. initially received some support from shareholders, that support was withdrawn after discovery. Further, because one of the main remedies Cotter Jr. is seeking is his reinstatement as CEO, his interests are divergent from the shareholders' interests. *See, e.g.*, *Berman v. Physical Med. Assocs., Ltd.*, 225 F.3d 429, 433 (4th Cir. 2000) (explaining that employment disputes are personal and do not create causes of action regarding directors' fiduciary duties). Cotter Jr. very clearly has significant personal interests in this matter as he alleges he was pushed out of the company as a result of a family feud with his sisters. Even Cotter Jr. acknowledged that the family feud regarding Cotter Sr.'s estate led to the underlying issues. Further, Cotter Jr.'s action appears to be vindic-

[5]For example, the *Larson* court notes that while a court should consider whether other shareholders support the plaintiff shareholder's action, a single shareholder is not prevented from bringing a derivative suit, and thus, this factor on its own would not be determinative of the shareholder's adequate representation. *Id.* at 1368.

tively sought in response to his termination as CEO, as evidenced by the timing of his action. Cotter Jr.'s assertion at oral argument that he is an adequate shareholder representative because the shareholders had an interest in the preservation of the succession plan Cotter Sr. put in place before his death, which provided Cotter Jr. would be CEO, is unpersuasive. If that succession plan became unworkable or not in the best interest of the company after Cotter Sr.'s death, as was alleged by the directors, the plan would no longer be in the shareholders' interest, and once again, only Cotter Jr.'s personal interest would be served by the underlying action. For these reasons, there is substantial evidence that Cotter Jr. does not adequately represent the shareholders because his personal interests far outweigh the shareholders' interests. Accordingly, the district court erred when it denied RDI and the directors' motions to dismiss for lack of standing. Thus, we reverse the district court's summary judgment orders in Docket Nos. 75053 and 76981, vacate the district court's orders denying the motions to dismiss, and remand.[6]

Docket No. 77648

The district court abused its discretion by awarding expert witness fees in excess of the statutory maximum

Cotter Jr. argues the district court abused its discretion by awarding $853,000 to RDI for the directors' expert witness fees because the experts did not testify in court. RDI relies on this court's decision in *Logan v. Abe*, 131 Nev. 260, 350 P.3d 1139 (2015), to argue that the circumstances of why an expert does not testify may be sufficient to overcome the testifying requirement for a party to receive more than $1,500 in expert witness fees.

Under NRS 18.005(5), a district court may award "[r]easonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee." The court of appeals adopted factors the district court must consider when determining if an expert witness's testimony warrants a larger fee. *Frazier v. Drake*, 131 Nev. 632, 650-51, 357 P.3d 365, 377-78 (Ct. App. 2015). This court reviews an award of costs for an abuse of discretion. *Id.* at 644, 357 P.3d at 373; *LVMPD v. Blackjack Bonding, Inc.*, 131 Nev. 80, 89, 343 P.3d 608, 614 (2015).

In 2015, this court considered "the circumstances surrounding the expert's testimony, or in this case, the lack thereof, . . . [in determining the costs] were of such necessity as to require the larger fee." *Logan*, 131 Nev. at 268, 350 P.3d at 1144 (internal quotations

[6]Accordingly, we do not reach the merits of the district court's orders granting summary judgment and dismissing the directors from the case. Nor do we reach the merits of the challenge to Cotter Jr.'s asserted futility of making a demand.

omitted). However, in 2017, this court concluded an "expert must testify to recover more than $1,500 in expert fees." *Pub. Emps.' Ret. Sys. of Nev. v. Gitter*, 133 Nev. 126, 134, 393 P.3d 673, 681 (2017) (*citing Khoury v. Seastrand*, 132 Nev. 520, 540, 377 P.3d 81, 95 (2016) (implying that the expert must testify to be paid more than $1,500 because NRS 18.005(5) uses the phrase "the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee")). While there may be some extraordinary circumstances where an award of expert witness fees in excess of $1,500 for an expert who did not testify may be warranted, those circumstances are not present here. Unlike in *Logan* where the rebuttal expert did not testify solely because the opposing party did not call his expert, this matter never went to trial and nothing Cotter Jr. did prevented the directors' experts from testifying. Because the underlying matter was resolved at the summary judgment stage, without the district court relying on the directors' expert reports, the experts' testimony was not of such a necessity as to warrant the larger fee. Thus, the district court abused its discretion in awarding more than $1,500 per expert.

The district court did not abuse its discretion by awarding RDI costs

Cotter Jr. contends the district court also abused its discretion in awarding RDI $581,718.69 in costs when RDI was a nominal defendant.[7] NRS 18.020(3) provides that a prevailing party is entitled, as a matter of course, to all costs against an adverse party where the recovery sought was more than $2,500. Even though a corporation is a nominal defendant in a derivative action, it is not precluded from recovering expenses it incurred as a result of the action, including those costs it incurred through any agreement it may have had to indemnify its directors. Nothing in the record demonstrates the district court abused its discretion by awarding RDI costs. *LVMPD*, 131 Nev. at 89, 343 P.3d at 614. Accordingly, we reverse the award of expert witness fees that exceeded $1,500 per expert, affirm the remainder of the cost award to RDI challenged in Docket No. 77648, and remand.

Docket No. 77733

RDI argues the district court abused its discretion by denying RDI's motion for attorney fees. We review a decision regarding at-

[7]In addition to the amount awarded for expert witness fees discussed above, the district court awarded RDI a total of $701,319.74 in costs. Cotter Jr. only challenges $581,718.69 of that amount, which appears to be the amount the district court awarded RDI for its filing fees, deposition fees and costs, Westlaw costs, and electronic discovery costs. Thus, Cotter Jr. does not challenge the remainder of the amount the district court awarded RDI for costs the directors had incurred, outside of the expert witness fees.

torney fees for an abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014). The district court found that "this case does not meet the standards of NRS 18.010 to support an award of attorneys' fees" and that Cotter Jr.'s claims were not vexatious. Nothing in the record demonstrates the district court abused its discretion. Accordingly, we affirm the district court order challenged in Docket No. 77733.[8]

CONCLUSION

Today, we resolve two matters of first impression in the context of corporate law. First, we hold that a corporate nominal defendant in a derivative action cannot challenge or defend the underlying merits of that action, but may challenge a shareholder plaintiff's standing to bring a derivative suit. Second, we adopt an eight-factor test for determining whether a shareholder plaintiff adequately represents shareholders, and thus has standing to bring a derivative action. Because Cotter Jr. lacked standing as an adequate representative of the shareholders in Docket Nos. 75053 and 76981, we reverse the summary judgments, vacate the orders denying respondents' motions to dismiss, and remand this matter for the district court to enter an order granting the motion to dismiss challenging Cotter Jr.'s standing. We also reverse the district court's order awarding RDI costs to the extent it awarded RDI costs in excess of $1,500 for each expert retained by the directors, but affirm the remainder of the cost award, and remand for the district court to enter a revised cost order in Docket No. 77648. Lastly, we affirm the district court's denial of RDI's request for attorney fees in Docket No. 77733.

Hardesty, Parraguirre, Stiglich, Cadish, and Silver, JJ., concur.

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[8]RDI also challenges the district court order denying its request for judgment to be entered in its favor. As discussed above, because RDI was a nominal defendant, judgment could not be entered in its favor.

APCO CONSTRUCTION, INC., a Nevada Corporation, Appellant, *v.* ZITTING BROTHERS CONSTRUCTION, INC., Respondent.

No. 75197

October 8, 2020 473 P.3d 1021

Appeal from a district court summary judgment and attorney fees and costs award, certified as final under NRCP 54(b), in a contract action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Affirmed.

[Rehearing denied December 23, 2020]

[En banc reconsideration denied March 5, 2021]

Marquis Aurbach Coffing and *Kathleen A. Wilde, Jack Chen Min Juan*, and *Cody S. Mounteer*, Las Vegas; *Fennemore Craig, P.C.*, and *John Randall Jefferies* and *Christopher H. Byrd*, Las Vegas, for Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, and *Jorge A. Ramirez* and *I-Che Lai*, Las Vegas, for Respondent.

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

OPINION

By the Court, Stiglich, J.:

In *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, we concluded that pay-if-paid provisions in construction contracts, whereby a subcontractor gets paid only if the general contractor is paid by the project owner for that work, are generally unenforceable because they violate public policy. 124 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (2008). At the same time, we recognized that, due to statutory amendments, such provisions could be enforceable in limited circumstances, subject to the restrictions laid out in NRS 624.624-.626 of Nevada's Prompt Payment Act. *Id.* at 1117 & n.50, 197 P.3d at 1042 & n.50.

We take this opportunity to clarify that pay-if-paid provisions are not per se void and unenforceable in Nevada. However, such provisions are unenforceable if they require subcontractors to waive or limit rights provided under NRS 624.624-.630, relieve general contractors of their obligations or liabilities under NRS 624.624-.630, or require subcontractors to waive their rights to damages, as further outlined under NRS 624.628(3). Because provisions in the subcontract considered here condition payment on the general contractor receiving payment first and require the respondent sub-

contractor to forgo its right to prompt payment under NRS 624.624 when payment would otherwise be due, such provisions are void under NRS 624.628(3) and cannot be relied upon by appellant general contractor for its nonpayment to respondent for work performed. Furthermore, because appellant's evidence in support of its other conditions-precedent defenses is precluded and the plain language of NRS 108.239(12) permits a subcontractor to sue a contractor for unpaid lien amounts, we affirm the district court's grant of summary judgment and award of attorney fees and costs in favor of respondent.

FACTS AND PROCEDURAL BACKGROUND

Appellant APCO Construction, Inc., served as general contractor on the Manhattan West mixed-used development project in Las Vegas owned by Gemstone Development West, Inc. In 2007, APCO entered into a subcontract agreement with respondent Zitting Brothers Construction, Inc., to perform woodframing, sheathing, and shimming work on the project.

The subcontract required APCO to pay Zitting for 100 percent of work completed during the prior month, minus 10 percent for retention, within 15 days of APCO receiving payment from Gemstone for Zitting's competed work. Payment to Zitting was conditioned upon APCO's receipt of payment from Gemstone—known colloquially as a "pay-if-paid" provision. The subcontract also conditioned APCO's payment to Zitting of the retention amount on the following conditions precedent: (1) completion of each building, (2) Gemstone's approval of Zitting's work, (3) APCO's receipt of final payment from Gemstone, (4) Zitting's delivery to APCO of all as-built drawings for its work and other close-out documents, and (5) Zitting's delivery to APCO of a release and waiver of claims. The subcontract further conditioned APCO's payment to Zitting for change orders on Gemstone paying APCO, except where APCO executed and approved the change order in writing and Zitting completed those changes. Moreover, if the prime contract were terminated, APCO would pay Zitting for completed work after Gemstone paid APCO. The contract also contained a severability clause and provided that the prevailing party in litigation would be entitled to costs, attorney fees, and any other reasonable expenses.

Zitting performed work under APCO until the prime contract between APCO and Gemstone terminated in August 2008. Camco Pacific Construction Company subsequently became general contractor, and Zitting continued to work for Camco until the project shut down in December 2008. As a result of the project's failure, APCO, Zitting, and other subcontractors went unpaid and filed multiple lawsuits and mechanics' liens.

Relevant to this appeal, Zitting in 2009 sued APCO and Gemstone for breach of contract, foreclosure of a mechanics' lien, and

various other claims. Zitting sought $750,807.16 for work completed prior to APCO's departure, including $403,365.49 in unpaid retention amounts for Buildings 8 and 9 and $347,441.67 in unpaid change orders. APCO raised various affirmative defenses in its answer, including that Zitting failed to meet conditions precedent and that Gemstone never paid APCO to thereby compel payment under the pay-if-paid provisions. But in 2010, when Zitting sent interrogatories to APCO seeking the facts supporting APCO's defenses, APCO only mentioned the pay-if-paid provisions to defend its nonpayment.

Zitting served APCO again in April 2017 with the same set of interrogatories, and APCO responded with similar responses raising its pay-if-paid defense.[1] Zitting deposed two of APCO's NRCP 30(b)(6) witnesses. Discovery closed in June 2017, and Zitting moved for summary judgment on its breach of contract and foreclosure of mechanics' lien claims.

APCO opposed summary judgment, raising arguments in support of its additional conditions-precedent defenses other than the pay-if-paid provisions for the first time. Without ruling on summary judgment, the district court reopened discovery on a limited basis.

APCO deposed Zitting's NRCP 30(b)(6) witness and filed a supplemental response to its interrogatories three weeks before trial to include the other conditions-precedent defenses. Zitting moved to limit APCO's defenses to only the pay-if-paid provisions, and the district court granted that motion in a minute order.

The district court granted partial summary judgment in favor of Zitting's breach of contract and mechanics' lien claims, concluding that the pay-if-paid provisions were void and unenforceable. It also concluded that APCO failed to seasonably amend its interrogatories pursuant to NRCP 26(e)(1) and to explain its reasoning for not disclosing its other defenses. The district court precluded APCO from providing evidence in support of other defenses under NRCP 37(c)(1), since those defenses were "too little, too late" and the delay prejudiced Zitting, which had formed its litigation strategy based on the interrogatories. Furthermore, the court concluded that Zitting substantially complied with the conditions precedent, entitling it to payment for retention amounts, and its change orders were approved by operation of law under NRS 624.626(3), or alternatively, Zitting was entitled to payment upon APCO's termination pursuant to the subcontract. The district court also concluded that NRS 108.239(12)

[1]The underlying litigation was stayed for six years to resolve the lien priority between APCO's mechanics' liens and the construction loan deed of trust held by the project's lender, Scott Financial Corporation. We ultimately concluded that Scott Financial's deed of trust had priority. *In re Manhattan W. Mechanic's Lien Litig. v. Eighth Judicial Dist. Court*, 131 Nev. 702, 712, 359 P.3d 125, 131 (2015). Scott Financial thus received the net proceeds of the project's sale, leaving contractors and subcontractors unpaid. A special master was appointed in June 2016 to coordinate discovery on the remaining claims.

permitted Zitting to a personal judgment against APCO for unpaid amounts. Given that Zitting was entitled to its claimed amount, the district court found that Zitting's remaining claims were moot. APCO moved for reconsideration, which the district court denied. The district court entered an order awarding Zitting attorney fees and costs and entered judgment in favor of Zitting in the amount of $936,251.11, plus interest. The district court certified its judgment as final pursuant to NRCP 54(b). APCO appeals.[2]

DISCUSSION

We review the 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 may be granted for or against a party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 55, 366 P.3d 1105, 1109 (2016) (quoting NRCP 56(c) (2005)). "If the moving party will bear the burden of persuasion, that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence." *Cuzze v. Univ. & Cmty. Coll. Sys.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) (citing NRCP 56(a), (e)).

The district court did not err in granting summary judgment in favor of Zitting on its breach of contract claim

APCO argues that the district court erred in granting summary judgment on the breach of contract claim because the pay-if-paid provisions were enforceable, the district court abused its discretion in precluding the other conditions-precedent defenses, genuine issues of material fact precluded summary judgment, and the district court erred in applying a substantial performance standard and interpreting the contract. We disagree.

The pay-if-paid provisions are void and unenforceable

NRS 624.628(3) protects a subcontractor's statutory rights. The provision provides that:

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[2]APCO also appeals the district court's minute order granting Zitting's motion in limine to limit the defenses of APCO to the pay-if-paid provisions. As a preliminary matter, we agree with Zitting's argument that the minute order is not independently appealable. *See Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) (providing that a minute order is "ineffective for any purpose and cannot be appealed"). However, we conclude that we have jurisdiction to entertain APCO's arguments related to the preclusion of its conditions-precedent defenses as part of APCO's appeal from final judgment. *See Consol. Generator-Nev., Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).

> A condition, stipulation or provision in an agreement which:
>
> (a) Requires a lower-tiered subcontractor to waive any rights provided in NRS 624.624 to 624.630, inclusive, or which limits those rights;
>
> (b) Relieves a higher-tiered contractor of any obligation or liability imposed pursuant to NRS 624.624 to 624.630, inclusive; or
>
> (c) Requires a lower-tiered subcontractor to waive, release or extinguish a claim or right for damages or an extension of time . . .
>
> *is against public policy and is void and unenforceable*.

(Emphasis added.)

One of the rights that NRS 624.628(3)(a) protects includes a subcontractor's right to prompt payment for labor, materials, and equipment. *See* NRS 624.624. For example, NRS 624.624(1)(a) provides that if a higher-tiered contractor enters into a written agreement with a lower-tiered subcontractor *that includes a schedule for payments*, the higher-tiered contractor shall pay the lower-tiered subcontractor:

> (1) On or before the date payment is due; or
>
> (2) Within 10 days after the date the higher-tiered contractor receives payment for all or a portion of the work, materials or equipment described in a request for payment submitted by the lower-tiered subcontractor,
>
> whichever is earlier.

Where the written agreement contains *no schedule for payments*, NRS 624.624(1)(b) provides that the lower-tiered subcontractor be paid:

> (1) Within 30 days after the date the lower-tiered subcontractor submits a request for payment; or
>
> (2) Within 10 days after the date the higher-tiered contractor receives payment for all or a portion of the work, labor, materials, equipment or services described in a request for payment submitted by the lower-tiered subcontractor,
>
> whichever is earlier.

Nevada's prompt payment statute thus clearly sets out for subcontractors to be paid in a timely manner. In accordance with the purpose of lien statutes to "secure payment to those who perform labor or furnish material to improve the property of the owner," we concluded in *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, regarding pay-if-paid provisions that:

> Because a pay-if-paid provision limits a subcontractor's ability to be paid for work already performed, such a provision impairs the subcontractor's statutory right to place a mechanics' lien on the construction project. As noted above, Nevada's

> public policy favors securing payment for labor and material contractors. Therefore, we conclude that pay-if-paid provisions are unenforceable because they violate public policy.

124 Nev. 1102, 1115, 1117-18, 197 P.3d 1032, 1041-42 (2008) (internal quotation marks and footnote omitted). We clarified, however, that "[p]ay-if-paid provisions entered into subsequent to the Legislature's [2001] amendments are enforceable only in limited circumstances and are subject to the restrictions laid out" in the prompt payment provisions in NRS 624.624 through NRS 624.626. *Id*. at 1117 n.50, 197 P.3d at 1042 n.50.

To resolve any confusion that parties may still have on the enforceability of pay-if-paid provisions in Nevada, we clarify today that pay-if-paid provisions entered subsequent to the Legislature's 2001 amendments are not per se void and unenforceable. Rather, such provisions require a case-by-case analysis to determine whether they are permissible under NRS 624.628(3), and we hold that they are unenforceable if they require any subcontractor to waive or limit its rights provided under NRS 624.624-.630, relieve general contractors of their obligations or liabilities under NRS 624.624-.630, or require subcontractors to waive their rights to damages or time extensions. The district court therefore erred in outright concluding that pay-if-paid provisions are void and unenforceable without considering the specific contract terms and whether the provisions were permitted under statute.

Nonetheless, in reviewing the parties' subcontract de novo, *Lehrer McGovern Bovis*, 124 Nev. at 1115, 197 P.3d at 1041, and questions of statutory construction de novo, *I. Cox Constr. Co., LLC v. CH2 Invs., LLC*, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013), we conclude that the pay-if-paid provisions in the subcontract are unenforceable under NRS 624.628(3)(a) because they limit Zitting's rights to prompt payment under NRS 624.624(1). While the parties' subcontract appears to contain a schedule of payment that requires APCO to pay Zitting within 15 days after payment from Gemstone, akin to a pay-*when*-paid provision, other provisions in the subcontract condition payment to Zitting *solely* upon APCO receiving payment from Gemstone—thereby making the subcontract unmistakably pay-*if*-paid.

Thus, despite the subcontract's schedule for payments, Zitting would not be paid as required under NRS 624.624(1)(a) if APCO did not receive payment from Gemstone—even if Zitting performed its work, Gemstone accepted the work, and payment would otherwise be due. *Cf. Padilla Constr. Co. of Nev. v. Big-D Constr. Corp.*, Docket Nos. 67397 & 68683 (Order of Affirmance, Nov. 18, 2016) (concluding that payment never became due to the subcontractor under the subcontract or NRS 624.624(1)(a) because the owner never accepted the subcontractor's work for defectiveness and

never paid the contractor for the subcontractor's work).[3] Accordingly, such pay-if-paid provisions limit Zitting's right to prompt payment under NRS 624.624(1) and limit Zitting's recourse to a mechanics' lien. We therefore hold that the pay-if-paid provisions in the parties' subcontract are void and unenforceable under NRS 624.628(3)(a).[4] *See Saavedra-Sandoval v. Wal-Mart Stores, Inc*., 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (affirming where "the district court reached the correct result, even if for the wrong reason").

The district court's preclusion of APCO's evidence in support of its other conditions-precedent defenses was not an abuse of discretion

Next, APCO argues that the district court abused its discretion in precluding APCO from relying on its conditions-precedent defenses other than the pay-if-paid conditions. We review a district court's imposition of a discovery sanction for an abuse of discretion. *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010); *Bahena v. Goodyear Tire & Rubber Co*., 126 Nev. 243, 249, 235 P.3d 592, 596 (2010). In doing so, we affirm the district court's preclusion of APCO's evidence in support of its other defenses.

NRCP 26(e)(1) requires a party to timely supplement or correct any disclosure or response if it has responded to a request for discovery and later acquires new information that was not made known to the other party. If a party fails to provide information required by NRCP 26(e), then the party generally may not use that information to support its claims. NRCP 37(c)(1). Furthermore, the court may prohibit a party from supporting a claim or defense as a discovery sanction. *See* NRCP 37(b)(1)(B).

We conclude that APCO failed to timely supplement its interrogatories under NRCP 26(e)(1).[5] While we recognize that there was

[3]Even if the subcontract were construed to contain no schedule for payments, as Zitting maintains, NRS 624.624(1)(b) requires that Zitting be paid within 30 days after it requested payment if APCO were not paid. The pay-if-paid provisions, however, mean that Zitting would not be paid if APCO were not paid, violating NRS 624.624(1)(b).

[4]As we resolve this dispute on another basis, we need not reach the parties' arguments on whether the pay-if-paid provisions would be void under NRS 624.628(3)(c).

[5]APCO argues that it had no duty to timely supplement its interrogatories because Zitting had knowledge that its other conditions precedent were not met throughout the life of the lawsuit, and APCO's NRCP 30(b)(6) designee testified that not all of the conditions precedent were met. Because APCO never challenged its duty to supplement in the district court proceedings below, we consider that argument waived. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

a six-year stay on the case and that APCO's deposition of Zitting's NRCP 30(b)(6) witness occurred much later due to the parties' intentional delay, APCO asserted its conditions-precedent affirmative defenses as early as 2010 in its pleadings, yet failed to mention or provide any support for such defenses in response to Zitting's 2010 and 2017 interrogatories. One of APCO's NRCP 30(b)(6) witnesses also testified to its sole reliance on the pay-if-paid provisions. Even if its latter NRCP 30(b)(6) witness testified as to the conditions in July 2017, APCO should have amended its interrogatories then. However, APCO's amendments to its interrogatories to include those other defenses three weeks before trial in November 2017 were untimely.

To avoid preclusion of evidence in support of those defenses, APCO had to prove that its failure to disclose was substantially justified or harmless. *See Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 265, 396 P.3d 783, 787 (2017). APCO failed to provide any reasoning demonstrating justification or harmlessness before the district court. The district court therefore did not abuse its discretion in precluding APCO from providing evidence in support of its defenses other than the pay-if-paid provisions defense under NRCP 37. *See Foster*, 126 Nev. at 63, 66, 227 P.3d at 1046, 1049 (concluding that the district court did not abuse its discretion in striking appellants' pleadings where the appellants failed to supplement their responses to their answers to interrogatories and requests for production of documents).

We disagree with APCO's contention that the district court abused its discretion by not permitting the conditions-precedent defenses to be tried by consent under NRCP 15(b). NRCP 15(b) permits the parties to try issues not raised by the pleadings by express or implied consent—not to try an issue precluded due to a party's discovery conduct. Because APCO's conditions-precedent defenses were raised in the pleadings but were precluded due to its failure to comply with discovery obligations, NRCP 15(b) does not apply.

We hold that the district court did not abuse its discretion in precluding APCO's evidence in support of the other conditions-precedent defenses. Accordingly, even if there were factual disputes on whether Buildings 8 and 9 were complete or on whether the change orders were approved, such facts are not material to bar Zitting from summary judgment.[6] *See Wood*, 121 Nev. at 730, 121 P.3d at 1030 ("[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported

[6]Since such facts are not material, we need not resolve whether the contract requires strict or substantial compliance and whether APCO's termination of the contract required it to pay Zitting for unpaid amounts under section 9.4 of the parties' subcontract or NRS 624.626(6). To the extent that APCO argues on appeal that its assignment of the contract to Gemstone relieved it of liability pursuant to terms of the contract, such argument was not raised below and is therefore waived. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983.

motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact" that "might affect the outcome of the suit" (internal quotation marks omitted)). Therefore, we hold that the district court did not err in granting summary judgment in favor of Zitting on its breach of contract claim.

The district court properly granted summary judgment in favor of Zitting on its foreclosure of its mechanics' lien claim

APCO also argues that the district court erred in granting summary judgment on Zitting's NRS Chapter 108 claim because APCO has no ownership interest in the property and NRS 108.239(12) supports a judgment only against the owner. Reviewing statutory construction de novo, *I. Cox Constr. Co.*, 129 Nev. at 142, 296 P.3d at 1203, we conclude otherwise.

NRS 108.239 governs the procedure to foreclose a mechanics' lien on a property, stating notice requirements and the procedure to sell the property and distribute the proceeds. Where the sale proceeds satisfy more than the sum of all liens and the cost of the sale, the remainder is to be "paid over to the owner of the property." NRS 108.239(11). But where the sale proceeds of the property are insufficient to satisfy all liens, the proceeds are to be apportioned accordingly to the lien claimants. *Id*. NRS 108.239(12) further provides that "[e]ach party whose claim is not satisfied in the manner provided in this section is entitled to personal judgment for the residue *against the party legally liable for it* if that person has been personally summoned or has appeared in the action." (Emphasis added.)

The plain language of NRS 108.239(12) permits a judgment against the "party legally liable for it"—not necessarily the "owner." NRS 108.239(12) (referring to the party liable); *see City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989) ("When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it."). Because Zitting is claiming amounts that APCO owes on retention and change orders based on its contract with APCO, APCO is the "party legally liable" for the unsatisfied lien claim. APCO also appeared in the action as the party who brought summary judgment against Scott Financial on its NRS Chapter 108 foreclosure of mechanics' lien claim. Zitting may therefore obtain the residue of its unpaid portions from APCO under NRS 108.239(12).

We agree with APCO that the purpose of mechanics' lien statutes is to protect contractors and prevent unjust enrichment of property owners. *See In re Fontainebleau Las Vegas Holdings, LLC*, 128 Nev. 556, 574, 289 P.3d 1199, 1210 (2012) (explaining that the Legislature "created a means to provide contractors secured payment" since "contractors are generally in a vulnerable position because they extend large blocks of credit; invest significant time, labor, and

materials into a project; and have any number of workers vitally depend upon them for eventual payment" (internal quotation marks omitted)). NRS 108.239(12) is consistent with the public policy rationales protecting contractors because they have an additional mechanism to collect on the costs of labor and materials furnished. Just as Zitting may pursue a judgment against APCO, APCO may pursue a judgment against Gemstone for any deficient amounts.

APCO's argument that it is not liable under NRS 108.239(12), because APCO was never paid and NRS 108.235(2) requires the general contractor to indemnify the owner only when the general contractor is paid, is unsupported. NRS 108.235(2) imposes an affirmative duty on the general contractor to indemnify the owner if the owner paid the general contractor for the amounts that lien claimants, such as subcontractors, are claiming from the owner. If the owner pays the subcontractors for amounts that the general contractor owes, then the owner can deduct that amount from what it owes to the general contractor. *See* NRS 108.235(3). Where the owner did not pay the general contractor, the general contractor may itself recover through a notice of lien. *See* NRS 108.235(1). Nothing suggests, however, that the owner rather than the general contractor is liable to subcontractors for amounts that a general contractor owes to subcontractors.

Accordingly, we affirm the district court's grant of summary judgment in favor of Zitting.[7] Because Zitting is the prevailing party, and both the parties' subcontract and NRS 108.237(1) permit an award of reasonable attorney fees and costs to the prevailing lien claimant, we conclude that the district court did not abuse its discretion in granting Zitting attorney fees and costs. *Logan v. Abe*, 131 Nev. 260, 267, 350 P.3d 1139, 1144 (2015) (reviewing award of costs for an abuse of discretion); *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319 P.3d 606, 616 (2014) (reviewing award of attorney fees for abuse of discretion).

CONCLUSION

We hold today that resolving the enforceability of pay-if-paid provisions requires a case-by-case analysis to determine whether they are permissible under NRS 624.628(3). We conclude, however, that the pay-if-paid provisions in the parties' subcontract are void and unenforceable under NRS 624.628(3)(a) because they limit Zitting's right to prompt payment under NRS 624.624(1). Furthermore, we conclude that the district court did not abuse its discretion in lim-

[7]We decline to reach APCO's argument that the district court erred in denying its subsequent motion for reconsideration, as its opening brief only summarily asks us to reverse the denial without providing support. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (holding that this court need not consider claims that are not cogently argued).

iting APCO's conditions-precedent defenses, and NRS 108.239(12) permits a subcontractor to sue a contractor for unpaid lien amounts. Accordingly, we affirm the district court's grant of summary judgment and attorney fees and costs in favor of Zitting.

Gibbons and Silver, JJ., concur.

CLARK COUNTY, Appellant, *v.* BRENT BEAN, Respondent.

No. 78443

October 8, 2020, as amended December 30, 2020 482 P.3d 1207

Appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Affirmed.

[En banc reconsideration denied December 30, 2020]

Hooks Meng & Clement and *Dalton L. Hooks, Jr.*, and *John A. Clement*, Las Vegas, for Appellant.

Greenman Goldberg Raby & Martinez and *Lisa M. Anderson*, Las Vegas, for Respondent.

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

AMENDED OPINION

By the Court, Silver, J.:

In *DeMaranville v. Employers Insurance Co. of Nevada*, 135 Nev. 259, 448 P.3d 526 (2019), we addressed the calculation of a retired workers' compensation claimant's death benefits when the retiree died from a compensable occupational disease. Therein, we held that the retiree was entitled to death benefits based on the wages earned immediately before retirement. *Id.* at 266-67, 448 P.3d at 533. In doing so, we distinguished the death benefits at issue in that case from temporary total disability benefits, *id.* at 266, 448 P.3d at 532-33, which we have held are not available to a retiree when an occupational disease manifests after retirement, *Howard v. City of Las Vegas*, 121 Nev. 691, 695, 120 P.3d 410, 412 (2005) (concluding that a workers' compensation claimant is not entitled to total temporary disability benefits for an occupational disease manifesting after retirement).

In this case, the retiree is seeking neither death benefits nor total temporary disability benefits, but is instead seeking permanent

partial disability benefits under a previous version of the governing statute. The retiree argues that the reasoning in *DeMaranville* controls and that he is entitled to a benefits award, while appellant Clark County contends the reasoning in *Howard* controls, negating any benefits award. We conclude that *DeMaranville*'s analysis of compensation for death benefits is directly applicable here because the regulation governing the calculation of compensation for both types of benefits is the same. Furthermore, neither death benefits nor permanent partial disability benefits are statutorily limited based on the amount of work missed, and both are meant to compensate an employee who suffers death or permanent disability resulting from employment. *DeMaranville*, 135 Nev. at 266-67, 448 P.3d at 533. Both of these points distinguish permanent partial disability benefits from the total temporary disability benefits discussed in *Howard*. We therefore affirm the district court's denial of Clark County's petition for judicial review, as the appeals officer correctly found that, under the previous version of the governing statute, the retiree was entitled to permanent partial disability benefits based on the wages he was earning at the time he retired.

FACTUAL AND PROCEDURAL HISTORY

Respondent Brent Bean worked as a Clark County firefighter and retired in 2011. In 2014, he was diagnosed with prostate cancer and had part of his prostate removed. A doctor later assessed him with a 40-percent permanent partial disability rating, and Bean filed for occupational disease benefits. Clark County accepted Bean's claim for medical expenses, but rejected the claim insofar as it sought ongoing permanent partial disability benefits. Clark County reasoned that, because Bean was retired at the time he became permanently partially disabled, he was not earning any wages upon which to base a permanent partial disability benefits award. Thus, although Clark County did not dispute Bean's disability rating, it declined to award him any benefits for that rating.

Bean administratively challenged that decision, arguing his permanent partial disability benefits award should be based on the wages he was earning at the time he retired. The appeals officer agreed and reversed Clark County's denial. The appeals officer declined to apply *Howard*'s holding to Bean's request for permanent partial disability benefits, noting the difference between those benefits and the temporary total disability benefits at issue in *Howard*:[1] "Unlike temporary total disability benefits, which are intended to compensate the injured worker during the temporary period in which he is not working, permanent disability benefits are intended to compensate the injured worker for permanent physical impairment."

[1]The appeals officer had the parties brief *Howard*'s applicability, but *DeMaranville* was not published at the time the appeals officer entered her decision.

The district court had similar reasoning for rejecting Clark County's petition for judicial review challenging the appeals officer's decision. The district court stated that "[p]ermanent partial disability is a medical benefit intended to compensate the injured worker for permanent physical damages caused by the industrial injury or occupational disease and not a form of disability compensation associated with lost wages." The district court therefore rejected Clark County's assertions that *Howard* applied and that it required the court to reinstate the County's denial of Bean's permanent partial disability benefits claim. Clark County now appeals.

DISCUSSION

We review an administrative agency's decision in the same manner as the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). We review factual findings for clear error or an arbitrary abuse of discretion, only overturning if they are not supported by substantial evidence. *Id.* Such evidence exists where "a reasonable person could find the evidence adequate to support the agency's conclusion." *Id.* (quoting *Law Offices of Barry Levinson v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 384 (2008)). Questions of law, including the agency's interpretation of statutes, are reviewed de novo without deference to the agency's decision. *Id.* at 784-85, 312 P.3d at 482. As the County does not dispute that Bean suffered from an occupational disease or challenge his 40-percent permanent partial disability rating, we need only address the appeals officer's interpretation and application of the relevant statutes and administrative code provisions.

NRS 617.453(4) provides that firefighters or their dependents are entitled to compensation for disabling work-related cancers, such as Bean's prostate cancer. This includes both reimbursement for the costs of medical treatments and "[t]he compensation provided in chapters 616A to 616D, inclusive, of NRS for the disability or death." NRS 617.453(4)(a)-(b). Thus, "NRS Chapter 617 does not provide a method for determining the amount of the benefit, but applies NRS Chapters 616A to 616D and their implementing regulations for the purpose of determining benefits." *DeMaranville*, 135 Nev. at 264, 448 P.3d at 531 (internal citation omitted).

At the outset, we note that the Legislature amended NRS 617.453 in 2019 to add a subsection explicitly providing that, if the claim for occupational disease is not made until after the employee retires, the retired employee "is not entitled to receive any compensation for that disease other than medical benefits." 2019 Nev. Stat., ch. 548, § 1, at 3432-33 (limiting the application of subsection (4) to the added language). That amendment does not affect our analysis, however, as it did not become effective until years after Bean filed for the benefits at issue in this appeal. *See id.* at § 3, at 3433 (providing an

effective date of July 1, 2019). And, because the amendment does not apply to this case, we do not address whether Bean would be entitled to permanent partial disability benefits under the amended version of the statute. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (providing that this court does not render advisory opinions and only resolves "actual controversies").

"When a statute is unambiguous, we apply its ordinary meaning." *Id.* But if its language is susceptible to more than one reasonable interpretation, "it is ambiguous and should be interpreted consistent with the Legislature's intent, according with reason and public policy." *Id.* NRS 616C.490 addresses the amount of a benefit for a permanent partial disability rating. It bases the amount of compensation for such a rating on the employee's "average monthly wage." NRS 616C.490(8). NAC 616C.435 instructs that, to calculate an employee's average monthly wage, one uses a 12-week period "ending on the date on which the accident or disease occurred, or the last day of the payroll period preceding the accident or disease if this period is representative of the average monthly wage." NAC 616C.435(1), (8).

In *DeMaranville*, we concluded that this same provision was ambiguous when attempting to calculate the average monthly wage of an employee who died from an occupational disease after retirement. 135 Nev. at 265, 448 P.3d at 531-32 (recognizing that determining the amount of compensation the employee's dependents were entitled to for death benefits under NRS 616C.505 required calculation of the employee's average monthly wage under NAC 616C.435(1) and (8)). The ambiguity arises because, "[w]hile the date of occurrence for an industrial accident may be unambiguous, the date of occurrence for an occupational disease is not." *Id.* at 265, 448 P.3d at 532. Turning to legislative intent to decipher the provision's meaning, we concluded that the statutory scheme "envision[s] compensating claims arising after separation from service" and that NAC 616C.435, as an administrative regulation, cannot contradict the purpose of that statutory scheme. *Id.* at 265-66, 448 P.3d at 532 (listing statutes showing an intent to compensate employees post-retirement); *see also* NRS 617.453(6) (providing that a firefighter's claim of disability resulting from cancer can be made after separating from employment). We therefore rejected any interpretation of NAC 616C.435 that would reduce the employee's death benefit to zero, as that "would effectively nullify the provisions in [the workers' compensation] statutes that establish compensable claims." *DeMaranville*, 135 Nev. at 266, 448 P.3d at 532. The same analysis applies here. The statutory scheme at the time envisioned compensating employees like Bean who are diagnosed with disabling occupational diseases after retirement. *See* NRS 617.453(6). And to construe NAC 616C.435 as awarding no benefits to Bean because he was not earning wages at the time he was diagnosed and

made his claim would directly contradict the statutes' purpose. *See DeMaranville*, 135 Nev. at 265-66, 448 P.3d at 532.

Resolving the ambiguity of determining a retired employee's average monthly wage under NAC 616C.435, we concluded in *DeMaranville* that the legislative intent demonstrated the benefits calculation "should be related to the wage earned at the time the occupational disease causally connected to the disability occurred." 135 Nev. at 267, 448 P.3d at 533. In support of this conclusion, we noted that the Legislature created an entitlement program to compensate employees for disabilities resulting from an occupational disease that arises out of employment; that the compensation "is based on the value received by the employee for his or her services"; and that the connection between the compensable claim and employment is so great that the connection is conclusively presumed for certain occupational diseases. *Id.* "Thus, the applicable statutory scheme shows a legislative intent to base the amount of [the] claim on the earnings from the employment causally connected to the occupational disease underpinning [the] claim." *Id.* Applying this holding in *DeMaranville*, we concluded that "an occupational disease occurs for the purposes of an original death benefits claim on the last day of the disease-risk exposure that is causally connected to the disease," such that the wages the employee earned immediately preceding his retirement determined his death benefits amount. *Id.* at 268, 448 P.3d at 534. Again, the same reasoning applies in this case, as the amount of Bean's permanent partial disability benefits is based on the same provision as the death benefits in *DeMaranville*—NAC 616C.435. We therefore conclude that the compensation for Bean's disability must be based on the wages he was earning at the time he retired, as that was "the last day of the disease-risk exposure . . . causally connected to the disease." *DeMaranville*, 135 Nev. at 268, 448 P.3d at 534.

Nothing in *Howard v. City of Las Vegas* impacts our decision here.[2] 121 Nev. 691, 120 P.3d 410. Clark County argues that *Howard*'s holding precludes any award of permanent partial disability benefits to Bean because Bean was not earning any wages upon which to base the calculation of benefits. But it is clear in *Howard* that we were solely addressing total temporary disability benefits. *See generally id.* Moreover, we based our decision in *Howard* on NRS 617.420(1). *Id.* at 693-94, 120 P.3d at 411-12. That statute explicitly limits the payment of compensation for total temporary disability to instances when the disability "incapacitate[s] the employee for at least 5 cumulative days within a 20-day period from earning full wages." NRS 617.420(1). The same limitation is not

[2]We are also not convinced by Clark County's argument that NRS 616C.480 (addressing compensation for total temporary disability when the employee already received lump-sum compensation for permanent partial disability) shows that Bean is not entitled to permanent partial disability benefits in this case.

placed on compensation for permanent partial disability, as the benefits are calculated differently. *See DeMaranville*, 135 Nev. at 266, 448 P.3d at 533 (recognizing that NRS 617.420(1) addresses temporary total disability benefits). *Compare* NRS 616C.475 (addressing the calculation of total temporary disability benefits), *with* NRS 616C.490 (addressing the calculation of permanent partial disability benefits). And failing to compensate Bean "would be inconsistent with the intent evinced by the Legislature" to cover claims for disabilities resulting from occupational diseases, such as Bean's, that are presumed to have arisen out of and in the course of his career as a firefighter. *DeMaranville*, 135 Nev. at 267, 448 P.3d at 533; *see also* NRS 617.453 (providing that cancer is rebuttably presumed to arise out of and in the course of employment as a firefighter in certain circumstances).

CONCLUSION

Based on the foregoing, we affirm the district court's denial of Clark County's petition for judicial review, as the appeals officer correctly found that, under the previous version of NRS 617.453, compensation for Bean's permanent partial disability rating must be based on the wages he earned before retiring.

Gibbons and Stiglich, JJ., concur.