Audria to establish that removal was in the child's best interest. And even though the district court made findings that relocation was in the child's best interest after the fact, the establishment of the child in a new environment necessarily gave Audria a strategic advantage, and Audria's actions should have factored against awarding custody in her favor. *See* NRS 125.480(4)(c), (e); *Schwartz*, 107 Nev. at 382-83, 812 P.2d at 1271. Instead, the district court determined that Audria's motives were honorable and that she would continue to foster a relationship between the child and his father. But removal of the child without first obtaining permission certainly casts doubt on the findings of honorable motives and that Audria had a good faith reason for the move. Had the district court considered these factors in the proper light, the result may very well have been different. I would therefore reverse and remand to the district court for a new custody determination, and thus, I respectfully dissent.

PAMELA HOLDAWAY-FOSTER, AKA PAMELA JANE BRUNELL, APPELLANT, *v.* ROBERT GENE BRUNELL, RESPONDENT.

No. 61655

June 26, 2014 330 P.3d 471

Appeal from a post-divorce decree district court order declining to take jurisdiction in a child support matter. Eighth Judicial District Court, Family Court Division, Clark County; Jennifer Elliott, Judge.

Ex-wife filed a motion for a controlling order determination and for a judgment of child support arrears. The district court determined that it had lost jurisdiction over the matter and could not review or modify the Hawaii court's orders, reducing ex-husband's child support obligations, because ex-wife had failed to contest the orders within ten days of their issuance, and ex-wife appealed. The supreme court, DOUGLAS, J., held that: (1) as matter of first impression, Full Faith and Credit for Child Support Orders Act applies retroactively; (2) under Act, Nevada had continuing, exclusive jurisdiction over the child support matter; and (3) Hawaii did not have jurisdiction to modify the prior Nevada child support order.

Reversed and remanded.

Greenberg & Nguyen, Attorneys, and *Mike H.T. Nguyen*, Las Vegas, for Appellant.

Joseph W. Houston, II, Las Vegas, for Respondent.

1. Appeal and Error.
   The supreme court reviews a district court's decision regarding subject matter jurisdiction de novo.
2. Statutes.
   Generally, courts apply statutes prospectively unless the legislature clearly manifests an intent for retroactive application or the statute's purpose cannot otherwise be satisfied.
3. Child Support.
   Full Faith and Credit for Child Support Orders Act applies retroactively; Act is remedial in nature because it was designed to assist in collecting past child support arrears. 28 U.S.C. § 1738B.
4. Child Support.
   Under Full Faith and Credit for Child Support Orders Act, Nevada had continuing, exclusive jurisdiction over the child support matter because it had jurisdiction when it issued the original order, and ex-wife and the children had continuously resided in Nevada, including the time during which the Hawaii court modified the order, reducing ex-husband's child support obligation. 28 U.S.C. § 1738B(d).
5. Child Support.
   Under Full Faith and Credit for Child Support Orders Act, Hawaii court could have properly modified the Nevada child support order only if ex-wife and ex-husband had filed written consent in Nevada to give Hawaii exclusive, continuing jurisdiction over the Nevada order, and because neither party filed such consent, Hawaii did not have jurisdiction to modify the prior Nevada child support order; consequently, the Hawaii court's orders, reducing ex-husband's child support obligation, had no legal effect. 28 U.S.C. § 1738B(e)(2)(B).
6. Appeal and Error; Courts.
   Challenge to a court's subject matter jurisdiction is not waivable, unless by written consent, and can be raised at any time or reviewed sua sponte by an appellate court.
7. Child Support.
   Under Full Faith and Credit for Child Support Orders Act, Nevada child support order controlled for the purpose of determining ex-husband's child support arrears since Nevada had never lost continuing, exclusive jurisdiction over this matter and Hawaii did not have jurisdiction to modify the Nevada child support order. 28 U.S.C. § 1738B(f)(2).

Before the Court En Banc.

OPINION

By the Court, Douglas, J.:

In this opinion we consider whether a 1989 Nevada child support order is controlling under the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B (2012), when the mother and children continuously resided in Nevada and the parents did not consent to the assumption of jurisdiction over and modification of the order by a court in Hawaii, the father's new state of residence. To do so, we must determine whether the Act applies retroactively. We hold that the Act applies retroactively, and that under it, Nevada has

continuing, exclusive jurisdiction. Consequently, we conclude that the 1989 Nevada child support order controls.

FACTS

Appellant Pamela Holdaway-Foster and respondent Robert Brunell divorced in Nevada in 1985. In the divorce decree, the district court granted Pamela custody of the parties' two children and ordered Robert to pay Pamela $200 per month in child support. In 1989, the district court increased Robert's child support obligation to $625 per month. Subsequently, Robert relocated to Hawaii and allegedly ceased making the child support payments.

After Robert's relocation to Hawaii, Pamela filed a uniform support petition in the Nevada district court, seeking to register the 1989 Nevada child support order in Hawaii, under the Uniform Interstate Family Support Act (UIFSA). The Hawaii court issued an administrative order that continued the 1989 Nevada child support order, mandating Robert to pay $625 per month in support and $50 per month toward arrears. Subsequently, Robert filed a motion in Hawaii contesting the child support order and asserting that he could not pay the requisite amount. In 1992, after holding a hearing on the matter, the Hawaii court entered an order reducing Robert's child support obligation to $350 per month, determining that Robert had already paid $15,000 toward child support, and directing him to pay $10 per month toward the remaining arrears. The Hawaii court notified Pamela of its decision.

Pamela sent a letter to the Clark County District Attorney's office in which she asserted that Robert did not make $15,000 in child support payments. The District Attorney's office forwarded the letter to the Hawaii Child Support Enforcement Agency, and a representative from the agency informed Pamela that she had 30 days to appeal the Hawaii court order and that although the Hawaii order did not supersede the Nevada order, Hawaii would nevertheless enforce its order. The representative also informed Pamela that she could pursue an action in Nevada to recoup the difference between the orders. Pamela did not appeal the 1992 Hawaii order.

In 1996, the Hawaii court entered another order further reducing Robert's child support obligation to $100 per month, but increasing his arrears payment to $50 per month. The Hawaii court once again notified Pamela of its decision, and again, she did not appeal.

Several years later, after the children reached majority, Pamela filed a motion for a controlling order determination and for a judgment of arrears in the Nevada district court. In the motion, Pamela requested the Nevada court to determine that the 1989 Nevada child support order was controlling and to reduce to judgment the child support arrears that had accrued under the order. Robert argued that Pamela should have brought her motion in the Hawaii district court,

not in Nevada. Robert also asserted that waiver and estoppel barred Pamela from collecting arrears.

The Nevada district court determined that it had lost jurisdiction over the matter and could not review or modify the Hawaii court's orders because Pamela failed to contest the orders within ten days of their issuance. Alternatively, the Nevada district court determined that even if it had jurisdiction to review the Hawaii orders, Pamela implicitly waived her right to challenge them because she received proper notice of the orders and failed to timely contest their validity. Consequently, the district court denied Pamela's request to reduce the unpaid amount under the 1989 Nevada child support order to a judgment. Pamela then filed this appeal challenging the district court's decision, asserting that the Nevada support order is controlling under federal law.[1]

DISCUSSION

Standard of review

[Headnote 1]

This appeal requires us to address whether the district court had continuing, exclusive jurisdiction to enforce and modify its child support order. This court reviews a district court's decision regarding subject matter jurisdiction de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 667-68, 221 P.3d 699, 704 (2009).

Retroactive application of the federal law

Congress enacted the Full Faith and Credit for Child Support Orders Act in 1994 to regulate multiple and inconsistent child support orders from different states. *Twaddell v. Anderson*, 523 S.E.2d 710, 717 (N.C. Ct. App. 1999). The Act also provides guidelines for recognizing which state has continuing, exclusive jurisdiction. 28 U.S.C. § 1738B(d). Under the Act, a court that has issued a child support order has continuing, exclusive jurisdiction and courts in other states are prohibited from modifying the child support order unless certain jurisdictional criteria are met. 28 U.S.C. § 1738B(e).

Under the Supremacy Clause of the United States Constitution, the Act preempts any contrary or inconsistent state law, *see* U.S. Const. art. VI, cl. 2, thus, it is the controlling authority in this matter. Because the Act became effective after the Nevada child support orders and the Hawaii court's initial modification were entered, we must decide whether it should apply retroactively, which poses an issue of first impression in Nevada.

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[1]Pamela also contends that Hawaii lacked jurisdiction to alter the Nevada support order under the UIFSA and the Revised Uniform Reciprocal Enforcement of Support Act. In light of our conclusion that the Act governs here, we need not address these issues.

Pamela asserts that this court should apply the Act retroactively and determine that the Nevada child support order controls in this matter. To support this assertion, Pamela notes that other courts have applied the federal statute retroactively. In response, Robert does not address the Act's application directly, but instead maintains that the Hawaii orders control because Pamela did not seek to enforce the Nevada support order in Hawaii; rather, she established a new order in the Hawaii court, thereby providing Hawaii with jurisdiction over the matter. Robert's argument is without merit because the Hawaii court order expressly stated that it was modifying the Nevada child support obligation. Accordingly, we turn to the issue concerning the Act's retroactive application.

[Headnote 2]

Generally, courts apply statutes prospectively unless the legislature clearly manifests an intent for retroactive application or the statute's purpose cannot otherwise be satisfied. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 271 (1994); *McKellar v. McKellar*, 110 Nev. 200, 203, 871 P.2d 296, 298 (1994). We have also held that courts should apply statutes retroactively when the statute affects only remedies and procedure and does not create new substantive rights. *Valdez v. Emp'rs Ins. Co. of Nev.*, 123 Nev. 170, 179-80, 162 P.3d 148, 154 (2007).

[Headnote 3]

The Act is silent as to whether it applies retroactively; so, we must look to the purposes behind the Act, which we conclude mandate retroactive application. The Act has three purposes: "(1) to facilitate the enforcement of child support orders among the [s]tates; (2) to discourage continuing interstate controversies over child support . . . ; and (3) to avoid jurisdictional competition and conflict among [s]tate courts [when establishing] child support orders[.]" Full Faith and Credit for Child Support Orders Act, Pub. L. No. 103-383, 108 Stat. 4063 (1994). A strict prospective application would frustrate the Act's purposes because the very issues that Congress designed the Act to resolve would persist. Interstate conflicts and controversies would continue regarding child support orders entered before enactment. Further, a prospective application likely would make enforcing child support orders more difficult because orders entered before the Act's effective date would be subject to different procedural rules than those entered after that date. Additionally, the Act is remedial in nature because it was designed to assist in collecting past child support arrears. *See Ga. Dep't of Human Res. v. Deason*, 520 S.E.2d 712, 720 (Ga. Ct. App. 1999) (holding that the Act did not create a new right, rather it provided an avenue to enforce an existing obligation). Therefore, we determine that the Act must be retroactively applied. We note that this determination is consistent with other jurisdictions that have considered this same

issue. *See, e.g.*, *In re Marriage of Yuro*, 968 P.2d 1053, 1057 (Ariz. Ct. App. 1998); *In re Marriage of Lurie*, 39 Cal. Rptr. 2d 835, 844 (Ct. App. 1995); *Deason*, 520 S.E.2d at 719; *Twaddell*, 523 S.E.2d at 717.

Jurisdiction under the Act

Having concluded that the Act applies retroactively, we must now determine whether Nevada has jurisdiction over child support in this case. Under the Act, "a [state] court . . . that has made a child support order consistent[ ] with [the Act] has continuing, exclusive jurisdiction over the order if the [s]tate is the child's [s]tate or the residence of any individual contestant . . . ," unless another state court has modified the order in accordance with the Act. 28 U.S.C. § 1738B(d). A state court may modify an existing support order of another state if the parties file written consent to the modification. 28 U.S.C. § 1738B(e)(2)(B).

[Headnotes 4, 5]

Here, the district court erred in determining that Nevada lacked jurisdiction over this matter. Nevada has continuing, exclusive jurisdiction over the child support matter because it had jurisdiction when it issued the original order, and Pamela and the children have continuously resided in Nevada, including the time during which the Hawaii court modified the order. And no evidence suggests that the Nevada child support order and its subsequent modification did not comply with the federal law. Therefore, the Hawaii court could have properly modified the Nevada order only if Pamela and Robert filed written consent in Nevada to give Hawaii exclusive, continuing jurisdiction over the Nevada order. *See* 28 U.S.C. § 1738B(e)(2)(B). Neither party filed such consent; thus, Hawaii did not have jurisdiction to modify the 1989 Nevada child support order. Consequently, the Hawaii court's orders have no legal effect. *See Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990) (holding that a district court's custody ruling was void because the court lacked subject matter jurisdiction).

[Headnotes 6, 7]

Pamela's failure to formally object to the Hawaii modifications is immaterial because a challenge to a court's subject matter jurisdiction is not waivable, unless by written consent, and can be raised at any time, or reviewed sua sponte by an appellate court. *Id.* Moreover, our determination that Nevada never lost continuing, exclusive jurisdiction over this matter necessitates a finding that the 1989 Nevada order controls for the purpose of determining Robert's child support arrears. *See* 28 U.S.C. § 1738B(f)(2) (providing that when two courts issue a child support order but only one has continuing, exclusive jurisdiction under the Act, that court's order must be recognized).

Although we conclude that the 1989 Nevada child support order controls, the district court still must determine whether Pamela can collect arrears from Robert under the order. We have held that an obligor may assert equitable defenses, such as waiver and estoppel, in a proceeding to reduce child support arrearages to judgment. *See Parkinson v. Parkinson*, 106 Nev. 481, 483, 796 P.2d 229, 231 (1990), *abrogated on other grounds by Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009). Due to its jurisdictional error, the district court never addressed Robert's arguments that Pamela waived or was estopped from recovering arrears under the Nevada order.

Accordingly, we reverse the district court's order concluding that it lacked jurisdiction over the child support matter, and we remand this case to the district court to conduct a new hearing as to the child support arrears and for any other proceedings consistent with this opinion.

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

CHRISTOPHER THOMAS AND CHRISTOPHER CRAIG, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, APPELLANTS, *v.* NEVADA YELLOW CAB CORPORATION; NEVADA CHECKER CAB CORPORATION; AND NEVADA STAR CAB CORPORATION, RESPONDENTS.

No. 61681

June 26, 2014 327 P.3d 518

Appeal from a district court order dismissing a complaint in a minimum wage matter. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Taxicab drivers brought a class action against taxicab companies, arguing that they and similarly situated taxicab drivers had not been paid pursuant to constitutional minimum wage requirements during the course of their employment. The district court dismissed complaint, and drivers appealed. The supreme court, CHERRY, J., held that statutory exception for taxicab drivers provided in Nevada's minimum wage statute was impliedly repealed by Minimum Wage Amendment to the Nevada Constitution.

Reversed and remanded.

[Rehearing denied September 24, 2014]

PARRAGUIRRE, J., with whom GIBBONS, C.J., and SAITTA, J., agreed, dissented.

Leon Greenberg, a Professional Corporation, and *Leon M. Greenberg*, Las Vegas, for Appellants.

Tamer B. Botros and *Marc C. Gordon*, Las Vegas, for Respondents.

1. Appeal and Error.
   Order granting motion to dismiss for failure to state a claim upon which relief can be granted is subject to a rigorous standard of review on appeal. NRCP 12(b)(5).
2. Appeal and Error.
   On appeal from order granting a motion to dismiss for failure to state a claim, the supreme court presumes all factual allegations in the complaint are true and draws all inferences in favor of the plaintiff, and the supreme court reviews all legal conclusions de novo.
3. Statutes.
   A state legislature does not have the power to enact any law conflicting with the federal constitution, the laws of Congress, or the constitution of its particular state.
4. Constitutional Law.
   Nevada Constitution is the supreme law of the state, which controls over any conflicting statutory provisions.
5. Constitutional Law.
   The supreme court will construe statutes, if reasonably possible, so as to be in harmony with the constitution.
6. Constitutional Law.
   When a statute is irreconcilably repugnant to a constitutional amendment, the statute is deemed to have been impliedly repealed by the amendment; presumption is against implied repeal unless the enactment conflicts with existing law to the extent that both cannot logically coexist.
7. Labor and Employment.
   Statutory exception for taxicab drivers provided in Nevada's minimum wage statute was impliedly repealed by Minimum Wage Amendment to the Nevada Constitution; Amendment imposed a mandatory minimum wage pertaining to all employees who were defined for purposes of the Amendment as any persons who were employed by an employer, except for those employees under the age of 18, employees employed by nonprofits for after-school or summer work, and trainees working for no longer than 90 days, and the text of Amendment necessarily implied that all employees not exempted by the Amendment, including taxicab drivers, had to be paid the minimum wage set out in the Amendment, Amendment's broad definition of employee and very specific exemptions necessarily and directly conflicted with the legislative exception for taxicab drivers in minimum wage statute, and therefore, the two were irreconcilably repugnant. Const. art. 15, § 16(C); NRS 608.250(2)(e).
8. Constitutional Law.
   Statutes are construed to accord with constitutions, not vice versa.
9. Constitutional Law.
   Principle of constitutional supremacy prevents the Nevada Legislature from creating exceptions to the rights and privileges protected by Nevada's Constitution.
10. Constitutional Law.
    Goal of constitutional interpretation is to determine the public understanding of a legal text leading up to and in the period after its enactment or ratification.

11. Constitutional Law.

To seek the intent of the provision's drafters or to attempt to aggregate the intentions of Nevada's voters into some abstract general purpose underlying constitutional amendment, contrary to the intent expressed by the provision's clear textual meaning, is not the proper way to perform constitutional interpretation.

Before the Court En Banc.

OPINION

By the Court, Cherry, J.:

Appellant taxicab drivers brought an action in the district court claiming damages for unpaid wages pursuant to Article 15, Section 16 of the Nevada Constitution, a constitutional amendment that revised Nevada's then-statutory minimum wage scheme (the Minimum Wage Amendment). The district court held that the Minimum Wage Amendment did not entirely replace the existing statutory minimum wage scheme under NRS 608.250, which in subsection 2 excepts taxicab drivers from its minimum wage provisions. We hold that the district court erred because the text of the Minimum Wage Amendment, by clearly setting out some exceptions to the minimum wage law and not others, supplants the exceptions listed in NRS 608.250(2). Accordingly, we reverse the district court's dismissal order and remand for further proceedings on appellants' minimum wage claims.

FACTS AND PROCEDURAL HISTORY

Appellants Christopher Thomas and Christopher Craig brought class action against respondent taxicab companies, arguing that they and similarly situated taxicab drivers had not been paid pursuant to constitutional minimum wage requirements during the course of their employment. The complaint was based on the Minimum Wage Amendment, which was proposed by initiative petition and approved and ratified by the voters in 2004 and 2006, and which raised the state minimum wage to a rate higher than the minimum imposed in Nevada by the Labor Commissioner under NRS 608.250. *See* Nev. Const. art. 15, § 16. The taxicab companies moved to dismiss the complaint pursuant to NRCP 12(b)(5), arguing that the Minimum Wage Amendment did not eliminate the statutory exception for taxicab drivers under NRS 608.250(2)(e). Following a hearing, the district court concluded that the Minimum Wage Amendment did not repeal NRS 608.250 and that the statutory exceptions could be harmonized with the constitutional amendment. Accordingly, because NRS 608.250(2)(e) expressly excludes taxicab drivers from Nevada's minimum wage statutes, the district court granted the taxi-

cab companies' motion to dismiss the complaint. Appellants now bring this appeal.

DISCUSSION

[Headnotes 1, 2]

An order granting an NRCP 12(b)(5) motion to dismiss "is subject to a rigorous standard of review on appeal." *Buzz Stew, L.L.C. v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (quotations omitted). "This court presumes all factual allegations in the complaint are true and draws all inferences in favor of the plaintiff . . . . We review all legal conclusions de novo." *Stubbs v. Strickland*, 129 Nev. 146, 150, 297 P.3d 326, 329 (2013).

The issue on appeal is a purely legal one: Does the Minimum Wage Amendment to the Nevada Constitution, Article 15, Section 16, override the exception for taxicab drivers provided in Nevada's minimum wage statute, NRS 608.250(2)(e)? The Amendment imposes a mandatory minimum wage pertaining to all employees, who are defined for purposes of the Amendment as any persons who are employed by an employer, except for those employees under the age of 18, employees employed by nonprofits for after-school or summer work, and trainees working for no longer than 90 days. Nev. Const. art. 15, § 16(C).[1] In contrast, NRS 608.250(2), which was enacted prior to the Minimum Wage Amendment, excludes six classes of employees from its minimum wage mandate, including taxicab drivers. Appellants, as taxicab drivers excluded from coverage by NRS 608.250, base their claim for relief on the Minimum Wage Amendment. Respondents, however, argue that the Minimum Wage Amendment merely raised the amount of the wage and that it did not replace Nevada's statutory exceptions to the wage requirements.

[Headnotes 3-6]

It is fundamental to our federal, constitutional system of government that a state legislature "has not the power to enact any law conflicting with the federal constitution, the laws of congress, or

[1]Nevada Constitution, Article 15, Section 16 reads, in relevant part:

> **Payment of minimum compensation to employees.**
>
> A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section.
>
> . . . .
>
> C. As used in this section, "employee" means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.

the constitution of its particular State." *State v. Rhodes*, 3 Nev. 240, 250 (1867). "The Nevada Constitution is the 'supreme law of the state,' which 'control[s] over any conflicting statutory provisions.'" *Clean Water Coal. v. The M Resort, L.L.C.*, 127 Nev. 301, 309, 255 P.3d 247, 253 (2011) (alteration in original) (quoting *Goldman v. Bryan*, 106 Nev. 30, 37, 787 P.2d 372, 377 (1990)). We will construe statutes, "if reasonably possible, so as to be in harmony with the constitution." *State v. Glusman*, 98 Nev. 412, 419, 651 P.2d 639, 644 (1982). But when a statute "is irreconcilably repugnant" to a constitutional amendment, the statute is deemed to have been impliedly repealed by the amendment. *Mengelkamp v. List*, 88 Nev. 542, 545-46, 501 P.2d 1032, 1034 (1972). The presumption is against implied repeal unless the enactment conflicts with existing law to the extent that both cannot logically coexist. *See W. Realty Co. v. City of Reno*, 63 Nev. 330, 344, 172 P.2d 158, 165 (1946).

Respondents urge us to reconcile the Minimum Wage Amendment with NRS 608.250(2) by reading the Amendment as supplementing the statutory scheme, increasing the wage within the scheme but not adjusting the scheme as a whole. The district court likewise found that there was no explicit conflict between the statutory exceptions and the Minimum Wage Amendment's definition of "employee" and, therefore, that the Minimum Wage Amendment did not impliedly repeal the NRS 608.250(2) exceptions.

[Headnote 7]

In our view, the district court's and respondents' reading of the Minimum Wage Amendment as allowing the Legislature to provide for additional exceptions to Nevada's constitutional minimum wage disregards the canon of construction "'expressio unius est exclusio alterius,' the expression of one thing is the exclusion of another." *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). The Minimum Wage Amendment expressly and broadly defines employee, exempting only certain groups: "'employee' means any person who is employed [by an individual or entity that may employ individuals or enter into contracts of employment] but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days." Nev. Const. art. 15, § 16(C). Following the *expressio unius* canon, the text necessarily implies that all employees not exempted by the Amendment, including taxicab drivers, must be paid the minimum wage set out in the Amendment. The Amendment's broad definition of employee and very specific exemptions necessarily and directly conflict with the legislative exception for taxicab drivers

established by NRS 608.250(2)(e).[2] Therefore, the two are "irreconcilably repugnant," *Mengelkamp*, 88 Nev. at 546, 501 P.2d at 1034, such that "both cannot stand," *W. Realty Co.*, 63 Nev. at 344, 172 P.2d at 165, and the statute is impliedly repealed by the constitutional amendment.

[Headnotes 8, 9]

An alternative construction that would attempt to make the Minimum Wage Amendment compatible with NRS 608.250, despite the plain language of the Amendment, would run afoul of the principle of constitutional supremacy. A "constitutional amendment, adopted subsequent to the enactment of the statute relied on by counsel for petitioner, is controlling" over the statute that addresses the same issue. *State v. Hallock*, 16 Nev. 373, 378 (1882). Statutes are construed to accord with constitutions, not vice versa. *Foley v. Kennedy*, 110 Nev. 1295, 1300, 885 P.2d 583, 586 (1994). "Accepting respondents' position 'would require the untenable ruling that constitutional provisions are to be interpreted so as to be in harmony with the statutes enacted pursuant thereto; or that the constitution is presumed to be legal and will be upheld unless in conflict with the provisions of a statute.'" *Strickland v. Waymire*, 126 Nev. 230, 244, 235 P.3d 605, 613 (2010) (quoting *Foley*, 110 Nev. at 1300-01, 885 P.2d at 586). If the Legislature could change the Constitution by ordinary enactment, "no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.'" *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (alteration in original) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). In this case, the principle of constitutional supremacy prevents the Nevada Legislature from creating exceptions to the rights and privileges protected by Nevada's Constitution.

Respondents also argue that, despite the intent expressed by the text of the Amendment, the voters actually intended to merely raise the minimum wage, not to create a new minimum wage scheme. But respondents do not adequately explain their basis for deriving

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[2]Nevada's Attorney General reached the same conclusion in 2005:

> [T]he people, by acting to amend the minimum wage coverage and failing to include the statutory exclusions in the proposed amendment, are presumed to have intended the repeal of the existing exclusions so that the new minimum wage would be paid to all who meet its definition of "employee." Accordingly, the proposed amendment would effect an implied repeal of the exclusions from minimum wage coverage at NRS 608.250(2).

05-04 Op. Att'y Gen. 12, 18 (2005).

such intent. It would be impossible, for instance, to identify and query every Nevadan who voted in favor of the provision—and it is not even clear that such a survey would reveal the true intentions of those voters.

[Headnotes 10, 11]

Moreover, our recent precedents have established that we consider first and foremost the original public understanding of constitutional provisions, not some abstract purpose underlying them. "The goal of constitutional interpretation is 'to determine the public understanding of a legal text' leading up to and 'in the period after its enactment or ratification.'" *Waymire*, 126 Nev. at 234, 235 P.3d at 608-09 (quoting 6 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 23.32 (4th ed. 2008 & Supp. 2010)). To seek the intent of the provision's drafters or to attempt to aggregate the intentions of Nevada's voters into some abstract general purpose underlying the Amendment, contrary to the intent expressed by the provision's clear textual meaning, is not the proper way to perform constitutional interpretation. *See generally District of Columbia v. Heller*, 554 U.S. 570 (2008) (interpreting the Second Amendment by seeking the original public understanding of the text, with majority and dissent disagreeing on content of public understanding). "The issue ought to be not what the legislature," or, in this case, the voting public, "meant to say, but what it succeeded in saying." Lon L. Fuller, *Anatomy of the Law* 18 (Greenwood Press 1976).

The text of the Minimum Wage Amendment, by enumerating specific exceptions that do not include taxicab drivers, supersedes and supplants the taxicab driver exception set out in NRS 608.250(2). We accordingly reverse the district court's dismissal order and remand for further proceedings consistent with this opinion.

PICKERING, HARDESTY, and DOUGLAS, JJ., concur.

PARRAGUIRRE, J., with whom GIBBONS, C.J., and SAITTA, J., agree, dissenting:

I would affirm the district court's order dismissing Thomas's complaint because the Amendment was only intended to increase the minimum wage amount.

We presume that a statute is constitutional, and a party who challenges the constitutionality of a statute must clearly show its invalidity. *Martinez v. Maruszczak*, 123 Nev. 433, 448-49, 168 P.3d 720, 730 (2007). Moreover, implied repeal is disfavored in Nevada. *Presson v. Presson*, 38 Nev. 203, 208, 147 P. 1081, 1082 (1915). "'Where express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute . . . .'" *W. Realty Co. v. City of Reno*, 63 Nev. 330, 344, 172 P.2d 158, 165

(1946) (quoting *Ronnow v. City of Las Vegas*, 57 Nev. 332, 365, 65 P.2d 133, 145 (1937)); *see also In re Advisory Op. to the Governor*, 132 So. 2d 163, 169 (Fla. 1961) ("Implied repeals of statutes by later constitutional provisions [are] not favored and . . . in order to produce a repeal by implication the repugnancy between the statute and the Constitution must be obvious or necessary.").

We have stated that "'the interpretation of a . . . *constitutional provision will be harmonized with other statutes*.'" *Landreth v. Malik*, 127 Nev. 175, 180, 251 P.3d 163, 166 (2011) (alteration in original) (emphasis added) (quoting *We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008)). We "apply the plain meaning of a statute unless it is ambiguous." *Id.* A provision is ambiguous if "'it is susceptible to two or more reasonable but inconsistent interpretations.'" *Id.* (quoting *Miller v. Burk*, 124 Nev. 579, 590, 188 P.3d 1112, 1120 (2008)). In order to interpret an ambiguous constitutional provision, we look to the provision's history and public policy to determine the intended interpretation. *Id.*

Because the Amendment and NRS 608.250 both address minimum wage, I would attempt to harmonize these provisions. *See id.* Reading NRS 608.250 and the Amendment together, an ambiguity becomes readily apparent. Namely, it is unclear whether the Amendment raises the minimum wage without altering NRS 608.250(2)'s exemptions or whether it impliedly repeals the exemptions, as the majority concludes. Both of these interpretations of the Amendment appear reasonable. As a result, I would conclude that the Amendment is ambiguous and must be interpreted in light of its history and public policy. *Landreth*, 127 Nev. at 180, 251 P.3d at 166.

Since 1965, the Nevada Wage and Hour Law, codified in NRS Chapter 608, has governed employment compensation, wages, and hours for employees in Nevada. NRS 608.250(1) authorizes the Labor Commissioner to "establish by regulation the minimum wage which may be paid to employees in private employment within the State." "Taxicab and limousine drivers" are not entitled to this minimum wage.[1] NRS 608.250(2)(e).

In 2006, the Amendment was ratified by the voters, increasing the state minimum wage. *See* Nev. Const. art. 15, § 16(A). Although NRS Chapter 608 has been in existence since 1965 and addresses the same subject matter as the Amendment, the Amendment does

[1]"Casual babysitters" are also exempted from minimum wage entitlement. NRS 608.250(2)(a). Therefore, because the majority concludes that the Amendment impliedly repeals NRS 608.250(2), even casual babysitters will be entitled to minimum wage. This is an absurd result that the Amendment should be interpreted to avoid. *See J.E. Dunn Nw., Inc. v. Corus Constr. Venture, L.L.C.*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011).

not mention these long-standing statutes. We should presume that if the voters intended to restructure the entire legislative scheme, they would have done so explicitly. *Cf. State Indus. Ins. Sys. v. Woodall*, 106 Nev. 653, 657, 799 P.2d 552, 555 (1990) (stating that if the Legislature intended a particular result, it "would have indicated as much in the statutes themselves so the judiciary would not be required to divine such a rule out of thin air").

Moreover, the provision's title, "Raise the Minimum Wage for Working Nevadans," does not hint at any intended alteration of the NRS 608.250(2) exemptions. Nevada Ballot Questions 2006, Nevada Secretary of State, Question No. 6.[2] Similarly, the condensed ballot question only asked whether "the Nevada Constitution [should] be amended to raise the minimum wage," and made no mention of changing the group of employees entitled to minimum wage. *Id.* At the very least, if the Amendment was intended to repeal the NRS 608.250(2) exemptions, the arguments regarding the Amendment would have mentioned NRS Chapter 608, but they do not. *Id.* Therefore, I would conclude that the Amendment was only intended to raise the minimum wage amount, rather than abolish long-standing exemptions from the group of employees entitled to minimum wage.

The majority states that the public understanding of the Amendment must control our interpretation. Given that the Amendment's title, condensed ballot question, and arguments regarding the ballot question fail to mention any changes to Nevada law besides increasing the minimum wage, there is no basis for the majority's conclusion that the public understood that the Amendment would repeal the NRS 608.250(2) exemptions. Rather, the public understood that the Amendment would only increase the minimum wage.

We must presume that implied repeal was not intended and the exemptions set forth in NRS 608.250(2) are constitutional. *Martinez*, 123 Nev. at 448-49, 168 P.3d at 730; *Presson*, 38 Nev. at 208, 147 P. at 1082. Because the Amendment was neither intended nor understood to do more than raise the minimum wage amount, I would conclude that these presumptions have not been rebutted and would affirm the district court's order of dismissal.

Accordingly, I dissent.

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[2]*Available at* https://nvsos.gov/Modules/ShowDocument.aspx?documentid=206.

DARRYL L. JONES, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE DOUG SMITH, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 63303

July 3, 2014 330 P.3d 475

Original proper person petition for a writ of mandamus challenging a district court order labeling petitioner a vexatious litigant and restricting his access to the courts.

Following appeal in which defendant's convictions were affirmed in part and reversed in part, defendant filed a timely post-conviction petition for writ of habeas corpus. Based on motions filed by defendant, the district court determined that defendant was a vexatious litigant and issued order restricting his ability to file further documents in district court. Defendant petitioned for writ of mandamus. The supreme court, DOUGLAS, J., held that: (1) as a matter of first impression, Nevada district courts have inherent authority to issue orders that restrict a litigant's filings that challenge a judgment of conviction and sentence if the court determines that the litigant is vexatious; (2) a court imposing such access restrictions must provide notice of and an opportunity to oppose proposed restrictions, create adequate record that includes a list of the filings or other reasons that led to conclusion that restrictive order was needed, make substantive findings as to frivolous or harassing nature of litigant's actions, and narrowly tailor restrictions to address the specific problem and set an appropriate standard for measuring future filings; and (3) the district court's exercise of discretion, in issuing order based on vexatious-litigant finding that defendant's future filings in present proceeding be reviewed by chief judge before they could be filed in the district court, was arbitrary and capricious.

Petition granted.

Darryl L. Jones, Indian Springs, in Proper Person.

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

1. MANDAMUS.
   Mandamus is an extraordinary remedy, and the decision to entertain a petition for a writ of mandamus rests within the supreme court's discretion.
2. MANDAMUS.
   The supreme court would exercise its discretion to entertain defendant's mandamus petition challenging an order of the district court restrict-

ing his ability to file further documents in his first post-conviction habeas corpus proceeding, issued after the district court determined defendant to be a vexatious litigant; defendant had no other remedy at law, and petition raised an important issue involving his right to access the courts.

3. Injunction.

Nevada district courts have inherent authority, under state constitutional provision establishing their jurisdiction and powers, to issue orders that restrict a litigant's filings that challenge a judgment of conviction and sentence if the court determines that the litigant is vexatious. Const. art. 6, § 6(1).

4. Injunction.

A district court imposing access restrictions on a vexatious litigant with respect to filings that involve post-conviction challenges to a judgment of conviction or computation of time served pursuant to a judgment of conviction must: (1) provide notice of and an opportunity to oppose the proposed restrictions; (2) create an adequate record that includes a list of the filings or other reasons that led it to conclude that a restrictive order was needed, including consideration of other less onerous sanctions to curb the repetitive or abusive activities; (3) make substantive findings as to the frivolous or harassing nature of the litigant's actions; and (4) narrowly tailor the restrictions to address the specific problem and set an appropriate standard by which to measure future filings. NRS 34.745(4), 34.810(2), 209.451(1)(d), (5).

5. Constitutional Law; Injunction.

A defendant's due process interests are protected by requirement that the defendant, in a post-conviction proceeding challenging a judgment of conviction or computation of time served, be provided notice of, and an opportunity to oppose, proposed restrictions on future filings based on a district court's determinations that defendant is a vexatious litigant. U.S. Const. amend. 14.

6. Injunction.

The district court's exercise of discretion, in issuing order based on vexatious-litigant finding that defendant's future filings in post-conviction habeas corpus proceeding be reviewed by chief judge before they could be filed in the district court, was arbitrary and capricious; defendant did not have reasonable notice of and an opportunity to oppose order, the district court did not create adequate record for review or explain conclusory statement that defendant's filings were not made in good faith and had been made solely to harass the State and the district court, motions cited by the district court as being harassing and not filed in good faith were all normal motions that were routinely filed in post-conviction proceedings, and restrictive order was not narrowly drawn to address the "problem" encountered.

7. Criminal Law.

Question on review of an order restricting a defendant's future filings in a post-conviction proceeding upon a determination by the district court that the defendant is a vexatious litigant is whether the district court arbitrarily or capriciously exercised or manifestly abused its discretion.

8. Criminal Law.

An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law.

9. Criminal Law.

A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.

10. Constitutional Law; Injunction.

Order entered in post-conviction proceeding for writ of habeas corpus, restricting defendant's ability to file additional documents in that proceeding based on a determination that he was a vexatious litigant, violated his due process rights; the State's request for a vexatious litigant determination did not request a restrictive order but asked the district court to sanction defendant's conduct through a forfeiture of credits toward term of imprisonment, there was no record that defendant was given an opportunity to oppose the issuance of a restrictive order, and he was not present at hearing at which the district court summarily stated that he was a vexatious litigator. U.S. Const. amend. 14.

Before Hardesty, Douglas and Cherry, JJ.

OPINION

By the Court, Douglas, J.:

In considering this petition, we address whether the district court has the authority to restrict a criminal defendant's access to the courts in order to challenge a judgment of conviction and sentence or the computation of time served under a judgment of conviction and, if so, what approach courts should take when restricting that access.

Petitioner Darryl Jones filed a timely post-conviction petition for a writ of habeas corpus challenging his judgment of conviction and sentence, his first such petition. Jones represented himself in the post-conviction proceeding. Based on motions filed by Jones, including a motion for the appointment of post-conviction counsel, the district court determined that Jones was a vexatious litigant and issued an order restricting Jones' ability to file further documents in the district court. Jones filed this original petition to challenge that order.

This court has held that a district court has authority to label indigent proper person civil litigants as vexatious litigants and to restrict their access to the courts. *Jordan v. State ex rel. Dep't of Motor Vehicles & Public Safety*, 121 Nev. 44, 59, 110 P.3d 30, 41-42 (2005), *abrogated on other grounds by Buzz Stew, L.L.C. v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008). It has not addressed restrictive orders that prohibit a litigant from challenging a judgment of conviction or the litigant's custody status pursuant to a judgment of conviction. We conclude that the district court may restrict a litigant from filing petitions and motions that challenge a judgment of conviction or the litigant's custody status pursuant to a judgment of conviction and that the guidelines set forth in *Jordan* adequately protect a litigant's rights while providing instruction for the district courts as to when a restrictive order is warranted and the proper scope

of a restrictive order. A court imposing access restrictions on a vexatious litigant with respect to filings that involve post-conviction challenges to a judgment of conviction or computation of time served pursuant to a judgment of conviction must: (1) provide notice of and an opportunity to oppose the proposed restrictions; (2) create an adequate record that includes a list of the filings or other reasons that led it to conclude that a restrictive order is needed, including consideration of other less onerous sanctions to curb the repetitive or abusive activities; (3) make substantive findings as to the frivolous or harassing nature of the litigant's actions; and (4) narrowly tailor the restrictions to address the specific problem and set an appropriate standard by which to measure future filings. Under the facts presented in this case, we conclude that the district court acted arbitrarily and capriciously when it determined that Jones was a vexatious litigant and entered an order restricting his access to the court. We therefore grant the petition.

FACTS AND PROCEDURAL HISTORY

Jones was convicted, pursuant to a jury verdict, of five counts of burglary, one count of attempted theft, five counts of obtaining and using the personal identification information of another, four counts of theft, two counts of grand larceny auto, two counts of obtaining property under false pretenses, and one count of possession for sale of a document or personal identifying information to establish false status or identity. He was sentenced to a total of approximately 51 to 134 years in prison. On direct appeal, this court reversed the judgment of conviction as to four counts but affirmed as to the remaining counts. *Jones v. State*, Docket No. 55508 (Order Affirming in Part, Reversing in Part, and Remanding, November 5, 2010).

After his appeal, Jones filed a timely post-conviction petition for a writ of habeas corpus on December 21, 2010. At the time, he was not represented by counsel. He filed amendments to the petition in proper person on January 24, 2011, and February 3, 2011.

Jones filed in proper person a motion for the production of documents on April 14, 2011, and a motion to extend his prison copy limit on April 20, 2011. On April 28, 2011, the State filed a consolidated opposition and a request for vexatious litigant determination. At a hearing held on May 11, 2011, regarding Jones' motion for the production of documents, the district court stated in passing that Jones was a vexatious litigant and that he would be referred to the chief judge for an official determination. Jones was not present at this hearing, nor was he represented by counsel at the hearing.

A cursory order designating Jones a vexatious litigant was entered on June 16, 2011. The order lists four orders as proof that Jones is a vexatious litigant: a March 14, 2011, order denying Jones' motion for the appointment of counsel; a May 2, 2011, order denying Jones'

motion to extend prison copy work and motion for the production of documents; a May 9, 2011, order denying Jones' post-conviction petition for a writ of habeas corpus;[1] and the order finding that Jones was a vexatious litigant. It further states in a conclusory fashion that Jones' filings have not been made in good faith and that they have been filed solely for the purpose of harassing the State and the district court. Finally, the order states "that all future filings by defendant in this matter are referred to the Chief Judge for review and approval before they may come before this Department." Jones filed this petition for a writ of mandamus to challenge the order designating him as a vexatious litigant and restricting his access to the court.

DISCUSSION

[Headnotes 1, 2]

Mandamus is an extraordinary remedy, and the decision to entertain a petition for a writ of mandamus rests within our discretion. *See Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982); *see also State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983). We have indicated that mandamus is the appropriate vehicle for challenging orders that restrict a litigant's access to the courts. *Peck v. Crouser*, 129 Nev. 120, 124, 295 P.3d 586, 588 (2013). Because Jones has no other remedy at law and the petition raises an important issue involving his right to access the courts, we exercise our discretion to entertain the petition. *See State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779-80 (2011).

In 2005, in a civil case, this court recognized that Nevada courts have "the power to permanently restrict a litigant's right to access the courts," *Jordan v. State ex rel. Dep't of Motor Vehicles & Public Safety*, 121 Nev. 44, 59, 110 P.3d 30, 41-42 (2005), and approved procedures to guide courts in determining whether to restrict a litigant's access to the courts and in narrowly tailoring a restrictive order, *id*. at 60-62, 110 P.3d at 42-44. The court also recognized that constitutional considerations preclude courts from imposing

[1]On March 7, 2011, the district court issued a minute order vacating Jones' petition because it exceeded the department's 20-page limit and informed Jones that he needed to comply with the limit and refile. Jones filed a notice of appeal. Because the district court had not yet entered a written order, we directed the district court to do so. The district court then entered a written "Order Vacating Hearing on Defendant's Petition for a Writ of Habeas Corpus" on July 13, 2011. The written order stated that the petition was unreasonably and excessively lengthy, and contained grounds that were not relevant, discernible, or cognizable by the district court. The order further indicated that Jones was required to refile his petition before the district court would consider it. This court reversed the district court order and remanded for the district court to consider the petition on the merits. *Jones v. State*, Docket No. 58052 (Order of Reversal and Remand, September 14, 2011). We also suggested that the district court should appoint post-conviction counsel to represent Jones, which it did on October 14, 2011.

a complete ban on filings by an indigent proper person litigant "if the ban prevents the litigant from proceeding in criminal cases and in original civil actions that sufficiently implicate a fundamental right." *Id.* at 62, 110 P.3d at 43. *Jordan* did not discuss the propriety of restrictive orders that limit filings that challenge a judgment of conviction or the computation of time served pursuant to a judgment of conviction.

While Nevada has not considered restrictive orders in the criminal or post-conviction context, many other jurisdictions have concluded that the courts may issue restrictive orders to curb repetitive or abusive activities by litigants in challenging a judgment of conviction. Courts in some jurisdictions have determined that they have the inherent authority to impose sanctions and that injunctive restrictions on filings by vexatious litigants are necessary and prudent to curb conduct that would impair the rights of other litigants and the court's ability to carry out its functions. *See Alexander v. United States*, 121 F.3d 312, 315-16 (7th Cir. 1997); *Carter v. United States*, 733 F.2d 735, 737 (10th Cir. 1984); *Rivera v. State*, 728 So. 2d 1165, 1166 (Fla. 1998); *Howard v. Sharpe*, 470 S.E.2d 678, 680 (Ga. 1996). Other states, like Ohio, have vexatious-litigant statutes that allow courts to find criminal defendants filing post-conviction petitions for writs of habeas corpus to be vexatious litigants.[2] *See* Ohio Rev. Code Ann. § 2323.52; *Baumgartner v. Duffey*, 904 N.E.2d 534, 535 (Ohio 2009) (applying Ohio Rev. Code Ann. § 2323.52 to petitions for writs of habeas corpus).

[Headnotes 3, 4]

Although Nevada does not have a specific vexatious-litigant statute, we conclude that the district courts have inherent authority to issue orders that restrict a litigant's filings that challenge a judgment of conviction and sentence if the court determines that the litigant is vexatious. Similar to the federal and state courts and this court's conclusions in *Jordan*, the authority to issue a restrictive order is based on the fact that the courts are constitutionally authorized to issue all writs proper and necessary to complete the exercise of their jurisdiction and that "courts possess inherent powers of equity and of control over the exercise of their jurisdiction." *Jordan*, 121 Nev. at 59, 110 P.3d at 41 (citing Nev. Const. art. 6 §§ 4, 6(1)). The filing of numerous petitions and other motions challenging a judgment of conviction and sentence takes up significant judicial resources, and the use of restrictive orders may help curb vexatious

[2]Texas and California also have vexatious-litigant statutes but, based on the language of the statutes, have concluded that their statutes only apply to civil cases and that post-conviction petitions for a writ of habeas corpus are more criminal in nature than civil. *See Aranda v. District Clerk*, 207 S.W.3d 785, 786 (Tex. Crim. App. 2006); *In re Bittaker*, 64 Cal. Rptr. 2d 679, 683 (Ct. App. 1997).

behavior and preserve scarce judicial resources. But the right to access the courts is an important constitutional concern, *Sullivan v. Eighth Judicial Dist. Court*, 111 Nev. 1367, 1372, 904 P.2d 1039, 1042 (1995), and one that should not be restricted as a sanction for vexatious litigation without careful consideration. These competing interests must be carefully balanced, particularly where the restrictive order would limit a litigant's access to the courts in order to challenge a judgment of conviction and sentence. We conclude that the four-step analysis set forth in *Jordan* provides the appropriate balance between the litigant's right to access the courts to challenge a judgment of conviction and sentence and the public's interest in protecting scarce judicial resources from repetitious and vexatious litigation. *See generally Jordan*, 121 Nev. at 60 & n.27, 110 P.3d at 42 & n.27.

[Headnote 5]

The first part of the analysis "protects the litigant's due process rights." *Id*. at 60, 110 P.3d at 43. Thus, "the litigant must be provided reasonable notice of and an opportunity to oppose a restrictive order's issuance." *Id*. at 60, 110 P.3d at 42.

The second part of the analysis focuses on the record supporting a restrictive order. The district court must create an adequate record for review that includes a list of the petitions or motions, or an explanation of the reasons, "that led it to conclude that a restrictive order was needed to curb repetitive or abusive activities." *Id.* at 60, 110 P.3d at 43. In the context of restrictive orders that preclude a litigant from filing documents that challenge a judgment of conviction and sentence, the district court must also consider whether there are other, less onerous sanctions available to curb the repetitive or abusive activities. *See id*. at 60, 110 P.3d at 42 ("[W]e note a general reluctance to impose restrictive orders when standard remedies like sanctions are available and adequate to address the abusive litigation."). There are several standard remedies available to district courts to curb abusive litigation challenging a judgment of conviction and sentence.[3] If a litigant is filing a second or successive petition and raises the same claims that have been previously determined on the merits or raises claims that are new or different from those previ-

[3]We note that in Nevada there is no fee for filing a post-conviction petition for a writ of habeas corpus, NRS 34.724(1), and district court clerks cannot charge a filing fee that is not authorized by law, NRS 19.070; *see also* NRS 19.013(5) (stating that no filing fee may be charged to any defendant or the defendant's attorney in any criminal case or in habeas corpus proceedings); NRS 2.250(1)(d) (stating that the supreme court clerk cannot charge a filing fee in any action where the State is a party, or where the appeal is from a habeas corpus proceeding that is criminal in nature or where an appeal is taken from a criminal proceeding or from a special proceeding arising out of a criminal proceeding). As a result, Nevada courts cannot use a filing fee to curb abusive post-conviction litigation.

ously raised, the district court has the authority to summarily dismiss the petition without ordering the State to respond. *See* NRS 34.810(2); NRS 34.745(4). Another available sanction is to refer the litigant to the Department of Corrections for the forfeiture of credits previously earned. *See* NRS 209.451(1)(d), (5) (providing for the forfeiture of credits if an inmate files a petition for a writ of habeas corpus in state or federal court that contains a claim or defense that is included for an improper purpose, is not warranted by existing law or does not argue for a reasonable change in the law, or contains allegations not supported by evidence); *see also* Nev. Dep't of Corr. Admin. Regulation 707.02(5) (2010) (setting forth that it is a major violation (MJ 48) of the prison rules to violate a rule of court, submit false documents, violate the rules of civil, criminal, or appellate procedure, or to receive sanctions or warning for any such action from any court). Therefore, the district court should consider whether there are other standard remedies that are available and adequate to curb the abusive litigation before entering a restrictive order preventing the filing of a petition or motion.

The third part of the analysis focuses on whether the litigant's actions identified by the district court in the second part of the analysis are vexatious. "[T]he district court must make substantive findings as to the frivolous or harassing nature of the litigant's actions." *Jordan*, 121 Nev. at 61, 110 P.3d at 43 (internal quotation marks and citations omitted). The filings must be more than just repetitive or abusive—they must also be without an arguable legal or factual basis, or filed with the intent to harass. *Id*. In other words, the purpose of a restrictive order must be to curb vexatious litigation, not just litigiousness. *Id.*

The final part of the analysis is focused on protecting the litigant's constitutional right to access the courts by ensuring that the restrictive order is narrowly tailored. "[T]he order must be narrowly drawn to address the specific problem encountered" and must set an appropriate standard by which any future filings will be measured. *Id.* at 61-62, 110 P.3d at 43-44. For example, if the specific problem is that the litigant repeatedly asserts the same claim or type of claim, the restrictive order should be limited to filings raising the same claim or type of claim. Further, if the district court determines that a litigant has been abusive in his filings challenging a judgment of conviction, the restrictive order should only bar abusive challenges to the judgment of conviction. Such an order thus would not preclude the litigant from filing a challenge to the computation of time served pursuant to a judgment of conviction based on a disciplinary hearing that resulted in the forfeiture of credits. The order should be no more restrictive than warranted by the litigant's vexatious actions.

[Headnotes 6-9]

Turning to the restrictive order challenged by Jones, the question is whether the district court arbitrarily or capriciously exercised or

manifestly abused its discretion. *Peck*, 129 Nev. at 124, 295 P.3d at 588; *see also Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law." *Armstrong*, 127 Nev. at 931-32, 267 P.3d at 780 (internal quotation marks and citations omitted). Similarly, "[a] manifest abuse of discretion is '[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.'" *Id.* (quoting *Steward v. McDonald*, 958 S.W.2d 297, 300 (Ark. 1997)).

Although this court had not clearly addressed restrictive orders that limit a criminal defendant's filings that challenge a judgment of conviction and sentence before today, our decision in *Jordan* provided at least some relevant guidance as the only decision by this court related to restrictive orders. It does not appear that the district court considered *Jordan*.

[Headnote 10]

First, the district court failed to provide Jones with reasonable notice of, and an opportunity to oppose, the restrictive order's issuance. The State filed its request for vexatious determination on April 28, 2011. That motion did not put Jones on notice that the court was considering a restrictive order because it did not request such an order. In the motion, the State did not mention a restrictive order or *Jordan*; rather, the State asked the court to sanction Jones' allegedly vexatious litigation practices pursuant to NRS 209.451, which provides for the forfeiture of credits. There also is no record of Jones being given an opportunity to oppose the issuance of a restrictive order. The determination that Jones was vexatious appears to have been made at a hearing on May 11, 2011, when the district court summarily stated that "Jones is a vexatious litigator."[4] Jones was not present at that hearing and was not represented by counsel.[5] The district court's quick decision without a hearing did not allow Jones to oppose the issuance of a restrictive order in writing or orally. Because the notice and the opportunity to oppose were

[4]The court indicated that it believed it had to transfer the matter to the chief judge "to make [the] final determination" as to Jones being a vexatious litigant. At a brief proceeding on the record one month later, the district court indicated that it "was determined" that Jones was a vexatious litigant and that the court would prepare findings of fact and send them to the chief judge. It does not appear that the matter was ever referred to the chief judge. A few days later, the respondent district court judge entered the restrictive order.

[5]The State suggests that Jones' attorney was informed at the May 11, 2011, hearing that the district court was considering a vexatious determination. But the record does not indicate that Jones was represented by counsel or was present at that hearing. The counsel that the State suggests had notice was the Clark County Public Defender's Office. Although that office may have represented Jones early in the criminal case before conflict counsel was appointed, the office did not represent him in the post-conviction proceeding.

inadequate or nonexistent, the restrictive order violated Jones' due process rights.

Second, the district court failed to create an adequate record for review or to give an explanation of the reasons that led it to conclude that a restrictive order was necessary. The district court's conclusory statement that Jones' filings were not made in good faith and had been filed solely to harass the State and the district court is not supported by the record. The district court merely listed four of its own orders in support of its determination. Those orders denied appellant's motion for the appointment of counsel, motion for the production of documents, motion to extend prison copy work, and found Jones to be a vexatious litigant. The motions cited by the district court as being harassing and not made in good faith are all normal motions that are routinely filed during a post-conviction proceeding and were not excessive in quantity. The order does not indicate that Jones had previously instituted other collateral challenges to his judgment of conviction and sentence or filed similar motions that were determined to be meritless or otherwise resulted in an adverse resolution. Nor is there any indication that the district court had considered other, less severe sanctions to curb Jones' perceived vexatious actions. Therefore, the district court failed to demonstrate that there was an adequate record or reasons supporting a restrictive order.

Third, the district court failed to make substantive findings as to the frivolous or harassing nature of Jones' actions. Again, the district court's conclusory statement that Jones' filings have not been made in good faith and were filed only to harass is not sufficient.

Finally, the restrictive order was not narrowly drawn to address the "problem" encountered. The district court put a blanket restriction on Jones' ability to file documents "in this matter." The order is not limited to addressing the specific problems perceived by the district court. The order also does not set forth an appropriate standard against which future filings should be measured. The order merely states that the chief judge will review all filings before they may be filed in the district court. There is no guidance to either Jones or the chief judge as to what may pass scrutiny and what will not be filed.

Because the restrictive order runs afoul of the applicable guidelines, we conclude that the district court acted arbitrarily and capriciously in designating Jones a vexatious litigant and entering the restrictive order. We therefore grant the petition. The clerk of this court shall issue a writ of mandamus directing the district court to vacate its June 16, 2011, order designating Jones a vexatious litigant and restricting his access to the court.

HARDESTY and CHERRY, JJ., concur.

KAMI LEAVITT, APPELLANT, *v.* JON L. SIEMS, M.D.; AND SIEMS ADVANCED LASIK AND REFRACTIVE SURGERY CENTER, RESPONDENTS.

No. 59369

July 10, 2014 330 P.3d 1

Appeal from a district court judgment on a jury verdict and post-judgment orders in a medical malpractice action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Patient who underwent corrective vision surgery brought action against surgeon who performed eye surgery, another physician employee of the eye clinic, and eye clinic for medical malpractice and professional negligence. After entering a default judgment against one nonanswering physician, and following a jury trial, the district court entered judgment for the surgeon and the clinic, and denied patient's motion for a new trial. Patient appealed. The supreme court, CHERRY, J., held that: (1) the district court did not err by retroactively applying the rule articulated in *Williams v. Eighth Judicial District Court*, 127 Nev. 518, 262 P.3d 360 (2011), that defense experts in a medical malpractice case may offer opinions concerning causation that either contradict the plaintiff's expert or furnish reasonable alternative causes to those offered by the plaintiff, without having to meet the reasonable-degree-of-medical-probability standard; (2) the district court did not abuse its discretion in allowing defense counsel to call one of patient's treating physicians and expert witnesses to testify as to his opinion that it was the use of numbing eye drops that caused patient's deteriorating vision, rather than eye surgery; (3) in a matter of first impression, counsel for defendant physician and eye clinic was precluded from conducting ex parte communications with patient's treating physician absent patient's express consent; but (4) defense counsel's improper ex parte communications with patient's treating physician without her express consent were insufficient to justify a new trial; and (5) a default judgment entered against an employee physician of eye clinic could not be used to impose vicarious liability on eye clinic as an answering employer codefendant who was contesting liability.

Affirmed.

[Rehearing denied September 24, 2014]

Christensen Law Offices, LLC, and *Thomas F. Christensen*, Las Vegas, for Appellant.

Alverson, Taylor, Mortensen & Sanders and *Chelsea R. Hueth* and *David J. Mortensen*, Las Vegas, for Respondents.

1. Constitutional Law.

   Patient lacked standing to challenge the constitutionality of the statutory expert affidavit requirement in an action for medical malpractice; patient's attachment of an expert affidavit to her complaint removed any element of harm she may have experienced from the alleged constitutional violation, and because she had already paid for an expert, the alleged injury could not be redressed by the supreme court. NRS 41A.071.

2. Courts.

   The district court did not err in applying the rule articulated in *Williams v. Eighth Judicial District Court*, 127 Nev. 518, 262 P.3d 360 (2011), that defense experts in a medical malpractice case may offer opinions concerning causation that either contradict the plaintiff's expert or furnish reasonable alternative causes to those offered by the plaintiff, without having to meet the reasonable-degree-of-medical-probability standard, even though the Williams opinion issued after the close of trial; retroactivity is the default rule in civil cases.

3. Evidence.

   Any expert testimony introduced for the purpose of establishing causation in a medical malpractice case must be stated to a reasonable degree of medical probability; however, defense experts may offer opinions concerning causation that either contradict the plaintiff's expert or furnish reasonable alternative causes to that offered by the plaintiff, without having to meet that standard.

4. Evidence.

   Once a plaintiff's causation burden is met in a medical malpractice case, the defense expert's testimony may be used for either cross-examination or contradiction purposes without having to meet the reasonable-degree-of-medical-probability standard, so long as the testimony consists of competent theories that are supported by relevant evidence or research; this lowered standard is necessarily predicated on whether the defense expert includes the plaintiff's causation theory in his or her analysis.

5. Courts.

   The retroactive effect of judicial decisions is the default rule in civil cases.

6. Evidence.

   The district court did not abuse its discretion in allowing defense counsel to call one of patient's treating physicians and expert witnesses to testify as to his opinion that it was the use of numbing eye drops that caused patient's deteriorating vision, rather than eye surgery, even if portions of the expert's testimony was speculative and did not meet the reasonable-degree-of-medical-probability standard for a medical malpractice case; the physician's testimony was not offered as an alternative causation theory, but rather for the purpose of contradicting patient's theory that her eye surgery was the cause of her deteriorating vision, it was based on the expert's personal observations that were based on his training and experience with numbing eye drops' toxicity through his residency, cornea clinics, and 20 years of practice, and it was for the jury to assess the weight to be assigned to the expert's testimony. NRS 50.305.

7. Appeal and Error.

   The supreme court reviews a district court's decision to admit expert testimony for an abuse of discretion; the district court commits an abuse of discretion when no reasonable judge could reach a similar conclusion under the same circumstances.

8. Privileged Communications and Confidentiality.

   Counsel for defendant physician and eye clinic was precluded from conducting ex parte communications with patient's treating physician ab-

sent patient's express consent; formal discovery procedures enabled defendants to reach all relevant information while simultaneously protecting the patient's privacy by ensuring supervision over the discovery process. NRS 49.225; RPC 8.4(d).

9. Privileged Communications and Confidentiality.
Bringing a claim for personal injury or medical malpractice results in a limited waiver of the physician-patient privilege with regard to directly relevant and essential information necessary to resolve the case. NRS 49.225.

10. New Trial.
Defense counsel's improper ex parte communications with patient's treating physician without her express consent were insufficient to justify a new trial, as opposed to some other sanction, absent a showing that physician's testimony that patient would likely have recovered her vision if she had allowed physician to treat her and stopped using topical anesthetics would have changed as a result of counsel's contact with physician, or that any prejudice to patient resulted from any ex parte communications. NRS 49.225; RPC 8.4(d).

11. Judgment.
A default judgment entered against an employee physician of eye clinic could not be used to impose vicarious liability on eye clinic as an answering employer codefendant who was contesting liability with regard to patient's medical malpractice action.

12. Judgment; Pleading.
The answer of a codefendant inures to the benefit of a defaulting defendant when there exists a common defense as to both of them; likewise, when the defenses interposed by the answering codefendant call into question the validity of plaintiffs entire cause of action and when such defenses prove successful, the defenses inure to the benefit of the defaulting codefendant.

13. Judgment.
Default judgments are punitive sanctions that are not favored by the law and cannot be used as a foundation for vicarious liability against an answering codefendant.

Before the Court En Banc.

OPINION

By the Court, Cherry, J.:

This appeal principally challenges the defendant's use of expert testimony from the plaintiff's treating physician to explain a possible alternate cause of the plaintiff's medical condition. The district court admitted the treating physician's testimony even though the entirety of the testimony was not stated to a reasonable degree of medical probability. We conclude that the district court correctly applied our holding in *Williams v. Eighth Judicial District Court*, 127 Nev. 518, 262 P.3d 360 (2011), which clarified that a defense expert's alternative-causation testimony need not be stated to a reasonable degree of medical probability when being used to challenge an element of the plaintiff's claim.

We also take this opportunity to determine that ex parte communication with an opposing party's expert witness is improper. If such

improper communication occurs, as it did in this case, a new trial is warranted if prejudice is demonstrated. Because the expert's testimony was not affected by the improper communication in this case, however, appellant Kami Leavitt has not demonstrated prejudice, and thus, the improper communication does not warrant a new trial.

[Headnote 1]

We further address whether an employee's default may be used against an employer codefendant who is contesting liability. Because we conclude that it cannot, we affirm the district court's decision in this case.[1]

FACTS

Leavitt met with respondent Jon L. Siems, M.D., for an initial consultation for Lasik corrective vision surgery. Leavitt noted on her patient intake form that she "always" had dry eyes. The same day, Dr. Siems performed Lasik corrective surgery on both of her eyes. After the surgery, Leavitt lost vision and experienced irritation; she later developed other ocular complications. In the following years, her eyes suffered from a number of conditions, including diffuse laminar keratitis (DLK) and epithelial defects.[2] Leavitt underwent treatment by many specialists.

Leavitt subsequently sued Dr. Siems, respondent Siems Advanced Lasik and Refractive Center, and a Siems Advanced Lasik employee, Dr. Kathleen Wall, asserting claims for medical malpractice and professional negligence. Dr. Siems and Siems Advanced Lasik answered, asserting affirmative defenses of contributory negligence or wrongful conduct and assumption of the risk. A default judgment was entered against Dr. Wall, who was served via publication and did not answer or appear in the district court.

The case went to trial against Dr. Siems and Siems Advanced Lasik. By that time, Leavitt was experiencing constant pain and burning in her eyes, had permanently lost visual function in her right eye, and had only a possibility of slightly better than legally blind vision in the left eye. At trial, defense counsel argued that Leavitt's

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[1]Leavitt also challenges the constitutionality of NRS 41A.071's expert affidavit requirement. However, this issue is not reviewable because Leavitt's attachment of an expert affidavit to the complaint removed any element of harm that she may have experienced from the alleged constitutional violation. Moreover, Leavitt has already paid for an expert and that alleged injury cannot be redressed by this court. Accordingly, Leavitt lacks standing because litigated matters "'must present an existing controversy, not merely the prospect of a future problem.'" *Resnick v. Nev. Gaming Comm'n*, 104 Nev. 60, 66, 752 P.2d 229, 233 (1988) (quoting *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986)); *see Elley v. Stephens*, 104 Nev. 413, 416, 760 P.2d 768, 770 (1988).

[2]DLK is an inflammatory response. An epithelial defect occurs when the surface tissue of the eyeball has been abraded or sloughed off from trauma, dry eyes, an infection, or the use of certain medications.

eyes did not heal properly because she abused numbing eye drops after the surgery, exacerbating her eye problems. The defense argued that Leavitt's condition was consistent with eye drop abuse.

To support the eye-drop-abuse argument, defense counsel called one of Leavitt's treating physicians and expert witnesses, Dr. Stephen Hansen, M.D., an ophthalmologist, to the stand. Dr. Hansen testified that he had discharged Leavitt as a patient for noncompliance, explaining that Leavitt had requested numbing eye drops and he felt that she was stealing eye drops from his clinic because bottles went missing after several of her appointments. He testified that the use of the numbing eye drops may have caused her vision to deteriorate and contributed to her lack of improvement. He also felt that had she followed his directions, he could have returned her to her best corrective vision.

Leavitt, on the other hand, presented expert testimony that Dr. Siems failed to exercise the proper standard of care in his preoperative workup of the dry eye issue and by deciding to do the procedure on the same day. Her expert explained that Leavitt's deteriorating vision was not consistent with someone who abused numbing eye drops and that her subsequent procedures were all a result of the Lasik surgery and the ensuing inflammatory responses. Leavitt herself testified that, while she had been given numbing eye drops by a couple of doctors in the past, she stopped using the drops on the recommendation of one of her doctors. Leavitt stated that she never took numbing drops from a doctor's office without permission.

The jury returned a verdict for the defense, finding that Dr. Siems was not negligent and did not proximately cause damages to Leavitt. Leavitt filed a motion for a new trial, or alternatively, for judgment as a matter of law, based in part on what Leavitt argued was an improper drug-abuse defense and on the use of Dr. Hansen's testimony to establish an alternative cause of her condition without requiring that the testimony be stated to a reasonable degree of medical probability.

Dr. Siems moved for attorney fees after trial. Attachments to his motion contained line items for a conversation with Dr. Hansen's business, Shepherd Eye Center, regarding Dr. Hansen's testimony, four telephone conferences with Dr. Hansen, and four telephone conversations with Dr. Hansen's counsel. Based on this, Leavitt's counsel raised the issue that defense counsel was improperly directly communicating with one of their witnesses, Dr. Hansen, and his staff.

The motion for new trial, or alternatively, for judgment as a matter of law, was denied. The district court concluded that the purpose of the drug-abuse theory was to contradict Leavitt's theory of negligence and not to propose an independent alternative causation theory. The court thus determined that Dr. Hansen's testimony was permissible under *Williams v. Eighth Judicial District Court*, 127

Nev. 518, 262 P.3d 360 (2011), which provides that a defense expert's testimony regarding alternative causation need not be stated to a reasonable degree of medical probability when it is being used to controvert an element of the plaintiff's claim, rather than to establish an independent theory of causation.

After judgment on the jury verdict was entered, Leavitt filed a motion for final judgment in the district court, arguing that, because the default against Dr. Wall established her liability and the defense had admitted that Dr. Wall was an employee of Siems Advanced Lasik, liability therefore attached to Siems Advanced Lasik as Dr. Wall's employer, notwithstanding the jury verdict. The district court declined to impute Dr. Wall's liability to Siems Advanced Lasik. Leavitt appealed.

DISCUSSION

Admission of expert testimony

[Headnote 2]

Leavitt argues that the district court did not properly apply our holding in *Williams v. Eighth Judicial District Court*, 127 Nev. 518, 262 P.3d 360 (2011), when the court concluded that Dr. Hansen's testimony regarding the numbing eye drops did not have to meet the reasonable-degree-of-medical-probability standard. Leavitt therefore argues that the district court erred in admitting Dr. Hansen's testimony and in denying her motion for a new trial or judgment as a matter of law.

[Headnote 3]

We conclude that the district court correctly applied *Williams*. In *Williams*, we clarified when medical expert testimony must be stated to "'a reasonable degree of medical probability.'" 127 Nev. at 529, 262 P.3d at 367-68 (quoting *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 157, 111 P.3d 1112, 1115 (2005)). We explained that the application of the reasonable-degree-of-medical-probability standard hinges on the purpose of the testimony. *Id.* at 530, 262 P.3d at 368. "Any expert testimony introduced for the purpose of establishing causation must be stated to a reasonable degree of medical probability. However, defense experts may offer opinions concerning causation that either contradict the plaintiff's expert or furnish reasonable alternative causes to that offered by the plaintiff," without having to meet that standard. *Id*.

[Headnote 4]

This distinction exists because "when defense expert testimony regarding cause is offered as an alternative to the plaintiff's theory, it will assist the trier of fact if it is relevant and supported by competent medical research." *Id*. at 529, 262 P.3d at 367-68. Accordingly, once a plaintiff's causation burden is met, the defense expert's

testimony may be used for either cross-examination or contradiction purposes without having to meet the reasonable-degree-of-medical-probability standard, so long as the testimony consists of competent theories that are supported by relevant evidence or research. *Id.* "This lowered standard is necessarily predicated on whether the defense expert includes the plaintiff's causation theory in his or her analysis." *Id.* at 531, 262 P.3d at 368.

[Headnote 5]

Leavitt argues that *Williams* should not be applied in this case because that opinion issued after the close of trial. However, retroactivity is the default rule in civil cases. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 847 (1990) (Scalia, J., concurring); *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982). The district court thus did not err in applying *Williams* to this case.

Dr. Hansen's testimony satisfied the requirements of Williams and was properly admitted

[Headnote 6]

As to whether the district court properly applied our holding in *Williams*, Leavitt contends that the court erred in finding that Dr. Hansen's testimony was offered merely to contradict her expert's testimony because the drug-abuse theory was an alternative causation theory. Leavitt also argues that Dr. Hansen's testimony in that regard should not have been admitted because it was too speculative, did not assist the jury, and was not based on a reliable methodology. Leavitt therefore contends that the district court erred in denying her motion for a new trial and motion for judgment as a matter of law. Respondents contend that Dr. Hansen's testimony was properly admitted because it merely contradicted Leavitt's causation theory, and thus, satisfied *Williams*. They argue that the testimony concerning the eye drop abuse was based on Dr. Hansen's training and experience with numbing eye drops through his residency, cornea clinics, and 20 years of practice.

[Headnote 7]

We review a district court's decision to admit expert testimony for an abuse of discretion. *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances. *See Delno v. Mkt. St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir. 1942).

We conclude that the district court did not abuse its discretion in allowing the testimony from Dr. Hansen, because the testimony was not offered as an alternative causation theory but for the purpose of contradicting appellant's causation theory. *Hallmark*, 124 Nev. at 498, 189 P.3d at 650. Leavitt argued that her documented history

of dry eyes made her at high risk for complications such that Dr. Siems should have provided additional testing, obtained additional informed consent, and waited to perform the procedure and that his failure to do so led to her long-term visual deterioration. To rebut the argument that the surgery caused Leavitt's deteriorating vision, respondents called Dr. Hansen to testify.

Dr. Hansen testified that it was a possibility that use of numbing eye drops caused Leavitt's vision to deteriorate and that the drops contributed to her lack of improvement. He testified that in his opinion, based on speculation, if she had continued to follow his directions, he could have returned her to her best corrective vision. Dr. Hansen further testified that the drops did not cause her DLK or her initial epithelial defect, but caused her additional injury.

We conclude that respondents did not offer Dr. Hansen's testimony to establish the alternative causation theory that Leavitt's eye damage resulted from abuse of anesthetic drops rather than respondents' actions. Instead, his testimony was offered to "contradict the plaintiff's expert or furnish reasonable alternative causes to that offered by the plaintiff." *Williams*, 127 Nev. at 530, 262 P.3d at 368. It was offered to rebut Leavitt's contention that her deteriorating eye condition was a result of her surgery and show that Leavitt's deteriorating eye condition may have resulted from eye drop abuse. Because Dr. Hansen's testimony was only being used for cross-examination and contradiction, its admissibility is determined by whether he offered relevant theories that are competent and supported by relevant evidence or medical research. *Id*. at 531, 262 P.3d at 368-69. If so, then it is admissible. Dr. Hansen's testimony meets these requirements because his assessment was premised on his personal observations that were based on his training and experience with numbing eye drops' toxicity through his residency, cornea clinics, and 20 years of practice.

We further conclude that Dr. Hansen properly testified as to his opinions and inferences to rebut Leavitt's theory of causation and that, even if portions of his testimony were speculative, it was for the jury to assess the weight to be assigned to his testimony. NRS 50.305; *Houston Exploration Inc. v. Meredith*, 102 Nev. 510, 513, 728 P.2d 437, 439 (1986) (explaining in the context of a challenge to expert testimony as speculative that it is "for the jury to determine the weight to be assigned such testimony"). Accordingly, for the foregoing reasons, the district court did not abuse its discretion in admitting Dr. Hansen's testimony on the basis that his testimony met the standard for expert testimony set forth in Williams.[3]

[3]In light of this conclusion, reversal of the order denying judgment as a matter of law and a new trial is not warranted. *See Wyeth v. Rowatt*, 126 Nev. 446, 460, 244 P.3d 765, 775 (2010) (reviewing a denial of a motion for new trial for abuse of discretion and reviewing a district court's order on a judgment as a matter of law de novo); *Sheeketski v. Bortoli*, 86 Nev. 704, 706, 475 P.2d 675, 676 (1970)

Witness tampering

[Headnote 8]

Leavitt also argues that the district court erred in not granting a new trial based on witness tampering where defense counsel had direct, unauthorized communications with Dr. Hansen, who was Leavitt's treating physician and was disclosed by Leavitt as an expert.[4] In response, respondents argue that their communications with Dr. Hansen and his staff were necessary to schedule and coordinate the trial testimony. They contend that, accordingly, the communications did not constitute attorney misconduct and were not improper. They also point out that Leavitt failed to demonstrate how her substantial rights were affected by their communication with Dr. Hansen.

[Headnote 9]

Bringing a claim for personal injury or medical malpractice results in a limited waiver of the physician-patient privilege with regard to directly relevant and essential information necessary to resolve the case. *See Heller v. Norcal Mut. Ins. Co.*, 876 P.2d 999, 1019 (Cal. 1994) (Kennard, J., concurring and dissenting). In this context, we have yet to address whether opposing counsel may contact or communicate with a treating physician directly, or whether all communications must be through formal discovery methods. While numerous courts have already addressed this issue, no clear-cut answer has emerged. *See King v. Ahrens*, 798 F. Supp. 1371, 1373 (W.D. Ark. 1992) ("It appears that there is no easy answer to this question and a variety of rules have developed."); *Heller*, 876 P.2d at 1019 (Kennard, J., concurring and dissenting) ("Published decisions of federal courts and courts of our sister states have debated this question with great thoroughness and have given conflicting answers.").

Some courts permit ex parte communications between defense counsel and a plaintiff's treating physician. *See, e.g., Felder v. Wyman*, 139 F.R.D. 85, 88 (D.S.C. 1991); *Doe v. Eli Lilly & Co.*, 99 F.R.D. 126, 128-29 (D.D.C. 1983); *Trans-World Invs. v. Drobny*, 554 P.2d 1148, 1151-52 (Alaska 1976); *Domako v. Rowe*, 475 N.W.2d 30, 36 (Mich. 1991); *Lewis v. Roderick*, 617 A.2d 119, 122

("[A] directed verdict . . . is permissible only when all reasonable inferences from the facts presented to the jury favor the moving party."); *see* NRCP 59(a) (stating that a party is entitled to a new trial only if his or her substantial rights were materially affected).

[4]Leavitt was first apprised of this issue after trial when reviewing a motion for attorney fees from defense counsel that contained line items of the ex parte conversations. Her counsel then orally raised this issue at the hearing on the motion for new trial. While the district court did not address this argument in its new trial order, we consider the district court's silence as a denial of the sought-after relief. *See Sicor, Inc. v. Sacks*, 127 Nev. 896, 900, 266 P.3d 618, 620 (2011) (explaining that this court has "construed a district court's silence or refusal to rule as denial of the relief sought").

(R.I. 1992). Other jurisdictions prohibit such ex parte communications undertaken without express consent. *See, e.g.*, *Roosevelt Hotel Ltd. P'ship v. Sweeney*, 394 N.W.2d 353, 357 (Iowa 1986); *Alsip v. Johnson City Med. Ctr.*, 197 S.W.3d 722, 727 (Tenn. 2006); *Smith v. Orthopedics Int'l, Ltd.*, 244 P.3d 939, 943 (Wash. 2010); *see also* Daniel P. Jones, Annotation, *Discovery: Right to Ex Parte Interview With Injured Party's Treating Physician*, 50 A.L.R.4th 714, 716-18 (1986).

Our adoption of one approach over the other greatly depends on the existing rules relating to the physician-patient privilege and expert witnesses in Nevada. The physician-patient privilege is codified at NRS 49.225 and states that "[a] patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications among the patient, the patient's doctor or persons who are participating in the diagnosis or treatment under the direction of the doctor, including members of the patient's family." Only under certain circumstances does the privilege not apply. As germane to this case, the privilege does not apply "to *written* medical or hospital records relevant to an issue of the condition of the patient in any proceeding in which the condition is an element of a claim or defense." NRS 49.245(3) (emphasis added).

As to expert witnesses, the Nevada Rules of Civil Procedure affirmatively allow only formal depositions of experts. NRCP 26(b)(4), the discovery provision governing experts, provides in relevant part that:

> (A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. . . .
>
> (B) A party may, *through interrogatories or by deposition*, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b)[5] or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(Emphasis added.) This rule does not contemplate ex parte communications with the opposing party's expert witnesses.

Moreover, as previously explained by the Ninth Circuit Court of Appeals, professional ethics rules preclude defense counsel from speaking directly to the opposing counsel's expert. *Erickson v. Newmar Corp.*, 87 F.3d 298, 301 (9th Cir. 1996). In *Erickson*, the Ninth Circuit interpreted the Nevada Rules of Professional Conduct to determine whether an attorney's ex parte communications with the

[5]NRCP 35(b) provides that the party causing the examination shall, upon request, provide a written report setting out all findings.

opposing party's witness constituted misconduct. 87 F.3d at 301-02. The court concluded that legal ethics precluded defense counsel from speaking directly to opposing counsel's expert and offering him a job. *Id*. at 300-02. In doing so, the court explained that a leading legal ethics treatise states that:

> "Since existing rules of civil procedure carefully provide for limited and controlled discovery of an opposing party's expert witnesses, all other forms of contact are impliedly prohibited." Therefore, an attorney who engages in prohibited communications violates the attorney's ethical duty to obey the obligations of the tribunal.

Id. at 301-02 (citation omitted) (quoting 2 Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* § 3.4:402 (2d ed. Supp. 1994)); *see* RPC 3.4(c). "Moreover, since the procedure for the discovery of experts is well established, an attorney may also be in violation of the rule prohibiting conduct prejudicial to the administration of justice." *Erickson*, 87 F.3d at 302 (citing former SCR 203(4) (1986) (now RPC 8.4(d))).

Because "'formal discovery procedures enable defendants to reach all relevant information while simultaneously protecting the patient's privacy by ensuring supervision over the discovery process,'" we see no need to allow for such ex parte contact. *Alsip*, 197 S.W.3d at 727 (quoting *Crist v. Moffatt*, 389 S.E.2d 41, 46 (N.C. 1990)). There are also methods available to defense counsel to ensure that plaintiff's experts appear to testify at trial, such as subpoenas. *See* NRCP 45. While we recognize that the use of formal discovery procedures burdens defendants, this burden is outweighed by problems intrinsic in ex parte contact. *Smith*, 244 P.3d at 943. Given our adversarial system, allowing ex parte communications opens the door for abuse. *Alsip*, 197 S.W.3d at 729 n.5; *see Manion v. N.P.W. Med. Ctr., Inc.*, 676 F. Supp. 585, 594 (M.D. Pa. 1987), *disagreed with by MacDonald v. United States*, 767 F. Supp. 1295, 1299 n.5 (M.D. Pa. 1991).

Moreover, "'it is undisputed that ex parte conferences yield no greater evidence, nor do they provide any additional information, than that which is already obtainable through the regular methods of discovery.'" *Alsip*, 197 S.W.3d at 727 (quoting *Petrillo v. Syntex Labs., Inc.*, 499 N.E.2d 952, 956 (Ill. App. Ct. 1986)). Additionally, "ex parte discussions tend to place the physician in the position of having to make legal conclusions about the scope of the privilege and the relevancy of the material requested." *King*, 798 F. Supp. at 1373. "Asking the physician, untrained in the law, to assume this burden is a greater gamble and is unfair to the physician." *Roosevelt Hotel*, 394 N.W.2d at 357. The use of formal discovery procedures is also motivated by "the potential tort liability of physicians for breach or invasion of privacy, the potential that defense counsel may

seek to improperly influence plaintiff's treating physician or may discourage the physician from testifying, the duty of loyalty from the physician to the patient, and the view that discovery rules determine the extent of waiver of the physician-patient privilege." Jones, *supra*, at 717-18.

This approach also protects the confidential and intimate nature of the relationship between the physician and patient. *Alsip*, 197 S.W.3d at 726; *see also King*, 798 F. Supp. at 1373; *Heller*, 876 P.2d at 1021 (Kennard, J., concurring and dissenting). Patients have a right to expect that their medical information will be safeguarded by the discovery process. *Manion*, 676 F. Supp. at 594; *Petrillo*, 499 N.E.2d at 961-62.

Balancing the desire for confidentiality with the need for full disclosure of relevant medical information, we conclude that there is no need to allow ex parte communication with the opposing party's experts absent express consent. Thus, the respondents' conversations with Leavitt's expert witness were improper.

[Headnote 10]

Respondents acted suspiciously when they failed to inform Leavitt that they were using their reserved right to call Dr. Hansen to the stand and instead coordinated his testimony directly. Under the standard of proof required for motions for a new trial, however, Leavitt failed to show that she had been harmed because Dr. Hansen's testimony did not change as a result of the communications. *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1037, 923 P.2d 569, 576 (1996) (stating that if the challenged issues would not have changed the outcome of the case, there is no violation of the party's substantial rights and thus no basis for granting a new trial); *see also Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 132-33, 252 P.3d 649, 656 (2011) ("To justify a new trial, as opposed to some other sanction, unfair prejudice affecting the reliability of the verdict must be shown.").

In his pretrial deposition, Dr. Hansen indicated that he discharged Leavitt after treating her for several months because he believed that she was noncompliant and was stealing eye drops from examination rooms. He testified that he had repeatedly stressed to Leavitt that she should not use topical anesthetics because of the resultant damage to her eyes, and that it was his opinion that Leavitt's abuse of the drops contributed to her worsening condition. Dr. Hansen further testified that he felt that great progress had been made and that she likely would have recovered her vision if she had allowed him to treat her and had stopped using the topical anesthetics.

This testimony is consistent with the testimony provided by Dr. Hansen at trial. Because Dr. Hansen's testimony did not change as a result of respondents' counsel's contact with Dr. Hansen, Leavitt failed to demonstrate any prejudice resulting from the improper ex

parte discussions. Thus, a new trial was not warranted. *Wyeth v. Rowatt*, 126 Nev. 446, 460, 244 P.3d 765, 775 (2010) (stating that the denial of a motion for new trial is reviewed for abuse of discretion). We therefore affirm the district court's denial of Leavitt's new trial motion on this basis.[6]

Default judgment

[Headnote 11]

Finally, Leavitt argues that the district court erred in entering default judgment solely against Dr. Wall individually, and not also as an employee of Siems Advanced Lasik, because Leavitt alleged that Dr. Wall was acting within the scope of her employment. Leavitt asserts that because liability and causation against Dr. Wall were established upon entry of the default, Siems Advanced Lasik was precluded from asserting any defenses available to Dr. Wall and, thus, must be held vicariously liable for Dr. Wall's negligence. Respondents argue that the use of vicarious liability against Siems Advanced Lasik would deprive it of its right to have a jury determine the validity of its defense.

[Headnote 12]

We decline to extend Dr. Wall's inability to contest liability and causation to Siems Advanced Lasik. In Nevada, "the answer of a co-defendant inures to the benefit of a defaulting defendant when there exists a common defense as to both of them." *Sutherland v. Gross*, 105 Nev. 192, 198, 772 P.2d 1287, 1291 (1989). "Likewise, when the defenses interposed by the answering co-defendant call into question the validity of plaintiff's entire cause of action and when such defenses prove successful, the defenses inure to the benefit of the defaulting co-defendant." *Id*.

[Headnote 13]

In arguing that Dr. Wall's default should attach to answering codefendants, Leavitt attempts to turn *Sutherland* on its head. Default judgments are punitive sanctions that are not favored by the law. *Stillwell v. City of Wheeling*, 558 S.E.2d 598, 605-06 (W. Va. 2001). And we decline to use a default judgment as a foundation for vicarious liability against an answering codefendant. *See W. Heritage Ins. Co. v. Superior Court*, 132 Cal. Rptr. 3d 209, 221 (Ct. App. 2011) ("It is an established principle of law that admissions implied from the default of one defendant ordinarily are not binding upon a codefendant who, by answering, expressly denies and

[6]Leavitt also takes issue with the propriety of a plaintiff's treating physician testifying as an expert for the defense, but her failure to object to his testimony on this basis in the district court results in waiver of this issue. *See Holcomb v. Ga. Pac., L.L.C.*, 128 Nev. 614, 619 n.3, 289 P.3d 188, 191 n.3 (2012) (recognizing that this court will not consider an argument raised for the first time on appeal).

places in issue the truth of the allegations thus admitted by the absent party." (internal quotations omitted)); *Morehouse v. Wanzo*, 72 Cal. Rptr. 607, 611 (Ct. App. 1968) ("The general contractor, as an employer liable under the doctrine of respondeat superior, may take advantage of any favorable aspects of the judgment against the employee, but he is not bound by the issues resolved against the employee by the latter's default."); *Dade Cnty. v. Lambert*, 334 So. 2d 844, 847 (Fla. Dist. Ct. App. 1976) (finding that county could not be held vicariously liable based on its employee's failure to plead, and stating "[t]he default of one defendant, although an admission by him of the allegations of the complaint, does not operate as an admission of such allegation as against a contesting codefendant"); *United Salt Corp. v. McKee*, 628 P.2d 310, 313 (N.M. 1981) (holding that an employer is not foreclosed from litigating issues of negligence, respondeat superior, and damages based on an employee's default); *Balanta v. Stanlaine Taxi Corp.*, 763 N.Y.S.2d 840, 842 (App. Div. 2003) (stating that "[t]he granting of a default judgment against [the employee] does not preclude [the employer] from contesting the issue of [the employee's] negligence"). We thus decline to impose Dr. Wall's default on Siems Advanced Lasik, and therefore, we affirm the district court's order entering judgment against Dr. Wall individually only.[7]

CONCLUSION

We conclude that the district court appropriately applied our decision in *Williams v. Eighth Judicial District Court*, 127 Nev. 518, 262 P.3d 360 (2011), which clarified existing law on medical expert testimony, to the case at hand. We also reiterate that ex parte communication with an opposing party's expert witness is improper. Because Leavitt has not demonstrated prejudice, however, the improper communication does not warrant a new trial in this instance. We further determine that Dr. Wall's default may not be used against Siems Advanced Lasik as an answering employer codefendant who is contesting liability. Accordingly, we affirm the district court's judgment and post-judgment orders in this case.

Gibbons, C.J., and Pickering, Hardesty, Parraguirre, Douglas, and Saitta, JJ., concur.

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[7]Having considered all of the other issues raised by the parties, we conclude that they either lack merit or need not be addressed given our disposition of this appeal.

LOUIS MORRISON, APPELLANT, *v.* HEALTH PLAN OF NEVADA, INC.; SIERRA HEALTH SERVICES, INC.; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC.; SIERRA HEALTH-CARE OPTIONS, INC.; UNITED HEALTHCARE INSURANCE COMPANY; AND UNITED HEALTHCARE SERVICES, INC., RESPONDENTS.

No. 61082

July 10, 2014 328 P.3d 1165

Appeal from a district court order dismissing a tort action. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Medicare insured brought common law negligence claims against health insurance business, which provided medical services to Medicare beneficiaries through administration of Medicare Advantage Plans, alleging that business failed to properly investigate a contracted medical provider and should have known that provider engaged in unsafe medical practices that resulted in insured contracting hepatitis C. The district court dismissed complaint as preempted by federal laws. Insured appealed. The supreme court, HARDESTY, J., held that insured's claims were preempted by federal Medicare Act.

Affirmed.

[Rehearing denied September 24, 2014]

CHERRY, J., with whom GIBBONS, C.J., agreed, dissented.

Kemp, Jones & Coulthard, LLP, and *Will Kemp* and *Eric M. Pepperman*, Las Vegas, for Appellant.

Holland & Hart, LLP, and *Constance L. Akridge* and *Matthew T. Milone*, Las Vegas; *Lewis Roca Rothgerber, LLP*, and *Daniel F. Polsenberg*, Las Vegas; *Bryan Cave LLP* and *Lawrence G. Scarborough, J. Alex Grimsley*, and *Meridyth M. Andresen*, Phoenix, Arizona, for Respondents.

McDonald Carano Wilson LLP and *Debbie A. Leonard* and *Seth T. Floyd*, Las Vegas; *Crowell & Moring LLP* and *Arthur N. Lerner* and *April N. Ross*, Washington, D.C., for Amicus Curiae America's Health Insurance Plans, Inc.

Matthew L. Sharp, Ltd., and *Matthew L. Sharp*, Reno; *Gillock & Killebrew* and *Gerald I. Gillock* and *Nia C. Killebrew*, Las Vegas; *Edward M. Bernstein & Associates* and *Patti S. Wise* and *Gary W. Call*, Las Vegas; *Friedman Rubin* and *Richard H. Friedman* and *William S. Cummings*, Bremerton, Washington, for Amici Curiae Dolores J. Cappetto, Carole Grueskin, James London, Rodolfo Meana, and Dorothy Rogers.

Fennemore Craig Jones Vargas and *James L. Wadhams* and *Alexis L. Brown*, Las Vegas, for Amicus Curiae Nevada Association of Health Plans.

1. HEALTH; STATES.
   State common law negligence claims against health insurance business, which provided medical services to Medicare beneficiaries through administration of Medicare Advantage (MA) Plans, alleging that business failed to properly investigate a contracted medical provider and should have known that provider engaged in unsafe medical practices that resulted in insured contracting hepatitis C, was expressly preempted by federal Medicare Act; insured's negligent quality assurance claim was specifically covered by federal regulatory scheme, and even if claim was not related to quality assurance, Medicare established standards that broadly regulated an MA organization's conduct and relationship with providers to whom it sent its insureds. Social Security Act, § 1801 *et seq.*, 42 U.S.C. § 1395 *et seq.*
2. STATES.
   When a federal act contains an express preemption clause, the supreme court's primary task is to identify the domain expressly preempted by that language, and in doing so, the supreme court must focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's preemptive intent.
3. STATES.
   Even when there is no statutory language expressly preempting state law, preemption may be implied if Congress intended to thoroughly occupy the field or when the federal law conflicts with state law.
4. APPEAL AND ERROR.
   Whether state law claims are preempted by federal law is a question of law that the supreme court reviews de novo, without deference to the findings of the district court.
5. HEALTH; STATES.
   The Medicare preemption statute demonstrates a legislative intent to broaden the preemption provision beyond those state laws that are simply inconsistent with enumerated categories of standards; therefore, all state standards, including those established through case law, are preempted to the extent they specifically would regulate Medicare Advantage plans. Social Security Act, § 1856(b)(3), 42 U.S.C. § 1395w-26(b)(3).

Before the Court EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

In this appeal, we are asked to determine whether a Medicare beneficiary's state common law negligence claim against his private health insurance company, through which he is receiving his Medicare benefits, is preempted by the federal Medicare Act. Because we conclude that state common law negligence claims regarding the retention and investigation of contracted Medicare providers

[1]THE HONORABLE RON PARRAGUIRRE, Justice, voluntarily recused himself from participation in the decision of this matter.

are expressly preempted by the Medicare Act, we affirm the district court's order.

FACTS AND PROCEDURAL HISTORY

Respondents Health Plan of Nevada, Inc.; Sierra Health Services, Inc.; Sierra Health and Life Insurance Company, Inc.; Sierra Health-Care Options, Inc.; United Healthcare Insurance Company; and United Healthcare Services, Inc. (collectively, HPN) are health insurance businesses that specialize in health maintenance and/or managed care. They are engaged in the joint venture of providing insurance, including providing medical services to Medicare beneficiaries through the administration of Medicare Advantage (MA) Plans. Appellant Louis Morrison is a Medicare beneficiary who received his Medicare benefits through an MA Plan offered by HPN. Under HPN's insurance contract, Morrison was required to seek medical care from providers chosen by HPN. Since at least 2004, HPN had contracted with the Endoscopy Center of Southern Nevada, the Gastroenterology Center of Nevada, and the doctors employed or associated with the Gastroenterology Center of Nevada (collectively, the Clinic).[2] In 2006, Morrison was treated by the Clinic based on its status as a contracted provider for HPN; as a result of his treatment there, he became infected with hepatitis C.

Morrison's second amended complaint alleged that HPN breached its duty to "use reasonable care to select its health care providers" and "to inquire into the medical practices at the clinic" and was negligent in directing him to seek treatment at the Clinic.[3] The complaint alleged that HPN failed to properly investigate the Clinic and knew or should have known that since at least 2004 the Clinic engaged in unsafe medical practices causing a high risk of transmission of blood borne pathogens, such as hepatitis C, to patients at the Clinic. The district court ultimately dismissed Morrison's second amended complaint with prejudice, finding that Morrison's claim was preempted by the federal Medicare Act pursuant to this court's decision in *Pacificare of Nevada, Inc. v. Rogers*, 127 Nev. 799, 266 P.3d 596 (2011). Morrison argues on appeal that the district court

[2]It appears that HPN contracted with the Clinic prior to 2004, but the record fails to reveal the commencement date of the contract.

[3]Morrison's original complaint contained allegations that HPN failed to monitor medical practices at the Clinic and that it violated NRS Chapter 695G, which establishes Nevada's quality assurance program. HPN filed a motion to dismiss the claim as preempted by federal law. The district court agreed the claim was preempted, but it granted Morrison leave to amend the complaint. In his first amended complaint, Morrison still alleged a failure to monitor the Clinic but removed any references to the Nevada statutes. HPN filed another motion to dismiss based on preemption. The district court again agreed that the claim was preempted because, despite the removal of references to the Nevada statutes, the claim was still one for negligent implementation of a quality assurance program. But the district court once again allowed Morrison to amend his complaint.

erred in applying *Rogers* to dismiss his claim because the Medicare Act's preemption statute does not apply to his state common law negligence claim.

DISCUSSION

[Headnote 1]

To resolve this appeal, we must determine whether state common law negligence claims against Medicare plan providers are preempted by the federal Medicare Act.[4] The Medicare Act, enacted as Title XVIII of the Social Security Act and codified at 42 U.S.C. §§ 1395-1395kkk (2012), "creates a federally subsidized nationwide health insurance program for elderly and disabled individuals." *Rogers*, 127 Nev. at 802, 266 P.3d at 598. Pursuant to Part C of the Act, beneficiaries may receive Medicare benefits through MA plans provided by private entities called MA organizations. *Id.* (citing 42 C.F.R. § 422.2 (2010)).

"MA Organizations and their plans contract with, and are subject to extensive regulation by, the Centers for Medicare and Medicaid Services (CMS)." *Id.*; *see, e.g.*, 42 U.S.C. § 1395w-26(b)(1) (2012). Importantly, each MA organization that maintains one or more MA plans is required to adhere to a federally regulated quality improvement program. 42 C.F.R. § 422.152(a) (2013). The regulations specifically require that the MA organization "[m]ake available to CMS information on quality and outcomes measures that will enable beneficiaries to compare health coverage options and select among them." *Id.* § 422.152(b)(3)(iii). The quality improvement program also requires that each MA organization "have written policies and procedures for the selection and evaluation of providers." *Id.* § 422.204(a). An MA organization must also ensure that each physician or other health care professional be initially credentialed by review of verified "licensure or certification from primary sources, disciplinary status, eligibility for payment under Medicare, and site visits as appropriate." *Id.* § 422.204(b)(2)(i).

Although CMS does not directly select the physicians or facilities that are included in an MA plan's network, federal regulations require an MA organization to select and retain only those providers that meet the qualifications specified in the Medicare Act. *See id.* § 422.204(b). Furthermore, CMS has specified "requirements for relationships between . . . MA organizations[ ] and the physicians

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[4]The dissent discusses at length, and cites to cases as well as the Restatement (Second) of Torts, the proposition that one can sue an HMO for negligence in its selection and retention of its providers. However, the majority of the cases cited by the dissent involve a hospital's duty of care, not an HMO's duty of care. Moreover, none of these cases involve Medicare preemption, which is the issue in this case.

and other health care professionals and providers with whom they contract to provide services to Medicare beneficiaries enrolled in an MA plan." Centers for Medicare & Medicaid Services, *Medicare Managed Care Manual*, Ch. 6, § 10 (Rev. 24, June 6, 2003).

Morrison's common law negligence claim is expressly preempted by the Medicare Act

The Medicare Act contains an express preemption clause which states that

> [t]he standards established under this part shall supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to MA plans which are offered by MA organizations under this part.

42 U.S.C. § 1395w-26(b)(3) (2012). The scope of this preemption statute is very broad, and the "MA standards set forth in 42 CFR 422 supersede any State laws, regulations, contract requirements, or other standards that would otherwise apply to MA plans," with the exception of laws relating to licensing and plan solvency. *Medicare Managed Care Manual*, Ch. 6, § 30.1 (Rev. 101, August 18, 2011). "In other words, unless they pertain to licensure and/or solvency, State laws and regulations that regulate health plans do not apply to MA plans offered by MA organizations." *Id.*

[Headnotes 2-4]

When Congress explicitly conveys its intent to preempt in a statute, express preemption exists. *Rolf Jensen & Assocs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 441, 445, 282 P.3d 743, 746 (2012) ("The preemption doctrine emanates from the Supremacy Clause of the United States Constitution, pursuant to which state law must yield when it frustrates or conflicts with federal law."). "When a federal act contains an express preemption provision, this court's primary task is to 'identify the domain expressly pre-empted by that language.'" *Rogers*, 127 Nev. at 805, 266 P.3d at 600 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996)). In doing so, we must "'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Id*. (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Even when there is no statutory language expressly preempting state law, preemption may be implied if Congress intended to thoroughly occupy the field or when the federal law conflicts with state law. *Rolf Jensen*, 128 Nev. at 445, 282 P.3d at 746. "Whether state law claims are preempted by federal law is a question of law that we review de novo, without deference to the findings of the district court." *Id*.

With respect to Medicare Act preemption, we previously considered this clause in *Rogers*. 127 Nev. at 805, 266 P.3d at 600. In that case, the plaintiff filed suit against Pacificare, her Medicare provider, for injuries resulting from treatment she received at a Pacificare-approved facility under its MA plan. *Id*. at 802, 266 P.3d at 598. Similar to this case, the plaintiff asserted that Pacificare was liable for her injuries because it neglected to employ a proper quality assurance program. *Id.* We did not address whether her claims were preempted by the Medicare Act, however, because Pacificare argued that an arbitration provision included in the parties' contract governed, necessitating dismissal of plaintiff's claims, and thus the question before us was whether Nevada's common law unconscionability doctrine is preempted by the Medicare Act.

In resolving that issue, we considered the express language and legislative history of the Medicare Act's preemption provision. *Id.* at 804-06, 266 P.3d at 600-01. We stated that "[p]rior to 2003, Congress recognized a presumption against preemption unless a state law was in conflict with a Medicare requirement or fell within one of four express categories of preempted standards." *Rogers*, 127 Nev. at 806, 266 P.3d at 601. We then noted, however, that the 2003 amendment of the Act broadened the preemption coverage by stating that state laws are presumed to be preempted unless the law in question falls within two specific categories: state licensing requirements or state laws related to plan solvency. Medicare Program; Establishment of the Medicare Advantage Program, 69 Fed. Reg. 46866, 46904 (proposed Aug. 3, 2004) (to be codified at 42 C.F.R. pt. 417 and 422); *see Rogers*, 127 Nev. at 807, 266 P.3d at 601. Thus, we concluded that the "legislative history shows that the Act's preemption provision has been specifically amended to include generally applicable common law." *Rogers*, 127 Nev. at 806, 266 P.3d at 601; *see Estate of Ethridge v. Recovery Mgmt. Sys., Inc.*, 326 P.3d 297, 302 (Ariz. Ct. App. 2014) ("The amendment was intended to 'clarif[y] that the MA program is a federal program operated under Federal rules. State laws, do not, and should not apply, with the exception of state licensing laws or state laws related to plan solvency.'" (alteration in original) (quoting H.R. Rep. No. 108-391, at 557 (2003), *reprinted in* 2003 U.S.C.C.A.N. 1808, 1926)).

[Headnote 5]

Thus, as we concluded in *Rogers*, the Medicare preemption statute "demonstrates a legislative intent to broaden the preemption provision beyond those state laws that are simply inconsistent with enumerated categories of standards." *Rogers*, 127 Nev. at 807, 266 P.3d at 601. Therefore, "'all [s]tate standards, *including those established through case law*, are preempted to the extent they specifically would regulate MA plans.'" *Id*. (alteration in original) (quoting *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1156 (9th Cir. 2010) (internal quotations omitted)).

Federal standards exist regarding the conduct at issue in Morrison's common law negligence claim

Morrison argues that Congress intended for state laws and regulations to be preempted only when an express Medicare standard exists. And because no published Medicare standard exists that would supersede his common law negligence claim that HPN negligently directed him to receive treatment at the Clinic, he contends, the district court erred in concluding that it was expressly preempted. We disagree.

We have already concluded that a state law need not be "inconsistent" with the federal standard to be preempted, but rather, as long as a federal standard exists regarding the conduct at issue " 'all [s]tate standards, including those established through case law, are preempted to the extent they specifically would regulate MA plans.' " *Rogers*, 127 Nev. at 807, 266 P.3d at 601 (alteration in original) (emphasis omitted) (quoting *Do Sung Uhm*, 620 F.3d at 1156). But even if we accepted Morrison's argument that state law claims are preempted only where express Medicare standards exist, Morrison's claim would be preempted. "While the term 'standard' is not defined in the Act, 'a "standard" within the meaning of the preemption provision is a statutory provision or a regulation promulgated under the Act and published in the Code of Federal Regulations.' " *Id*. at 600 (quoting *Do Sung Uhm*, 620 F.3d at 1148 n.20).

As noted above, CMS has promulgated regulations for MA organizations to adhere to when selecting and contracting with providers for its MA plans. *See, e.g.*, 42 C.F.R. § 422.4(a)(1)(i) (2013) (providing that CMS will approve the network of providers to confirm that all federal standards, including quality of care, are being met); *id.* § 422.204 (setting forth the general standards for MA organizations regarding "[p]rovider selection and credentialing"); *id.* § 422.152(a) (requiring MA organizations to maintain quality improvement programs for each MA plan, which must include ongoing evaluation and quality assessment); *id.* § 422.152(f)(3) (requiring that "[f]or each plan, the organization must correct all problems that come to its attention through internal surveillance, complaints, or other mechanisms").

CMS has specified "requirements for relationships between . . . MA organizations[ ] and the physicians and other health care professionals and providers with whom they contract to provide services to Medicare beneficiaries enrolled in an MA plan." Centers for Medicare & Medicaid Services, *Medicare Managed Care Manual*, Ch. 6, § 10 (Rev. 82, April 27, 2007). In particular,

> [a]n MA organization's site visit policy must include procedures for detecting deficiencies and have mechanisms in place to address those deficiencies. . . . The MA organization must develop and implement policies that address the ongoing monitoring of sanctions and grievances filed against health

> care professionals. . . . In the event that an MA organization finds an incidence of poor quality or any type of sanction activity against a health care professional, it should intervene and correct the situation appropriately.

Id. § 60.3. Furthermore, in interpreting its regulations, CMS has stated that state laws which "set forth ongoing marketing, quality assurance, or network adequacy requirements for MA plans" are preempted. *Id.*, Ch. 10, § 30.1.

Thus, federal law provides standards that MA organizations must adhere to in conducting the relationship with their contracted providers. A state law action asserting that HPN was negligent in directing its insureds to the Clinic could result in the imposition of additional state law requirements on the quality assurance regime regulated by CMS. Thus, we conclude that even if the Medicare preemption provision applied only when express Medicare provisions exist, Morrison's state common law negligence claims would still be preempted. *See Rogers*, 127 Nev. at 807, 266 P.3d at 601.

The dissent argues that the federal regulations we cite do not immunize providers from liability and "fail[ ] to touch on the generally applicable negligence claim at issue here." Dissenting opinion *post.* at 531. The dissenting justices' argument maintains that the minimum standards do not immunize providers from liability without exploring why they are not standards that "supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to MA plans." 42 U.S.C. § 1395w-26(b)(3) (2012).

Furthermore, the dissent mischaracterizes the nature of Morrison's claim, referring to it as a "negligent selection claim." Dissenting opinion *post.* at 528. Certainly, Morrison's second amended complaint stated that HPN failed "to use reasonable care to select its health care providers" and "to inquire into the medical practices at the clinic." But our review of the record reveals that Morrison argued to the district court and to this court that he sought damages for HPN's negligence in directing its insureds to the Clinic after HPN became aware that patients undergoing procedures at the Clinic had contracted hepatitis C. Thus, Morrison's claim was not one of negligent selection, but rather, was based on HPN's failure to monitor its provider. This is a negligent quality assurance claim that is specifically covered by the federal regulatory scheme. Interestingly, the dissent admits that the Medicare standards we cite "might preempt Nevada's quality assurance standards, established by NRS 695G.180," dissenting opinion *post.* at 531, yet the dissenting justices fail to distinguish why a common law claim based upon the same conduct would not be preempted. Even assuming that the

claim is not directly related to quality assurance, as we noted earlier in this opinion, *supra* at 523, Medicare has established standards that broadly regulate an MA organization's conduct and relationship with the providers to whom it sends its insureds, and such regulations preempt Morrison's claim related to that relationship. *See, e.g.*, 42 C.F.R. § 422.152(f)(3) (requiring that "[f]or each plan, the organization must correct all problems that come to its attention through internal surveillance, complaints, or other mechanisms").

The Medicare Act's preemption clause applies to claims against MA organizations

Morrison also argues that even if the Medicare Act's preemption provision applies to state common law negligence claims, it does not apply in this matter because his claim is asserted against his MA organization, not his MA plan. He claims that the Medicare Act preemption clause only expressly preempts "any State law or regulation . . . with respect to MA plans," and therefore the preemption statute does not apply to his claim against his MA organization. 42 U.S.C. § 1395w-26(b)(3) (2012). In addition, he argues that this court has already held in *Munda v. Summerlin Life & Health Insurance Co.*, 127 Nev. 918, 267 P.3d 771 (2011), that a plaintiff's identical negligence claim is not preempted by ERISA and that the "with respect to" language in the Medicare Act should be interpreted in the same way as the language in ERISA which preempts state laws that "relate to" employee benefit plans. *See* 29 U.S.C. § 1144(a) (2012).

First, we look to the plain language of the Medicare Act's preemption provision which states that "[t]he standards established under this part shall supersede any State law or regulation . . . *with respect to MA plans which are offered by MA organizations under this part*." 42 U.S.C. § 1395w-26(b)(3) (2012) (emphasis added). In looking at the plain language of the provision as a whole, we determine that because MA plans can only be offered by MA organizations, the two are linked such that a claim regarding one is necessarily a claim regarding both. Morrison would have no claim against HPN if not for the MA plan. Moreover, in *Rogers* we failed to see a distinction between a claim brought against the MA organization and a claim brought against the MA plan. 127 Nev. at 806 n.4, 266 P.3d at 601 n.4 (" '[N]othing in the statutory text of the Act suggests that a state law or regulation must apply *only* to [an MA plan] in order to constitute a law "with respect to" ' an MA plan." (second alteration in original) (quoting *Do Sung Uhm*, 620 F.3d at 1150 n.25)). Finally, reading the statute in the way Morrison urges would lead to an absurd result, as the insured could simply name its MA organization, and not the MA plan, as the defendant in order to

avoid preemption. We thus conclude that Morrison's argument regarding the language of the Medicare Act fails.[5] *Las Vegas Taxpayer Accountability Comm. v. City Council of Las Vegas*, 125 Nev. 165, 177, 208 P.3d 429, 437 (2009) ("[W]hen interpreting a statute, the language of the statute should be given its plain meaning . . . .").

We also conclude that Morrison's argument regarding our interpretation of the preemption clause in ERISA fails to support his position. Morrison relies upon *Munda v. Summerlin Life & Health Insurance Co.*, 127 Nev. 918, 926, 267 P.3d 771, 776 (2011), where this court ultimately determined that the insureds' claim that their insurer was negligent in failing to comply with quality assurance standards was not preempted by ERISA. In *Munda*, we discussed that generally "ERISA preempts [state] suits that are predicated on administrative decisions made in administering an ERISA plan," which include decisions regarding the selection and retention of providers. 127 Nev. at 925, 267 P.3d at 775. However, we concluded that the plaintiffs' claim was not preempted because they alleged facts to show that their insurer/managed care organization (MCO) was not acting in its capacity as an administrator of the ERISA plan when it selected and oversaw its providers, but rather, in its independent role as an insurer. 127 Nev. at 926, 267 P.3d at 776. Thus, the duty on which the claim was based existed outside of the insurer's relationship with the ERISA plan. *Id.*

Morrison contends that his case is analogous to *Munda* because HPN contracted with its providers in its independent role as insurer, not in its special capacity as an MA organization. All of its insureds were directed to use its providers, whether they were under a Medicare plan or not. However, Morrison's argument fails because ERISA and Medicare are fundamentally different programs and cannot be analyzed in the same way. Unlike ERISA, the Medicare

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[5]Morrison additionally argues that his case is distinguishable from *Rogers* because the negligence common law under which he is bringing his claim does not regulate MA plans, only the corporate choices of his insurer. We reject this argument, as the conduct identified in Morrison's common law negligence claim is the same conduct that is specifically regulated by the Medicare Act. As such, if Morrison is allowed to argue that a different state standard should be applied to the MA organization, the federal regulation of MA plans would be frustrated, and we must yield to the federal law. *See Rolf Jensen & Assocs., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 441, 445, 282 P.3d 743, 746 (2012).

Finally, Morrison argues that this case is distinguishable from *Rogers* because there is no risk of an inconsistent result by allowing his negligence claim to survive. Morrison reasons that if HPN is found negligent, it would not run afoul of any Medicare standard because there is no standard that allows an HMO to direct an insured to a provider it knows or should know uses unsafe practices. This argument is unavailing. The concern in *Rogers*, that federal and state standards will differ and lead to inconsistent results, is applicable here. *See Pacificare of Nev., Inc. v. Rogers*, 127 Nev. 799, 807, 266 P.3d 596, 601 (2011).

Act has established standards that regulate an MA organization's selection of providers and implementation of a quality assurance regime. No state law may intercede in that regime. The ERISA program does not have analogous standards regulating the insurers for quality assurance.

CONCLUSION

The Medicare preemption provision contained in 42 U.S.C. § 1395w-26(b)(3) is very broad, and we have previously determined that it applies beyond those state laws that are simply inconsistent with the express standards set out in the Medicare Act: it preempts all state standards to the extent that they would regulate MA plans, other than laws and regulations related to licensing and plan solvency, including those established through case law. *Rogers*, 127 Nev. at 807, 266 P.3d at 601. Morrison's state law negligence claim would seek to regulate how contracted providers for MA plans are monitored, and thus, Morrison's claim is expressly preempted by 42 U.S.C. § 1395w-26(b)(3). And Morrison's arguments on appeal do not provide any basis for finding that his claims fall outside of the Medicare preemption provision. Accordingly, for the reasons set forth in this opinion, we affirm the district court's order dismissing Morrison's state common law negligence action.

PICKERING, DOUGLAS, and SAITTA, JJ., concur.

CHERRY, J., with whom GIBBONS, C.J., agrees, dissenting:

Today the majority holds that federal statutes and regulations preempt a Medicare recipient's claim against his Medicare Advantage organization for negligently selecting and retaining a contracted provider who infected the Medicare recipient with hepatitis C. It does so for two reasons: (1) Medicare regulations already set forth standards covering Medicare Advantage organizations' selection of contracted providers; and (2) any state tort law imposing a duty of care in selecting contracted providers would constitute a state law "with respect to" Medicare plans, which is expressly preempted under 42 U.S.C. § 1395w-26(b)(3). I respectfully dissent because I disagree with both rationales.

Medicare Advantage

As explained by the majority, Medicare Part C created the Medicare Advantage program, whereby health insurance organizations may contract with Medicare to provide federally subsidized health plans to Medicare enrollees. Medicare's regulatory agency, CMS, refers to these health insurance organizations (which can be health maintenance organizations, preferred provider organizations, reli-

gious fraternal benefit plans, or other organizations) as Medicare Advantage (MA) organizations.

MA organizations can be private entities that also offer health plans apart from the Medicare plans. MA organizations operate just as any non-Medicare health insurance organization would operate. For example, MA HMOs, like non-Medicare HMOs, contract with a network of providers to provide medical services. Health Plan of Nevada (HPN) is an HMO that also offers a Medicare Advantage plan.

CMS comprehensively regulates the MA plans offered by MA organizations. It approves the MA organizations' advertising materials, the providers with whom the organizations contract, and the terms of those contracts. It requires that MA organizations implement quality improvement programs. And it also requires that MA organizations establish grievance procedures, which enrollees may use to complain about the services offered by an MA organization and its providers.

Negligent selection claims

As an HMO, HPN contracted with and directed its insureds to a particular provider that, appellant Louis Morrison asserts, HPN knew or should have known was dangerous and unsafe. Morrison's claim against HPN for negligent selection and retention of a contracted provider is not a novel claim.[1] The following analysis of negligent selection claims will provide a useful background for preemption analysis.

Negligent selection and retention claims are based on the theory that, when an HMO holds out a physician as competent by making that physician a contracted provider, the HMO's failure to investigate the physician's skill and qualifications creates a foreseeable and unreasonable risk of harm to patients.

An HMO's duty of care in selecting and retaining contracted providers evolved out of the hospital context, where hospitals must determine which physicians may practice at their facilities. *See* Barry R. Furrow, *Managed Care Organizations and Patient Injury: Rethinking Liability*, 31 Ga. L. Rev. 419, 457, 461-62 (1997). Courts have held that "the failure to investigate a medical staff applicant's qualifications for the privileges requested gives rise to a foreseeable

[1]The majority states that "Morrison's claim was not one of negligent selection, but rather, was based on HPN's failure to monitor." Majority opinion *ante* at 524. But the second amended complaint alleges that "Defendants owed a duty to Plaintiff . . . to use reasonable care to select its health care providers" and that "Defendants breached this duty by failing to direct the Plaintiff to seek medical care at reasonably safe facilities." In these statements Morrison clearly alleges the duty and breach elements of a negligent selection claim.

risk of unreasonable harm and . . . a hospital has a duty to exercise due care in the selection of its medical staff." *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W. 2d 156, 164 (Wis. 1981). In *Moore v. Board of Trustees of Carson-Tahoe Hospital*, 88 Nev. 207, 495 P.2d 605 (1972), this court recognized both the changing role of the hospital and the concept of a hospital's "corporate responsibility for the quality of medical care." *Id.* at 211-12, 495 P.2d at 608.

The Missouri Court of Appeals in *Harrell v. Total Health Care, Inc.*, No. WD 39809, 1989 WL 153066, at *4-5 (Mo. Ct. App. Apr. 25, 1989), *affirmed*, 781 S.W.2d 58 (Mo. 1989), determined that HMOs have assumed a role sufficiently similar to that of a hospital to justify extending liability to HMOs. In that case, the court agreed with arguments that HMOs owe a duty of care to properly vet their contracted providers. The court reasoned that, in order for patients to realize the benefit of their health insurance, they must be treated by physicians approved by their plan. *Id.* at *5. In this arrangement "there is an unreasonable risk of harm to subscribers if the physicians listed . . . include doctors who are unqualified or incompetent." *Id.* The court held that the presence of this risk gives rise to a duty owed by the insurance company to ensure that contracted physicians are qualified and competent. *Id.*

Other courts have since upheld a plaintiff's ability to bring a negligent selection claim against an HMO. *See Petrovich v. Share Health Plan of Ill., Inc.*, 696 N.E.2d 356, 360-61 (Ill. App. Ct. 1998) (holding that HMOs can be liable for "corporate negligence as a result of negligent selection and control of the physician who rendered care"); *McClellan v. Health Maint. Org. of Pa.*, 604 A.2d 1053, 1059 (Pa. Super. Ct. 1992) ("HMOs have a nondelegable duty to select and retain only competent primary care physicians."). Some courts have also found that HMOs owe a duty of care in selecting contracted providers under the Restatement (Second) of Torts § 323 (1965), which states that

> [o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

See, e.g., *McClellan*, 604 A.2d at 1059.

In this case, HPN is a Nevada-licensed HMO that selects and contracts with medical providers. Morrison should not be prevented from enforcing the duty of care that HPN may owe to him sim-

ply because Morrison is a Medicare recipient, while HPN's non-Medicare customers may do so. As explained below, no such unequal treatment is created by the Medicare Act's preemption clause.

Preemption

"When a federal act contains an express preemption provision, this court's primary task is to 'identify the domain expressly pre-empted by that language.'" *Pacificare of Nev., Inc. v. Rogers*, 127 Nev. 799, 805, 266 P.3d 596, 600 (2011) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996)). Under the Medicare Act, the standards established by the federal Medicare statutes and regulations "supersede any state law . . . with respect to MA plans which are offered by MA organizations," except for licensing and solvency requirements. 42 U.S.C. § 1395w-26(b)(3) (2012); 42 C.F.R. § 422.402 (2013). Thus, to determine whether the domain is expressly preempted, one must consider (1) if there are federal standards superseding state negligent selection and retention law and (2) if negligent selection claims may result in laws "with respect to" MA plans.

Federal standards

The majority states that "[a]lthough CMS does not directly select the physicians . . . federal regulations require an MA organization to select and retain only those providers that meet the qualifications specified in the Medicare Act." Majority opinion *ante* at 520. The majority goes on to list several federal regulations that the majority contends preempt negligent selection claims. It reasons that such claims, although not necessarily inconsistent with the federal standards, "could result in the imposition of additional state law requirements on the quality assurance regime regulated by CMS." *Id.* at 524. I do not believe that those regulations create standards regulating the negligent selection of providers.

The majority first points to 42 C.F.R. § 422.4(a)(1)(i), which states that an MA organization's "network [of providers] is approved by CMS to ensure that all applicable requirements are met, including access and availability, service area, and quality." Nevertheless, the fact that CMS approves of a provider's inclusion in the network does not mean that negligent selection claims against the MA organization are preempted. For instance, 42 C.F.R. § 416.1 creates standards regulating certain providers, but the existence of those standards does not make the providers immune to negligence suits. In fact, Medicare regulations specifically acknowledge that a Medicare provider may be sued for malpractice. 42 C.F.R. § 424.530(a)(3)(i)(C) (2013) (stating that CMS may deny a provider's Medicare reenrollment if the provider is convicted of "[a]ny felony that placed the Medicare program or its beneficiaries at immediate risk (such as a malpractice suit that results in a convic-

tion of criminal neglect or misconduct)"). Just as CMS's provider standards do not preempt providers' malpractice liability, CMS's approval of an MA organization's provider selection does not preempt MA organizations' negligence liability.

The majority then considers 42 C.F.R. § 422.204(a), which states that "[a]n MA organization must have written policies and procedures for the selection and evaluation of providers. These policies must conform with the credential and recredentialing requirements set forth in paragraph (b) of this section and with the antidiscrimination provisions set forth in § 422.205." But the existence of minimum requirements for participation in Medicare Advantage does not preempt MA organizations' tort liability. Despite the existence of minimum procedural requirements, it is still the MA organization that "select[s] the practitioners that participate in its plan provider networks." 42 C.F.R. § 422.205(a) (2013). It is that discretionary selection that Morrison alleges HPN negligently performed—a selection that an HMO such as HPN may also make in a non-Medicare capacity.

Finally, the majority refers to the quality improvement program that CMS requires MA organizations to implement. *See* 42 C.F.R. § 422.152(a) (2013). I agree that this program might preempt Nevada's quality assurance standards, established by NRS 695G.180. And CMS's interpretation of its regulations says that states may not set forth ongoing quality assurance requirements. *Medicare Managed Care Manual*, ch. 10, § 30.1 (Nov. 4, 2011). Yet CMS states in the same text that "[o]ther State health and safety standards, or generally applicable standards, that are not specific to health plans are not preempted." *Id.* § 30.2. A general duty of care is just such a generally applicable standard.[2]

Thus, each federal standard cited by the majority fails to touch on the generally applicable negligence claim at issue here. In addition, any concern that tort liability may indirectly increase costs to MA organizations, thereby impacting their ability to comply with regulations, is irrelevant. The Supreme Court of the United States has stated, in the ERISA context, that state laws that are otherwise not preempted and that "affect only indirectly the relative prices of insurance policies, a result no different from myriad state laws in areas traditionally subject to local regulation," are not preempted. *N.Y. State Conference of Blue Cross & Blue*

[2]The majority argues that we do not distinguish conduct violating quality assurance requirements from conduct that might violate a duty of care. The distinction is obvious. An insurance organization violates NRS 695G.180's quality assurance standards when it fails to establish the procedures and record-keeping that constitute a quality insurance program. An insurance organization breaches a general duty of care when it commits tortious acts against its customers. One set of conduct concerns procedures and paperwork; the other concerns actual negligent acts that cause injury.

Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 668 (1995). The same logic applies to this case.

"With respect to"

Even if federal regulations provided standards governing the negligent selection of providers, it is not clear that negligent selection liability creates state law "with respect to" MA plans. This court has interpreted similar language in the ERISA context. Under ERISA, all state laws that "relate to" certain employee benefit plans are expressly preempted. 29 U.S.C. § 1144(a) (2012). In *Munda v. Summerlin Life & Health Insurance Co.*, 127 Nev. 918, 922, 267 P.3d 771, 773 (2011), the appellants argued that federal ERISA regulations did not "relate to" their claim for negligence, which alleged that the respondent "failed to identify the unsafe practices of or terminate its contract with the" provider. This court agreed, stating that ERISA's express preemption provision "does not preempt claims that are brought against Summerlin in its capacity as [a managed care organization], instead of in its capacity as an ERISA plan administrator." *Id.* at 926, 267 P.3d at 776. I believe that this case is analogous.

Here, Morrison alleges that HPN committed negligence in its capacity as an HMO. In other words, Morrison alleges that HPN negligently selected an unsafe provider—an activity that an HMO may perform without any connection to Medicare Advantage. The fact that Medicare contracted to compensate HPN on behalf of Morrison does not change the fact that HPN, exercising the discretion afforded it under federal regulations, chose the provider.

The majority contends that *Munda* is distinguishable because, in that case, "the plaintiffs' claim was not preempted because they alleged facts to show that their insurer . . . was not acting in its capacity as an administrator of the ERISA plan when it selected and oversaw its providers, but rather, in its independent role as an insurer." Majority opinion *ante* at 526. Yet this case is identical: HPN functions as a Nevada-licensed HMO by contracting with providers for medical care, regardless of whether Medicare is involved.[3] *See* NRS 695C.030(6), (7) (" 'Health maintenance organization' means any person which provides or arranges for provision of a health care service or services and is responsible for the availability and ac-

[3]The majority also argues that, "[u]nlike ERISA, the Medicare Act has established standards that regulate an MA organization's selection of providers." Majority opinion *ante* at 526-27. As stated above, I do not agree that there are standards governing the selection of providers. CMS regulations state that "an MA organization . . . select[s] the practitioners that participate in its plan provider networks," subject only to nondiscrimination rules and the satisfaction of procedural requirements. 42 C.F.R. § 422.205(a) (2013).

cessibility of such service or services to its enrollees." " 'Provider' means any physician, hospital or other person who is licensed or otherwise authorized in this state to furnish health care services."). It shouldn't matter whether HPN is compensated by Medicare, by the enrollee, or by other sources.

In sum, Medicare's standards do not cover general health and safety issues like negligence claims. Furthermore, under *Munda*, Morrison's claim for negligent selection of a provider is not "with respect to" Medicare and is therefore not expressly preempted. The Medicare Act's text does not show that Congress intended the unequal result that Medicare enrollees cannot have legal recourse against a negligent HMO while non-Medicare patients may. Accordingly, I respectfully dissent.