party being sued or if the proper person actually has been served," the defendant is adequately identified as a party to the litigation. 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1321, at 391-92 (3d ed. 2004); *see also* NRCP 10(c) ("Statements in a pleading may be adopted by reference in a different part of the same pleading . . . . A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."). It follows that a defendant not named in the caption of a petition for judicial review may still be a party to the action if named in the petition or its exhibits and properly served.

Many petitions for judicial review of adverse agency actions are filed by individuals who do not have a lawyer. I do not want to foreclose our consideration, in an appropriate case, of the holding in *Green v. Iowa Department of Job Services*, 299 N.W.2d 651, 654 (Iowa 1980), which allowed a petition for judicial review to proceed—even though the employee did not name the employer in the caption of the petition—where the employee timely served the employer and the petition incorporated and attached the agency decision, which did name the employer. *See Sink v. Am. Furniture Co*., No. 1160-88-3, 1989 WL 641960, at *1-2 (Va. Ct. App. 1989) (concluding that a failure to name a respondent in the caption did not invalidate the petition because respondent was mentioned in body of the petition and the prayer for relief).

CITY OF HENDERSON, APPELLANT, *v.*
GIANO AMADO, AKA BRANDON WELCH, RESPONDENT.

No. 70500

June 22, 2017 396 P.3d 798

Appeal from a district court order granting a petition for a writ of mandamus and/or writ of prohibition resulting in the dismissal of criminal complaints. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Reversed and remanded with instructions.

Josh M. Reid, City Attorney, and *Laurie A. Iscan*, Assistant City Attorney, Henderson, for Appellant.

William B. Terry, Chartered, and *William B. Terry*, Las Vegas, for Respondent.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, HARDESTY, J.:

NRS 174.085(5)(b) permits a municipality's prosecuting attorney to seek the voluntary dismissal of a misdemeanor complaint before trial and "without prejudice to the right to file *another* complaint, unless the State of Nevada has previously filed a complaint against the defendant which was dismissed at the request of the prosecuting attorney." (Emphasis added.) Further, "[if] a prosecuting attorney files a *subsequent* complaint after a complaint concerning the same matter has been filed and dismissed against the defendant," the case is required to be assigned to the same judge as the initial complaint. NRS 174.085(6)(a) (emphasis added).

As a matter of first impression, we must determine whether the subsequent complaint filed by the prosecuting attorney may be filed in the same case number as the original complaint. We conclude that a plain reading of the statute permits the City of Henderson (City) to file a subsequent complaint in the original case. Accordingly, we conclude that the district court acted arbitrarily and capriciously when it determined that the City was required to file a new complaint with a new case number when it voluntarily dismissed complaints pursuant to NRS 174.085(5)(b), and reverse.

FACTS AND PROCEDURAL HISTORY

After respondent Giano Amado had a physical altercation with his aunt and nephew, the City filed a criminal complaint against Amado, charging him with misdemeanor battery constituting domestic violence for pushing his aunt to the ground. Amado was arrested and posted a bail bond that same day. A criminal complaint was then filed in a separate case charging Amado with misdemeanor battery constituting domestic violence for grabbing, punching, or throwing his nephew to the ground. After the aunt and nephew repeatedly failed to appear for multiple trial dates, the City voluntarily dismissed both complaints without prejudice pursuant to NRS 174.085(5)(b).

The day following the dismissal of the complaints, the City refiled the criminal complaints as "Amended Criminal Complaint[s]" using the same case numbers. Amado filed a motion to dismiss the amended criminal complaints in the municipal court, arguing that the City was required to file new criminal complaints using new case numbers. The municipal court denied the motion.

Amado filed a petition for a writ of mandamus, or alternatively, a writ of prohibition in the district court raising the same claims regarding the amended criminal complaints. The district court grant-

ed the petition for a writ of prohibition and dismissed the amended complaints, finding that NRS 174.085(5)(b) required the City to file new complaints with new case numbers.

DISCUSSION

The district court acted arbitrarily and capriciously when it determined that the municipal court had violated NRS 174.085(5)(b) and dismissed the City's complaints

"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." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (citation and internal quotation marks omitted). "A manifest abuse of discretion is [a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *Id*. at 932, 267 P.3d at 780 (alteration in original) (internal quotation marks omitted).

The City argues that the district court arbitrarily and capriciously exercised its discretion by ignoring the plain language of NRS 174.085(5)(b) and determining that the statute only allows for a new complaint to be filed in a new case number. The City argues that NRS 174.085(5)(b) does not contain any such restriction, but rather refers to the filing of "another" complaint and a "subsequent" complaint, and the statute makes no mention of a new case number. We agree.

"Statutory construction is a question of law that this court reviews de novo." *Richardson Constr., Inc. v. Clark Cty. Sch. Dist.*, 123 Nev. 61, 64, 156 P.3d 21, 23 (2007). Generally, statutes are given their plain meaning, construed as a whole, and read in a manner that makes the words and phrases essential and the provisions consequential. *Mangarella v. State*, 117 Nev. 130, 133, 17 P.3d 989, 991 (2001).

In 1997, the Legislature amended NRS 174.085(5) to its current form:

> 5. The prosecuting attorney, in a case that the prosecuting attorney has initiated, may voluntarily dismiss a complaint:
>
> (a) Before a preliminary hearing if the crime with which the defendant is charged is a felony or gross misdemeanor; or
>
> (b) Before trial if the crime with which the defendant is charged is a misdemeanor,
>
> without prejudice to the right to file *another* complaint, unless the State of Nevada has previously filed a complaint against the defendant which was dismissed at the request of the prosecuting attorney. After the dismissal, the court shall order the defendant released from custody or, if the defendant is released on bail, exonerate the obligors and release any bail.

(Emphasis added.) *See* 1997 Nev. Stat., ch. 504, § 1(5), at 2392. Further, NRS 174.085(6)(a) provides that "[if] a prosecuting attorney files a *subsequent* complaint after a complaint concerning the same matter has been filed and dismissed against the defendant," the case is required to be assigned to the same judge as the initial complaint. (Emphasis added.)

Black's Law Dictionary defines "subsequent" as "occurring later; coming after something else." *Subsequent*, *Black's Law Dictionary* (10th ed. 2014). Nothing in the definition of "subsequent" nor any other provision in NRS 174.085(5)(b) or (6)(a) prohibits a prosecutor from filing a subsequent complaint in the original case.[1] In fact, we have previously reviewed NRS 174.085(5)'s statutory language in the context of an equal protection violation argument and "recognize[d] . . . the ability of a prosecutor to dismiss and reinstate a charge, known as a *nolle prosequi* order at common law." *Sheriff, Washoe Cty. v. Marcus*, 116 Nev. 188, 194, 995 P.2d 1016, 1020 (2000); *see also Bassing v. Cady*, 208 U.S. 386, 392 (1908) (seeing no violation of a "right secured . . . by the Constitution or laws of the United States" where the charges against the defendant were dismissed and he was released from custody followed by the State's reinstatement of those charges at a later date).

The City has indicated in its writ petition that the municipal court established the procedure of filing a subsequent complaint in the same case to ensure the case was assigned to the same judge as required by NRS 174.085(6)(a). Amado could point to no prejudice that he suffered when the new/subsequent complaint was labeled "amended" and filed in the same case number. The district court identified no prejudice Amado suffered by the procedure selected by the municipal court. The district court's reading of the statute also discounts any inherent authority and flexibility the municipal court may have in implementing procedures to effectuate the provisions of NRS 174.085(5) and (6) for subsequently filed complaints.

CONCLUSION

Because we conclude that the plain language of NRS 174.085(5) and (6) unambiguously permits the filing of a subsequent complaint in the original case, we conclude that the district court arbitrarily and capriciously abused its discretion when it erroneously determined that the municipal court had violated NRS 174.085(5)(b) and dismissed the complaints against Amado.

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[1]We conclude that Amado's argument challenging the label "amended" on the subsequent complaints is without merit. The City represented that the complaints were amended simply to include aliases that were not included in the original complaints and not to imply that the original complaints had not been dismissed. Affixing the label "amended," which was arguably unnecessary in filing the subsequent complaints, did not warrant dismissal.

Accordingly, we reverse the district court's order and remand to the district court with instructions to enter an order consistent with this opinion.

PARRAGUIRRE and STIGLICH, JJ., concur.

MIRIAM PIZARRO-ORTEGA, AN INDIVIDUAL, APPELLANT, *v.* CHRISTIAN CERVANTES-LOPEZ, AN INDIVIDUAL; AND MARIA AVARCA, AN INDIVIDUAL, RESPONDENTS.

No. 68471

June 22, 2017 396 P.3d 783

Appeal from a judgment after a jury verdict in a tort action and an order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Affirmed.

[Rehearing denied September 28, 2017]

Rogers, Mastrangelo, Carvalho & Mitchell, Ltd., and *Charles A. Michalek, R. Kade Baird*, and *Dawn L. Davis*, Las Vegas, for Appellant.

Simon Law and *Daniel S. Simon*, Las Vegas, for Respondents.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

Per Curiam:

NRCP 16.1(a)(1)(C) requires a party to produce, "without awaiting a discovery request . . . [a] computation of any category of damages claimed." In this appeal, we clarify that future medical expenses are a category of damages to which NRCP 16.1(a)(1)(C)'s computation requirement applies and that a plaintiff is not absolved of complying with NRCP 16.1(a)(1)(C) simply because the plaintiff's treating physician has indicated in medical records that future medical care is necessary. Although respondents did not provide appellant with a computation of their future medical expenses before trial, appellant has not shown that she was unable to contest the reasonableness of the amounts requested, and we therefore conclude that appellant's substantial rights were not materially affected so as to warrant a new trial. Because appellant's remaining arguments also do not warrant a new trial, we affirm the district court's judgment on the jury verdict.

FACTS AND PROCEDURAL HISTORY

Appellant Miriam Pizarro-Ortega[1] caused a car wreck wherein respondents Christian Cervantes-Lopez and Maria Avarca sustained injuries, primarily to discs in their backs.[2] Respondents underwent various modes of treatment for their injuries and eventually filed the underlying negligence action against appellant. While the action was pending, Christian was referred to a neurosurgeon, Dr. Stuart Kaplan, who informed Christian that he would require a lumbar fusion surgery in the future.[3] Dr. Kaplan noted this future surgery in Christian's medical records by indicating, "I have recommended an L5-S1 fusion for him."

As part of their initial disclosures, respondents provided appellant with a computation of their past medical expenses and a copy of Christian's medical records, including the above-quoted record from Dr. Kaplan. At no point before trial, however, did respondents provide appellant with a cost computation for Christian's future lumbar fusion surgery. Consequently, appellant filed a motion in limine seeking to prevent respondents from introducing evidence at trial in support of Christian's future medical expenses. In particular, appellant contended that respondents were required under NRCP 16.1(a)(1)(C) to provide a cost computation for Christian's lumbar fusion surgery. Because respondents failed to do so, appellant contended that respondents should be prohibited from seeking damages at trial for the lumbar fusion surgery. *Cf.* NRCP 37(c)(1) ("A party that without substantial justification fails to disclose information required by Rule 16.1 . . . is not, unless such failure is harmless, permitted to use as evidence at a trial . . . any witness or information not so disclosed.").

Although the record is unclear, it appears that the parties and the district court discussed appellant's motion in limine in the context of this court's then recently published opinion *FCH1, LLC v. Rodriguez*, 130 Nev. 425, 335 P.3d 183 (2014). In *FCH1*, this court held that a plaintiff's treating physician does not need to provide an expert report under NRCP 16.1(a)(2)(B) and can testify regarding any opinions he or she formed during the course of treating the plaintiff so long as all documents supporting those opinions are disclosed to the defendant. 130 Nev. 434, 355 P.3d at 189-90 (discuss-

[1]We direct the clerk of this court to modify the caption on the docket for this case to conform with the caption of this opinion, which reflects that Miriam Pizarro-Ortega is the only appellant.

[2]Appellant admitted liability. The issues at trial pertained to whether respondents' medical expenses were necessary and whether the costs incurred for those expenses were reasonable.

[3]A different treating physician recommended that Maria undergo future medical treatment. Because appellant has not presented any individualized arguments with respect to Maria, this opinion discusses the applicability of NRCP 16.1(a)(1)(C) in the context of Christian's treatment.

ing NRCP 16.1(a)(2)'s provision regarding "Disclosure of Expert Testimony"). Evidently based on *FCH1*, the district court concluded that because respondents had disclosed all of Christian's medical records from Dr. Kaplan, and because Dr. Kaplan was Christian's treating physician who would be performing the recommended lumbar fusion surgery, respondents were not required to provide a cost computation for the surgery. The district court consequently denied appellant's motion and permitted Dr. Kaplan to testify at trial regarding the recommended surgery.

The evening before Dr. Kaplan testified at trial, respondents provided appellant with a dollar figure for Christian's surgery. The following day, and over appellant's objection, Dr. Kaplan opined that the surgery would cost $224,100. In appellant's case in chief thereafter, appellant sought to elicit testimony from her medical expert, Dr. Derek Duke, who opined that Dr. Kaplan's projected cost for the surgery "look[ed] very high." On cross-examination, Dr. Duke further opined that "[$]120,000 is what I've seen in the past for the [lumbar] fusion."

Ultimately, the jury awarded Christian $200,000 for his future lumbar fusion surgery. The jury also awarded Maria $85,000 in damages for future medical expenses, and it awarded each respondent damages for past medical expenses, as well as past and future pain and suffering. In total, the jury awarded Christian roughly $499,000 and Maria roughly $222,000. Appellant subsequently filed a motion for a new trial and/or remittitur arguing, among other things, that the district court had committed reversible error in allowing respondents to introduce evidence of Christian's future medical expenses because respondents had not provided a computation of those expenses as required by NRCP 16.1(a)(1)(C). The district court denied appellant's motion, and this appeal followed.

DISCUSSION

Appellant contends that the district court abused its discretion in denying her request for a new trial.[4] *See Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 74, 319 P.3d 606, 611 (2014) ("This court reviews a district court's decision to grant or deny a motion for a new trial for an abuse of discretion."). NRCP 59(a) lists several grounds upon which a new trial may be warranted, including, as relevant here: "(1) . . . abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the . . . prevailing party; . . . [and] (7) Error in law occurring at the trial and objected to by the party making the motion." However, even if one of NRCP 59(a)'s new-trial grounds has been established, the estab-

[4]As indicated, appellant's motion in district court also sought remittitur of the damages awarded for future medical expenses. Because appellant clarified at oral argument for this appeal that she is seeking only a new trial (and not remittitur), we address appellant's arguments within that context.

lished ground must have "materially affect[ed] the substantial rights of [the] aggrieved party" to warrant a new trial. *Id.*

Within this framework, we first consider appellant's argument regarding NRCP 16.1(a)(1)(C) and the district court's admission of evidence pertaining to Christian's future medical expenses. We then consider whether any of appellant's additional arguments warrant a new trial.

NRCP 16.1(a)(1)(C) and future medical expenses

Under NRCP 16.1(a)(1)(C), a party is required to produce, "without awaiting a discovery request . . . [a] computation of any category of damages claimed." Appellant contends that a new trial is warranted regarding Christian's future medical expenses because respondents did not provide a computation of those expenses as required by NRCP 16.1(a)(1)(C). For support, appellant relies on several decisions from federal district courts in Nevada that have recognized that future medical expenses are indeed a "category of damages" subject to NRCP 16.1(a)(1)(C)'s cost-computation requirement.[5] *See, e.g.*, *Calvert v. Ellis*, No. 2:13-cv-00464-APG-NJK, 2015 WL 631284, at *1-2 (D. Nev. Feb. 12, 2015); *Smith v. Wal-Mart Stores, Inc.*, No. 2:13-cv-1597-MMD-VCF, 2014 WL 3548206, at *1-2 (D. Nev. July 16, 2014); *Patton v. Wal-Mart Stores, Inc.*, No. 2:12-cv-02142-GMN-VCF, 2013 WL 6158461, at *1-3 (D. Nev. Nov. 20, 2013); *Baltodano v. Wal-Mart Stores, Inc.*, No. 2:10-cv-2062-JCM-RJJ, 2011 WL 3859724, at *1-3 (D. Nev. Aug. 31, 2011). In opposition, respondents contend that despite NRCP 16.1(a)(1)(C), there has been a general understanding amongst Nevada attorneys practicing in state court that there is no requirement to provide a cost computation for future medical expenses. From this premise, respondents appear to be arguing that the *FCH1* opinion reinforced this general understanding because that opinion did not discuss NRCP 16.1(a)(1)(C).[6] Respondents therefore contend that appellant's relied-upon federal caselaw is inapposite.

Respondents' reading of *FCH1* is untenable. In *FCH1*, this court addressed the discrete issue of when a plaintiff's treating physician must provide an expert report under NRCP 16.1(a)(2)(B) ("Disclosure of Expert Testimony"). 130 Nev. at 434, 335 P.3d at 189-90. In so doing, this court held (1) a treating physician need not provide an expert report so long as the opinion to be provided

[5]Our independent research has revealed no contrary authority inside or outside of Nevada.

[6]Respondents' position regarding *FCH1*'s applicability or lack thereof is unclear and appears to have changed at oral argument for this appeal. Regardless of respondents' actual position, we issue this opinion to clarify for Nevada practitioners that the above-mentioned general understanding is mistaken and that litigants are not free to disregard the rules of civil procedure, including NRCP 16.1(a)(1)(C).

at trial was formed during the course of treating the plaintiff; and (2) even if an expert report is not necessary, the plaintiff must still disclose to the opposing party any documents the treating physician reviewed in forming his or her opinion. *Id.* These holdings pertaining to NRCP 16.1(a)(2)(B) ("Disclosure of Expert Testimony") did not address, much less abrogate, a party's responsibilities under NRCP 16.1(a)(1)(C) ("Initial Disclosures").

Additionally, and to the extent that the aforementioned general understanding amongst Nevada practitioners is premised on the perceived difficulty in providing a precise dollar figure for a future surgery, that premise is not a valid basis for disregarding NRCP 16.1(a)(1)(C). *See Clasberry v. Albertson's LLC*, No. 2:14-cv-00774-JAD-NJK, 2015 WL 9093692, at *2 (D. Nev. Dec. 16, 2015) (observing that a party is required to provide a computation of damages based on the information available and that, under the federal counterpart to NRCP 26(e), "[a] party has an ongoing duty to supplement its initial disclosures"); *Olaya v. Wal-Mart Stores, Inc.*, No. 2:11-cv-997-KJD-CWH, 2012 WL 3262875, at *2-3 (D. Nev. Aug. 7, 2012) (same); *cf. Calvert*, No. 2:13-cv-00464-APG-NJK, 2015 WL 631284, at *2 (observing that the purpose of providing a computation of damages is not necessarily to pinpoint an exact dollar figure but to "enable the defendants to understand the contours of their potential exposure and make informed decisions regarding settlement and discovery" (quotation omitted)). Thus, to the extent that the district court absolved respondents of their obligation under NRCP 16.1(a)(1)(C) to provide a computation of Christian's future medical expenses based on *FCH1* or a general understanding amongst Nevada practitioners, doing so was an error of law.[7] *See* NRCP 59(a)(7). We clarify that when a party has failed to abide by NRCP 16.1's disclosure requirements, NRCP 37(c)(1) provides the appropriate analytical framework for district courts to employ in determining the consequence of that failure. Under NRCP 37(c)(1), a party is prohibited from "us[ing] as evidence at trial . . . any witness or information not so disclosed" unless the party can show there was "substantial justification" for the failure to disclose or "unless such failure is harmless." *See also* NRCP 16.1(e)(3)(B) (providing for discretionary exclusion of evidence under similar circumstances if an attorney "fails to reasonably comply with any provision of [NRCP 16.1]").

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[7]We note, however, that pain and suffering damages are not subject to NRCP 16.1(a)(1)(C)'s computation-of-damages requirement. *See* NRCP 16.1 drafter's note (2004 amendment) ("Paragraph (1)(C) is intended to apply to special damages, not general or other intangible damages."); *Jackson v. United Artists Theatre Circuit, Inc.*, 278 F.R.D. 586, 593 n.1 (D. Nev. 2011) (recognizing that the federal counterpart to NRCP 16.1(a)(1)(C) does not require a computation of pain and suffering damages because those damages "are subjective and do not lend themselves to computation").

As indicated, however, even when one of NRCP 59(a)'s new-trial grounds has been established, the established ground must have "materially affect[ed] the substantial rights of [the] aggrieved party" to warrant a new trial.[8] Here, we conclude that the district court was within its discretion in determining that a new trial was not warranted. *Gunderson*, 130 Nev. at 74, 319 P.3d at 611. Important to our conclusion is that appellant is not contesting whether Christian's future lumbar surgery is *necessary*, but only whether the testified-to cost of that surgery is *reasonable*. In this regard, the district court observed that appellant was able to elicit opinions from her medical expert, Dr. Duke, as to whether Dr. Kaplan's $224,100 cost estimate was reasonable, to which Dr. Duke responded that the estimate "look[ed] very high." Likewise, on cross-examination, Dr. Duke further opined that "[$]120,000 is what I've seen in the past for the [lumbar] fusion."

Appellant contends that these opinions did not carry as much weight for the jury as they might have if Dr. Duke had been given more time to review Dr. Kaplan's cost estimate. However, appellant made no offer of proof, submitted no affidavits, and provided no further medical opinions in conjunction with her new trial motion, nor has she otherwise explained on appeal what additional testimony Dr. Duke would have provided or what testimony her proffered medical billing expert (discussed below) could have provided regarding Dr. Kaplan's estimate for the surgery. *Cf.* NRCP 59(a)(4) (providing that a new trial may be warranted based upon "[n]ewly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial"). Also in this respect, the district court found that Dr. Duke should have been able to provide such testimony even given the time constraints because he performs the same type of surgery and because he was Dr. Kaplan's former practicing partner. Moreover, it appears that the jury *did* give credence to Dr. Duke's opinions, as the amount awarded for Christian's surgery ($200,000) was less than Dr. Kaplan's $224,100 estimate. Under these circumstances, we conclude that appellant's substantial rights were not materially affected by allowing Dr. Kaplan to testify regarding the cost of Christian's lumbar surgery without having provided a cost computation under NRCP 16.1(a)(1)(C). NRCP 59(a). Accordingly, the district court was within its discretion in denying a new trial

[8]We disagree with appellant's suggestion that we should employ NRCP 37(c)(1)'s framework in resolving this appeal. Because appellant is appealing the district court's denial of her motion for a new trial, we necessarily consider the appeal under NRCP 59(a)'s framework and the abuse-of-discretion standard of review applicable to new trial motions. *See Gunderson*, 130 Nev. at 74, 319 P.3d at 611.

insofar as appellant's request related to the cost of Christian's future medical treatment.[9]

Additional arguments

Appellant raises several additional arguments in support of her new trial motion. As explained below, to the extent that any of the arguments might satisfy one of NRCP 59(a)'s new-trial grounds, appellant has not demonstrated that her substantial rights were materially affected.

Exclusion of appellant's medical billing expert

Appellant proffered a registered nurse, Tami Rockholt, to testify as a "medical billing expert" regarding the reasonableness of respondents' past medical expenses. From what can be determined from the record, it appears that Nurse Rockholt reviewed the costs for each medical procedure respondents underwent and was prepared to testify that the costs for those procedures were higher than the average cost that doctors in southern Nevada charge for those procedures.[10] On this subject, Nurse Rockholt sought to opine that although Christian was seeking roughly $57,000 in past medical expenses, the reasonable cost was roughly $36,000. Likewise, Nurse Rockholt sought to opine that although Maria was seeking roughly $43,000 in past medical expenses, the reasonable cost was roughly $24,000.

The district court struck Nurse Rockholt as a witness, and although the record is unclear, the decision appears to have been based on one or more of the following reasons: (1) she was not qualified to provide an expert opinion on medical billing, (2) her opinion would not be helpful to the jury, and/or (3) her opinion implicated the collateral source rule. Nevertheless, the district court permitted Dr. Duke to read to the jury Nurse Rockholt's opinions from her report—i.e., to opine on Nurse Rockholt's behalf that $36,000 in past medical expenses was reasonable for Christian and that $24,000 in past medical expenses was reasonable for Maria.

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[9]As indicated, appellant has not presented any individualized arguments regarding Maria's future medical expenses. To the extent appellant seeks a new trial on those grounds, a new trial is unwarranted. Maria's treating physician testified that he was familiar with the billing practices for roughly 20 of the 40 Las Vegas-area pain management specialists and that he charges $16,000 per radiofrequency procedure. Appellant has not explained what testimony her proffered medical billing expert or anyone else would have provided to challenge the reasonableness of that billing rate. Thus, appellant's substantial rights were not materially affected by allowing Maria's treating physician to testify regarding the cost of her future medical treatment. NRCP 59(a).

[10]The record is unclear whether Nurse Rockholt was equating "reasonable" with "average" or some other metric.

The jury ultimately awarded Christian and Maria all of the past medical expenses they had requested, and appellant raised the exclusion of Nurse Rockholt as a basis for a new trial. Without revisiting whether the exclusion of Nurse Rockholt had actually been proper, the district court determined that appellant's substantial rights had not been materially affected because Dr. Duke had been able to opine on Nurse Rockholt's behalf.

On appeal, appellant continues to argue that the exclusion of Nurse Rockholt's testimony warrants a new trial. We disagree. Although we cannot determine from the record whether the district court properly exercised its discretion in excluding Nurse Rockholt under any of the three aforementioned reasons, *see FCH1*, 130 Nev. 431-32, 335 P.3d at 188 (reviewing the admission or exclusion of evidence for an abuse of discretion), we nevertheless conclude that this issue does not warrant a new trial because appellant has not demonstrated that her substantial rights were materially affected. *See* NRCP 59(a). In particular, and as the district court noted in denying appellant's new trial motion, Dr. Duke was allowed to testify regarding the reasonableness of respondents' past medical expenses based on Nurse Rockholt's opinions. Appellant does not dispute that Dr. Duke was permitted to provide Nurse Rockholt's opinions on her behalf, nor does appellant meaningfully explain why she was prejudiced by not being permitted to have Nurse Rockholt provide her opinion directly. Thus, the district court was within its discretion in determining that the exclusion of Nurse Rockholt did not warrant a new trial.

Attorney misconduct

Appellant contends that a new trial is warranted because respondents' counsel engaged in misconduct during closing arguments. *See* NRCP 59(a)(2). By way of example, respondents' counsel made the following statements:

> You have important power and important duty and a service that you provided here for us today. And you have two options. If your verdict is too low, then that tells people they can get away with breaking the rules.

After appellant objected and the district court instructed counsel to modify his closing arguments, counsel stated:

> Just so we're clear, when you go into that jury room and reach this verdict, your verdicts are read. Plaintiff reads it, the defense reads it. Other people . . . here in the courtroom read it. Your verdict might even hit the paper. Verdicts hit the paper. The reason they do that is because people read verdicts. And verdicts shape how people follow the rules. I submit to you the evidence in this case. If you return a verdict that is too low, people don't follow the rules.

According to appellant, these statements and others made by respondents' counsel constituted misconduct because they amounted to a "golden rule" argument, which is prohibited under *Lioce v. Cohen*, 124 Nev. 1, 20-23, 174 P.3d 970, 982-84 (2008). We disagree that the statements identified by appellant amounted to a golden rule argument.[11]

Under *Lioce*, "attorneys violate the 'golden rule' by [(1)] asking the jurors to place themselves in the plaintiff's position or [(2)] nullify the jury's role by asking it to 'send a message' to the defendant *instead of evaluating the evidence*." *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 368-69, 212 P.3d 1068, 1082 (2009) (quoting *Lioce*, 124 Nev. at 20-23, 174 P.3d at 982-84 (emphasis added)). We are not persuaded that counsel's comments during closing arguments amounted to a golden rule argument. *See Lioce*, 124 Nev. at 20, 174 P.3d at 982 (reviewing de novo whether an attorney's comments amount to misconduct). First, it does not appear that counsel necessarily asked the jurors to place themselves in respondents' position. Second, to the extent that counsel's comments could be construed as asking the jurors to "send a message," counsel asked the jury to do so *based on the evidence*. In *Gunderson*, 130 Nev. at 77-78, 319 P.3d at 613-14, although this court did not expressly approve of "send a message" arguments, we concluded that such arguments are not prohibited so long as the attorney is not asking the jury to ignore the evidence. Thus, counsel's comments did not amount to an improper golden rule argument under *Lioce* and *Gunderson*, meaning that a new trial due to attorney misconduct is unwarranted.[12] *Lioce*, 124 Nev. at 20, 174 P.3d at 982; *see* NRCP 59(a)(2).

Exclusion of medical lien evidence

Appellant contends a new trial is warranted because the district court abused its discretion by excluding evidence that respondents' treating doctors who testified at trial had obtained medical liens. *FCH1*, 130 Nev. 431-32, 335 P.3d at 188 (reviewing a district court's decision to admit or exclude evidence for an abuse of discre-

[11]Beyond asserting that counsel's comments amounted to a golden rule argument, appellant has not argued that counsel's comments amounted to misconduct under Nevada law for any other reason. We therefore confine our analysis to the issue presented.

[12]We also agree with the district court's conclusion that counsel's conduct during opening statements does not warrant a new trial. *See Lioce*, 124 Nev. at 17, 174 P.3d at 981 (setting forth the standard for objected-to and admonished misconduct). Additionally, appellant contends that respondents' counsel committed misconduct by (1) disparaging Dr. Duke, (2) referring to insurance, and (3) disparaging appellant's case. Having considered the cited-to portions of the record where these alleged instances of misconduct occurred, we are not persuaded that respondents' counsel engaged in misconduct. *Lioce*, 124 Nev. at 20, 174 P.3d at 982.

tion).[13] According to appellant, this evidence would have been relevant to show that respondents' treating doctors were biased, in that a large verdict would increase the likelihood they would be paid for their services. While appellant is correct that evidence of medical liens may be relevant to show bias depending upon the terms of the medical lien, this court recently recognized in *Khoury v. Seastrand*, 132 Nev. 520, 539, 377 P.3d 81, 94 (2016), that the degree of relevance is "limited," particularly when the medical liens indicate the plaintiff will still be responsible for his or her medical bills if he or she does not obtain a favorable judgment. Here, and despite not having the benefit of the subsequently issued *Khoury* decision, the district court determined the liens would be of limited relevance for the same reason put forth in *Khoury*. Additionally, the district court believed that introduction of medical liens would not simply show that respondents' treating doctors were biased, but that they "would have a motivation to lie." Thus, the district court excluded evidence of the medical liens based on the court's belief that the limited probative value of the liens would be substantially outweighed by the unfairly prejudicial effect of coloring respondents' doctors as liars. *See* NRS 48.035(1).

While we recognize that the district court's distinction between "bias" and "motivation to lie" is nuanced, appellant has not addressed on appeal whether the district court erred in drawing that distinction. Thus, in light of the medical liens' limited relevance and appellant's failure to address the district court's basis for determining the liens would be unfairly prejudicial, we are not persuaded that the district court necessarily abused its discretion in excluding that evidence, particularly when the district court did not have the benefit of this court's *Khoury* opinion at the time it made its decision. *FCH1*, 130 Nev. at 431-32, 335 P.3d at 188. Accordingly, this alleged error does not warrant a new trial. NRCP 59(a)(1).

CONCLUSION

We clarify that this court's opinion in *FCH1, LLC v. Rodriguez*, 130 Nev. 425, 335 P.3d 183 (2014), does not absolve a party of his

[13]Appellant also contends the district court improperly (1) excluded evidence of a surveillance video, and (2) prohibited Dr. Duke from opining that respondents had secondary gain motivations. The district court excluded the surveillance video after determining appellant should have disclosed the video in compliance with an initial disclosure deadline, not an extended deadline. The district court prohibited Dr. Duke from opining regarding secondary gain motivations after finding he was not qualified to provide such an expert opinion. Appellant has not addressed the district court's stated bases for excluding this evidence, and we conclude that the district court was otherwise within its discretion in excluding the evidence. *FCH1*, 130 Nev. at 431-32, 335 P.3d at 188; *cf.* NRCP 16.1(e)(3)(B) (permitting exclusion of evidence not produced in compliance with disclosure deadlines); *Hallmark v. Eldridge*, 124 Nev. 492, 498-99, 189 P.3d 646, 650-51 (2008) (requiring an expert witness to be qualified to provide his or her opinion).

or her affirmative obligation under NRCP 16.1(a)(1)(C) to provide a computation of future medical damages that are to be sought at trial. Because respondents failed to provide appellant with a computation of their future medical damages, the district court erred in permitting respondents to introduce evidence in support of those damages. But because appellant has not shown that she was unable to contest the reasonableness of the amounts requested, we conclude that appellant's substantial rights were not materially affected so as to warrant a new trial. Because appellant's remaining arguments also do not warrant a new trial, we affirm the district court's judgment on the jury verdict.

IN THE MATTER OF THE PARENTAL RIGHTS AS TO R.T., K.G.-T., N.H.-T. AND E.H.-T., MINOR CHILDREN.

JACQUELINE G., APPELLANT, *v.* WASHOE COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT.

No. 70210

June 29, 2017 396 P.3d 802

Appeal from a district court order terminating appellant's parental rights. Second Judicial District Court, Family Court Division, Washoe County; Egan K. Walker, Judge.

Affirmed.

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

Christopher J. Hicks, District Attorney, and *Tyler M. Elcano*, Deputy District Attorney, Washoe County, for Respondent.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

In this case, we are asked to determine whether one's parental rights may be terminated due to poverty and, if not, whether the district court's termination order was improperly based on the appellant's poverty. We take this opportunity to clarify that poverty is not, and has never been, a valid basis for terminating one's parental rights. Additionally, we hold the district court's termination order was not predicated on the appellant's poverty and is supported by substantial evidence. Therefore, we affirm the district court's order.

FACTS AND PROCEDURAL HISTORY

Appellant Jacqueline G. is a 26-year-old mother of four children: R.T., K.G.-T., N.H.-T., and E.H.-T. From October 2012 to April 2013, respondent Washoe County Department of Social Services (WCDSS) received several reports indicating Jacqueline did not have adequate housing for her children. WCDSS discovered that Jacqueline had changed residences several times, had been evicted from her most recent residence, and had exhausted all local resources for housing. As a result, R.T., K.G.-T., and N.H.-T. were removed from Jacqueline's custody in April 2013 and placed with a foster parent.

Jacqueline received a case plan, which required her to: (1) obtain and maintain housing; (2) obtain and maintain a stable income, either through welfare or employment; and (3) demonstrate that she could care for her children's basic needs (e.g., keep the home clean, pay her bills on time, and get the children to appointments and school on time). Jacqueline's case was also placed in a program that allowed her to receive assistance from the Children's Cabinet, a nonprofit agency that provides services to families in need.

On January 1, 2014, E.H.-T. was born. Shortly thereafter, Jacqueline was evicted from her apartment, and she eventually moved into a trailer with the father of her children. During this time, WCDSS received a report indicating Jacqueline's residence was not safe for the child. An assessment worker visited the residence and observed a broken window, a broken glass door, a broken refrigerator, a knife on the counter, dirty dishes, and some trash and piles of clothes throughout the living room. However, E.H.-T. was not yet mobile, and the room where E.H.-T. slept was relatively clean and free of clutter. Therefore, E.H.-T. was not removed from Jacqueline's custody.

Following a domestic dispute, Jacqueline moved out of the trailer. Eventually, Jacqueline moved into a motel room, and an assessment worker scheduled a time to visit Jacqueline at the residence. The assessment worker observed significant clutter, animal feces and urine, and dirty diapers throughout the room. The assessment worker concluded that the environment posed a safety risk to E.H.-T. because E.H.-T. was now mobile. As a result, E.H.-T. was subsequently removed from Jacqueline's custody and placed with the foster parent. Jacqueline received another case plan, which was similar to her first case plan. In addition, Jacqueline was asked to participate in therapy and to undergo a psychosocial evaluation to ensure her purported depression and anxiety did not interfere with her ability to reunite with her children.

From October 2012 to July 2015, Jacqueline had resided in approximately 15 different shelters, apartments, and motels. Meanwhile, WCDSS and the Children's Cabinet provided Jacqueline

with several services to help her find affordable housing, including referrals and assistance with the Reno Housing Authority, Section 8 housing, victim assistance programs, and low-income energy assistance programs. In addition, WCDSS and the Children's Cabinet helped Jacqueline find employment opportunities and apply for jobs. Nonetheless, Jacqueline quit, or was terminated from, almost every job she held within a month's time. WCDSS also referred Jacqueline to several mental health professionals for evaluations and counseling. Many of these individuals testified that therapy would have helped treat Jacqueline's anxiety and depression. Although Jacqueline was referred to at least three separate therapists, services were discharged with each therapist after Jacqueline failed to attend appointments.

Ultimately, WCDSS concluded that Jacqueline had made minimal progress on her case plan goals. On July 17, 2015, WCDSS filed an amended petition to terminate Jacqueline's parental rights. A six-day bench trial was held, in which 21 witnesses testified, including Jacqueline, several social workers, and several mental health professionals. After the trial, the district court issued an order terminating Jacqueline's parental rights with respect to all four children. Specifically, the district court held: (1) Jacqueline failed to overcome NRS 128.109's presumptions with respect to R.T., K.G.-T., and N.H.-T.;[1] (2) Jacqueline demonstrated only token efforts to care for her children under NRS 128.105(1)(b)(6); and (3) the best interests of the children were served by termination. The district court specifically rejected Jacqueline's argument that poverty caused her failure to reunify with the children. Jacqueline now appeals the district court's order.

DISCUSSION

On appeal, Jacqueline argues that the district court terminated her parental rights due to her poverty, and that poverty is not a valid basis for terminating one's parental rights.[2] In response, WCDSS

[1]NRS 128.109 imposes a presumption that a parent has demonstrated only token efforts to care for his or her children and that the best interests of the children are served by termination if the children have resided outside of their home for 14 months of any 20 consecutive months. NRS 128.109(1)(a), (2).

[2]Jacqueline also argues that the district court erred in terminating her parental rights because it did not find "serious harm" to any of her children. We reject this argument. We have never held that a district court must find "serious harm" to the children before terminating one's parental rights. Furthermore, although a finding of parental fault may be based on a "[r]isk of serious physical, mental or emotional injury to the child if the child were returned to, or remains in, the home of his or her parent," NRS 128.105(1)(b)(5), this specific form of parental fault need not be found in every termination case. *See* NRS 128.105(1)(b) (requiring the court to find at least one ground of parental fault). We also note that NRS 128.105 was amended in 2015, and that those amendments do not alter this court's disposition. 2015 Nev. Stat., ch. 250, § 3, at 1184-85.

argues that the district court did not terminate Jacqueline's parental rights due to poverty, but due to her continued failure to comply with her case plan goals despite having the ability to do so.

We take this opportunity to clarify that poverty is not, and has never been, a valid basis for terminating one's parental rights. Generally, "[a] party petitioning to terminate parental rights must establish by clear and convincing evidence that (1) termination is in the child's best interest, and (2) parental fault exists." *In re Parental Rights as to A.L.*, 130 Nev. 914, 918, 337 P.3d 758, 761 (2014) (internal quotation marks omitted); *see also* NRS 128.105. In determining whether parental fault exists, the district court must find at least one of the following factors: "abandonment of the child; neglect of the child; unfitness of the parent; failure of parental adjustment; risk of injury to the child if returned to, or if left remaining in, the home of the parents; and finally, only token efforts by the parents." *In re Termination of Parental Rights as to N.J.*, 116 Nev. 790, 801, 8 P.3d 126, 133 (2000); *see also* NRS 128.105(1)(b)(1)-(6).

Under Nevada law, a district court may not find parental fault if one's failure to care for his or her children is the result of a financial inability to do so. *See* NRS 128.106(1) ("In determining neglect by or unfitness of a parent, the court shall consider, without limitation, the following conditions which may diminish suitability as a parent . . . (e) [r]epeated or continuous failure by the parent, *although physically and financially able*, to provide the child with adequate food, clothing, shelter, education or other care . . . ." (emphasis added)); *see also* NRS 128.013(1)(c) (defining "injury" to a child's health or welfare as the failure to provide the child "proper or necessary subsistence, education or medical or surgical care, *although he or she is financially able to do so or has been offered financial or other reasonable means to do so*" (emphasis added)).

However, this principle does not prohibit the district court from considering a parent's failure to maintain housing or employment in contravention of a state-issued case plan. Indeed, we have previously affirmed termination orders in circumstances similar to the present matter. *See In re Parental Rights as to Daniels*, 114 Nev. 81, 83-85, 93-95, 953 P.2d 1, 2-3, 8-10 (1998); *Cooley v. Div. of Child & Family Servs.*, 113 Nev. 1191, 1192-99, 946 P.2d 155, 155-60 (1997); *In re Parental Rights as to Bow*, 113 Nev. 141, 143-51, 930 P.2d 1128, 1129-34 (1997).[3]

[3]We acknowledge that these cases have been overruled to the extent they relied on the jurisdictional/dispositional analysis announced in *Champagne v. Welfare Division of Nevada State Department of Human Resources*, 100 Nev. 640, 646-47, 691 P.2d 849, 854 (1984). *See In re Termination of Parental Rights as to N.J.*, 116 Nev. at 800 n.4, 8 P.3d at 132 n.4.

In each of these cases, (1) a parent received a case plan requiring him or her to, *inter alia*, maintain adequate housing and secure stable employment; (2) the district court terminated the parent's rights due, in large part, to the parent's failure to comply with the case plan despite reasonable efforts by the child welfare agency to facilitate reunification; and (3) Justice Charles Springer expressed concern in his dissenting opinion that poverty was an underlying cause of the termination. *In re Parental Rights as to Daniels*, 114 Nev. at 95-98, 953 P.2d at 10-12 (SPRINGER, C.J., dissenting); *Cooley*, 113 Nev. at 1200-02, 946 P.2d at 160-62 (SPRINGER, J., dissenting); *In re Parental Rights as to Bow*, 113 Nev. at 153-55, 930 P.2d at 1135-37 (SPRINGER, J., dissenting). In addressing Justice Springer's concerns, this court's majority emphasized "that immaturity, poverty, and disability, . . . [were] *not* factors for our decision[s]" in termination of parental rights cases. *Cooley*, 113 Nev. at 1199, 946 P.2d at 160.

We reaffirm *Cooley* and the associated caselaw to the extent those cases hold, implicitly or explicitly, that poverty is not a basis for terminating one's parental rights. Furthermore, we hold that substantial evidence supports the district court's finding that Jacqueline's failure to reunite with her children was not due to her poverty. *See In re Termination of Parental Rights as to N.J.*, 116 Nev. at 795, 8 P.3d at 129 (stating this court does not "substitute its own judgment for that of the district court" and "will uphold termination orders based on substantial evidence").

In this matter, Jacqueline had over two years to comply with her case plan goals before WCDSS filed its amended petition to terminate her parental rights. In addition, the parties do not dispute that WCDSS and the Children's Cabinet provided Jacqueline with several resources to help her reunite with her children. *See In re Parental Rights as to Bow*, 113 Nev. at 151, 930 P.2d at 1135 (SHEARING, J., concurring) ("It is true that [the appellant] was poor at the time of termination, but it appears she squandered several opportunities given to her to escape poverty."). Unfortunately, not only did Jacqueline fail to make progress towards her case plan goals, she declined to take advantage of the resources made available to her to help her accomplish these goals. This includes Jacqueline's failure to: (1) find an apartment after receiving a Section 8 housing voucher from the Reno Housing Authority, (2) apply for Victims of Crime Act funds, or (3) submit the documentation for low-income energy assistance.

In addition, the record supports the district court's conclusion that Jacqueline failed to stay employed for any significant period of time, and that Jacqueline voluntarily left several jobs. To the extent Jacqueline struggled to maintain employment due to her anxiety, WCDSS referred Jacqueline to several mental health profession-

als for treatment. However, Jacqueline invariably failed to follow through with therapy.[4] Given the amount of time Jacqueline had to comply with her case plans and the services WCDSS provided to Jacqueline,[5] we hold there is substantial evidence to support the district court's conclusion that Jacqueline's failure to reunite with her children was not the result of poverty and that she made only token efforts toward reunification.[6] Accordingly, we affirm the district court's order.

HARDESTY and STIGLICH, JJ., concur.

DR. VINCENT M. MALFITANO, AN INDIVIDUAL; VIRGINIA CITY GAMING, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND DELTA SALOON, INC., A NEVADA CORPORATION, APPELLANTS, *v.* COUNTY OF STOREY, ACTING BY AND THROUGH THE STOREY COUNTY BOARD OF COUNTY COMMISSIONERS; AND STOREY COUNTY LIQUOR BOARD, RESPONDENTS.

No. 70055

June 29, 2017 396 P.3d 815

Appeal from a district court order denying a petition for a writ of mandamus that challenged liquor- and business-licensing decisions. First Judicial District Court, Storey County; James E. Wilson, Judge.

Affirmed.

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[4]As such, we hold the district court's finding that Jacqueline failed to address her emotional and mental illnesses is supported by substantial evidence. We also note that Nevada law requires the district court to consider a parent's emotional and mental illnesses when evaluating a parent for neglect or unfitness. *See* NRS 128.106(1)(a) (stating "the court shall consider . . . . [e]motional illness, mental illness or mental deficiency of the parent which renders the parent consistently unable to care for the immediate and continuing physical or psychological needs of the child for extended periods of time").

[5]WCDSS also provided Jacqueline with several other services, such as: (1) the provision of funds for a temporary hotel room; (2) the provision of diapers, donated furniture, cleaning supplies, a vacuum, a baby play yard, a day planner, and bus passes; (3) referrals to charities for food, clothing, and diapers; (4) generating a list of job openings in the community and helping her create a resumé and apply for jobs; and (5) education and assistance regarding proper etiquette, hygiene, and appearance for interviews, including the provision of a gift card to purchase appropriate clothes.

[6]Jacqueline principally argues that the district court's finding of parental fault was improperly based upon her poverty. However, to the extent Jacqueline suggests that the best interests of the children were not served by termination, we hold that the district court's finding to the contrary is supported by substantial evidence. *See In re Termination of Parental Rights as to N.J.*, 116 Nev. at 795, 8 P.3d at 129.

Holland & Hart LLP and *Matthew B. Hippler, Scott Scherer*, and *Brandon C. Sendall*, Reno, for Appellants.

Anne Langer, District Attorney, and *Keith Loomis*, Deputy District Attorney, Storey County, for Respondents.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

Storey County Code (SCC) § 5.12.010(A) requires an applicant for a liquor license to "provide the county liquor license board with . . . [p]roof of financial standing to warrant an expected satisfactory and profitable business operation." In this appeal, we must determine whether the term "satisfactory" is vague, thereby rendering SCC § 5.12.010(A) unconstitutional. In addition, we must determine whether appellant Vincent Malfitano's due process or equal protection rights were violated when respondent Storey County Liquor Board (the Liquor Board) denied his applications for liquor licenses. We answer these questions in the negative; therefore, we affirm the district court's order.

FACTS AND PROCEDURAL HISTORY

Appellant Vincent Malfitano purchased two saloon casinos located in Virginia City: the Delta Saloon and the Bonanza Saloon. At the time of purchase, Malfitano did not have the requisite licenses to operate these properties. Therefore, Malfitano authorized a properly licensed third-party entity to run the properties while he applied for gaming, liquor, and general business licenses.

Malfitano first applied for gaming licenses with the Nevada Gaming Commission (NGC). The Nevada Gaming Control Board (NGCB) held a hearing on the matter, after which it issued an order recommending that the NGC deny Malfitano's applications. In particular, the NGCB stated that Malfitano (1) failed to demonstrate "adequate business competence"; (2) failed "to disclose a significant number of important items," including "lawsuits, foreclosures, business interests, delinquent tax payments, tax liens, and default notices"; and (3) had significant employment-related issues with his assisted-living business and his prior dental practice. The NGCB also stated that Malfitano appeared to have "significant cash flow problems." Ultimately, the NGC issued an order denying Malfitano's applications.

Malfitano also applied for business and liquor licenses with Storey County. Respondent Storey County Board of County Commis-

sioners (the Board of Commissioners) presides over general business license applications,[1] and the Liquor Board presides over liquor license applications.[2] At a hearing on September 1, 2015, respondents initially denied the applications because a license could not be issued to two different entities for the same property, and the third-party entity still held the relevant licenses. However, Chairman McBride stated that (1) if Malfitano severed relations with the third-party entity, "there would be no delay in obtaining the licenses," and his applications would "be approved soon after"; and (2) there was "no reason not to license Dr. Malfitano except for the fact that it would be a duplication." Notably, County Manager Pat Whitten clarified that Malfitano's applications would only be considered, not necessarily approved, once he obtained control of the properties.

Thereafter, Malfitano obtained temporary licenses from Sheriff Antinoro. Malfitano also reapplied for permanent licenses after the third-party entity vacated both properties. The Board of Commissioners and the Liquor Board considered Malfitano's second round of applications on October 6, 2015. Believing his applications would be granted as a matter of course, Malfitano did not attend the hearing.

Malfitano's liquor license applications were denied after three members of the Liquor Board concluded that he failed to demonstrate "[p]roof of financial standing to warrant an expected satisfactory and profitable business operation" as required under SCC § 5.12.010(A). In particular, the Liquor Board was concerned about Malfitano's financial stability due to the NGCB's findings.[3] With respect to the business license applications, the Board of Commissioners unanimously approved the Delta Saloon application and denied the Bonanza Saloon application. The latter was denied because the property did not have fire sprinklers installed, and the Storey County Fire Protection District Fire Chief stated the building was not safe.

Malfitano filed a petition for a writ of mandamus with the district court, requesting that the court reverse the respondents' decisions to deny his applications and to compel respondents to approve the applications. In his petition and subsequent pleadings, Malfitano argued that (1) respondents acted arbitrarily and capriciously in denying his license applications, (2) respondents violated his due process and equal protection rights in denying his license applications,

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[1]The Board of Commissioners consists of Chairman Marshall McBride, Vice-Chairman Lance Gilman, and Commissioner Jack McGuffey.

[2]The Liquor Board consists of the three members of the Board of Commissioners and Storey County Sheriff Gerald Antinoro.

[3]Although the NGCB's findings were not discussed at the September 1 hearing, it appears Chairman McBride was aware of the NGCB's order at that time.

and (3) SCC § 5.12.010(A) is unconstitutionally vague. The district court entered an order denying Malfitano's writ petition, from which Malfitano now appeals.

DISCUSSION

On appeal, Malfitano argues that SCC § 5.12.010(A) is unconstitutionally vague and that respondents violated his due process and equal protection rights in denying his license applications. We address these arguments in turn.

"Generally, we review a district court's decision regarding a petition for a writ of mandamus for an abuse of discretion." *Veil v. Bennett*, 131 Nev. 179, 180-81, 348 P.3d 684, 686 (2015). However, when an appeal of an order resolving a writ petition involves questions of law, such as the constitutionality of a statute, this court will review the district court's decision de novo. *See id.*; *Wyeth v. Rowatt*, 126 Nev. 446, 460, 244 P.3d 765, 775 (2010) (explaining that questions of law are reviewed de novo); *see also Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 796, 358 P.3d 234, 237 (2015) (providing that constitutional issues are questions of law reviewed de novo).

SCC § 5.12.010(A) is not unconstitutionally vague

SCC § 5.12.010(A) states that an applicant for a liquor license "shall provide the county liquor license board with . . . [p]roof of financial standing to warrant an expected satisfactory and profitable business operation." Malfitano argues that SCC § 5.12.010(A) is unconstitutionally vague because the term "satisfactory" is subjective, and it is unclear from the ordinance what the Liquor Board may find "satisfactory." Respondents argue that liquor boards have wide discretion in reviewing applications for liquor licenses and that the term "satisfactory" is not so vague as to impart unbridled discretion to the Liquor Board.

We examined the void-for-vagueness doctrine in *Carrigan v. Commission on Ethics*, wherein we explained:

> The void-for-vagueness doctrine is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments. *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 553 (2010). A law may be struck down as impermissibly vague for either of two independent reasons: "(1) if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited'; or (2) if it 'is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Id.* at 481-82, 245 P.3d at 553 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010)). "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the

> nature of the enactment." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Civil laws are held to a less strict vagueness standard than criminal laws "because the consequences of imprecision are qualitatively less severe." *Id.* at 498-99.

129 Nev. 894, 899, 313 P.3d 880, 884 (2013); *see also* Nev. Const. art. 1, § 8(5); *cf. Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006) ("[T]he second prong is more important because absent adequate guidelines, a criminal statute may permit a standardless sweep, which would allow the police, prosecutors, and juries to pursue their personal predilections." (internal quotation marks omitted)).

Malfitano relies principally on *McCormack v. Herzog* for the proposition that the term "satisfactory" is unconstitutionally vague. 788 F.3d 1017 (9th Cir. 2015). The Idaho statute considered in *McCormack* required abortions to take place in a hospital, physician's office, or clinic that was "*properly* staffed" and where the physicians had "made *satisfactory* arrangements with one or more acute care hospitals" in case of an emergency. *Id.* at 1030. Persons who performed abortions in violation of this law were subject to civil and criminal penalties. *Id.*

The Ninth Circuit recognized in *McCormack* that the terms "properly" and "satisfactory" were not defined by statute and that they "subject[ed] physicians to sanctions based not on their own objective behavior, but on the subjective viewpoints of others." *Id.* at 1031 (internal quotation marks omitted). Therefore, the Ninth Circuit held that the statute was unconstitutionally vague because the statute "could well impose criminal liability on activity that offends some people's sense of what is properly staffed and equipped or what arrangements are satisfactory, but may appear to others as more than adequate." *Id.* at 1032 (internal quotation marks omitted).

Although we agree with Malfitano and the Ninth Circuit that the term "satisfactory" is subjective, *McCormack* does not dispose of this matter for two reasons. First, unlike in *McCormack*, there is no criminal or civil penalty for failing to comply with SCC § 5.12.010(A); rather, one's application for a liquor license may simply be denied. Therefore, the United States and Nevada Constitutions necessarily tolerate a degree of vagueness in this context not otherwise permissible in the criminal context. *See Carrigan*, 129 Nev. at 899, 313 P.3d at 884.

Second, it is generally recognized that a licensing board has broad discretion in granting or refusing permits "where discretion relates to matters within the police regulation and where broad administrative discretion is necessary to protect the public health, safety, morals or general welfare." 9 Eugene McQuillin, *The Law of Mun. Corps.* § 26:85 (3d ed. rev. 2016). Accordingly, we have previously

stated that such ordinances need not prescribe detailed standards. *See Mills v. City of Henderson*, 95 Nev. 550, 552, 598 P.2d 635, 636 (1979) ("When . . . the activity to be licensed . . . is the proper and necessary subject of police surveillance and regulation, we think the grant of discretionary power to license need not be restricted by specific standards."); *see also State ex rel. Grimes v. Bd. of Comm'rs of Las Vegas*, 53 Nev. 364, 372, 1 P.2d 570, 572 (1931) ("[F]or the carrying on of a business of a character regarded as tending to be injurious, such as dealing in intoxicating liquor, a wide discretion may be given to licensing officers to grant or withhold a license *without prescribing definite and uniform rules of action*." (emphasis added)).

As applied to the ordinance before us, this precedent and the ordinance's nature vitiate Malfitano's arguments. SCC § 5.12.010(A) requires an applicant to demonstrate that they have the financial ability to run "an expected satisfactory and profitable business operation." The term "satisfactory" is commonly understood to mean "adequate." *See Satisfactory*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007). Although the Liquor Board must exercise its discretion in determining whether an applicant has met this requirement, *see Grimes*, 53 Nev. at 373-75, 1 P.2d at 572-73, this discretion is permitted by the nature of the ordinance and tempered by due process. That is, because neither criminal nor civil penalties are at stake and the activity to be regulated is deemed hazardous to the public welfare, a greater degree of discretion is allowed.

Furthermore, the Liquor Board's discretion is cabined by the ordinance itself; the Liquor Board may examine whether the applicant's financial standing "warrant(s) an expected satisfactory and profitable business operation," the existence and extent of the applicant's criminal record, and the applicant's experience in the liquor business. SCC § 5.12.010; *see* McQuillin, *supra*, § 26:82. The Liquor Board's discretion is also limited by the requirement that its decision be based on objective facts—its decision cannot be arbitrary; but the mere possibility that the Liquor Board might abuse its discretion is not sufficient to render the ordinance unconstitutional. *See Moyant v. Borough of Paramus*, 154 A.2d 9, 22 (N.J. 1959); McQuillin, *supra*, § 26:82. Accordingly, we hold that the term "satisfactory" in SCC § 5.12.010(A) does not authorize or encourage discriminatory enforcement and is not unconstitutionally vague. *See Moyant*, 154 A.2d at 22-23 (holding that the use of the standard "satisfactory" in an ordinance regarding the issuance of solicitor licenses was legally sufficient).

The Liquor Board did not violate Malfitano's due process rights in denying his license applications

Malfitano argues that the Liquor Board violated his due process rights when it denied his liquor license applications. The Liquor

Board contends that Malfitano does not have a cognizable property interest in permanent liquor licenses, and thus, the denials do not implicate his due process rights.

The Due Process Clauses of the United States and Nevada Constitutions prohibit the State from depriving any person "of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; Nev. Const. art. 1, § 8(5). There are two steps to analyzing a procedural due process claim: first, it must be determined "whether there exists a liberty or property interest which has been interfered with by the State, . . . [and second] whether the procedures attendant upon that deprivation were constitutionally sufficient." *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989).

The United States Supreme Court has stated that cognizable property interests "are not created by the Constitution," but "[r]ather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*

Malfitano argues that he had a legitimate claim of entitlement to permanent liquor licenses because (1) he held temporary liquor licenses, (2) the Liquor Board had promised him that his applications would be approved, and (3) the Liquor Board had a history of leniently granting applications. He also argues that *Burgess v. Storey County Board of Commissioners*, 116 Nev. 121, 992 P.2d 856 (2000), requires resolving this matter in his favor. We disagree.

First, a temporary liquor license is a privilege created and defined by the Storey County Code. Specifically, the Code states that "[a] temporary liquor license may be issued for the purpose of continuing an existing business *during the period in which a liquor license application has been made, and prior to its approval or disapproval*." SCC § 5.12.130 (emphasis added). The Code does not require the Liquor Board to grant a temporary license holder's application for a permanent license; rather, the Code explicitly recognizes that such applications may be denied. Therefore, Malfitano's temporary licenses do not, in themselves, grant him a legitimate claim of entitlement to permanent liquor licenses. *Cf. Groten v. California*, 251 F.3d 844, 850 (9th Cir. 2001) (holding that the appellant had a legitimate claim of entitlement to a license if he satisfied three prerequisites because a federal statute *required* states to issue a license under such circumstances).

Second, we hold that the district court did not abuse its discretion in concluding Malfitano did not have an agreement with the Liquor Board that his applications would be granted. There is no evidence that Chairman McBride's statements were made on behalf of the other members of the Liquor Board. More importantly, County Manager Whitten corrected Chairman McBride's statements and clarified that Malfitano's applications would only be considered, not necessarily approved, once he took control of the properties.[4] Therefore, even if Malfitano sincerely believed he was entitled to the licenses, this belief was not mutually held by the Liquor Board. *See Gerhart v. Lake Cty.*, 637 F.3d 1013, 1020 (9th Cir. 2011) (holding that the appellant did not have a protected property interest in a permit because he "did not have an ongoing or informal agreement with the County," and he had "not alleged a mutual understanding with the Commissioners").

Third, the United States Supreme Court has stated that "[a] constitutional entitlement cannot be created—as if by estoppel—merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past." *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981) (internal quotation marks omitted); *see also Gerhart*, 637 F.3d at 1021 ("[A] government body's past practice of granting a government benefit is insufficient to establish a legal entitlement to the benefit."); *see also Cty. of Clark v. Atl. Seafoods, Inc.*, 96 Nev. 608, 610, 615 P.2d 233, 234 (1980) (stating that a county liquor board enjoys wide discretion in reviewing applications for licenses). Thus, even assuming the Liquor Board has leniently issued liquor licenses in the past, this does not entitle Malfitano to a permanent liquor license.

Finally, *Burgess* does not favor Malfitano either. In *Burgess*, the Storey County Licensing Board revoked the appellant's brothel license because of his association with the Hell's Angels. 116 Nev. at 122-23, 992 P.2d at 857-58. This court held that the revocation violated the appellant's due process rights because "the Board failed to provide [him] with proper notice of what was to be discussed at the license revocation hearing." *Id.* at 125, 992 P.2d at 858-59. Following this rationale, Malfitano argues that he did not have notice that the NGCB's findings would be discussed at the October 6 hearing in violation of his due process rights.

"The protections of due process attach only to deprivations of property or liberty interests." *Id.* at 124, 992 P.2d at 858 (internal quotation marks omitted). In *Burgess*, this court initially determined that the appellant had a property interest in the brothel license. *See*

[4]Video of the hearing indicates Chairman McBride agreed with County Manager Whitten's correction.

id. at 124-25, 992 P.2d at 858. In particular, the appellant had possessed the brothel license for 15 years, and the Storey County Code stated that the license could be revoked only after a hearing and good cause shown. *See id.* at 122-24, 992 P.2d at 857-58.

Here, the Liquor Board did not revoke existing licenses, nor, as discussed above, has Malfitano demonstrated a legitimate claim of entitlement to the licenses at issue. Therefore, Malfitano had no property interest to which the due process notice requirements could apply, and *Burgess* does not support his argument. Accordingly, we hold that the district court did not abuse its discretion when it concluded that Malfitano's due process rights were not violated.[5]

The Liquor Board did not violate Malfitano's equal protection rights in denying his license applications

Finally, Malfitano argues that the Liquor Board violated his equal protection rights because his applications were held to a higher standard than that of previous applicants and that the Liquor Board denied his applications due to animus towards him. Respondents argue that the Liquor Board had more information available to it when considering Malfitano's applications because he had recently been denied a gaming license and that the Liquor Board could consider the NGCB's findings.

"The right[ ] to equal protection . . . [is] guaranteed by the Fourteenth Amendment of the United States Constitution and . . . Article 4, Section 21 of the Nevada Constitution." *Rico v. Rodriguez*, 121 Nev. 695, 702-03, 120 P.3d 812, 817 (2005). The United States Supreme Court has held that an equal protection claim may be brought by a "class of one" if the appellant can demonstrate that he or "she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

Assuming for the sake of argument that Malfitano was treated differently than other applicants, we hold that the district court did not abuse its discretion in concluding the Liquor Board had a rational basis for doing so. In particular, the Liquor Board was aware that Malfitano had recently been denied a gaming license because he (1) failed "to disclose a significant number of important items," including "lawsuits, foreclosures, business interests, delinquent

[5]Malfitano also argues that the district court abused its discretion in concluding that his due process rights were not violated by the Board of Commissioners' decision to deny one of his business license applications. However, Malfitano does not articulate how he has a legitimate claim of entitlement to a business license. Therefore, we reject this argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that this court need not consider claims that are not cogently argued or supported by relevant authority).

tax payments, tax liens, and default notices"; (2) had significant employment-related issues with his assisted-living business and his prior dental practice; and (3) appeared to have "significant cash flow problems." These concerns directly relate to Malfitano's financial standing under SCC § 5.12.010(A), and therefore, the Liquor Board had a rational basis for distinguishing Malfitano's application from those of previous applicants.[6]

CONCLUSION

We hold that the term "satisfactory" does not render SCC § 5.12.010(A) unconstitutionally vague. In addition, we hold that the district court did not abuse its discretion when it concluded that Malfitano's due process and equal protection rights were not violated by the denial of his license applications. Accordingly, we affirm the district court's order.

HARDESTY and STIGLICH, JJ., concur.

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[6]We also reject Malfitano's argument that the Liquor Board's decision to deny his applications was guided by animus. Each member that voted to deny Malfitano's liquor license applications stated that they denied the applications because of concerns regarding Malfitano's financial standing. Nothing in the record indicates that any member of the Liquor Board harbored a personal animus towards Malfitano.

Malfitano has not argued that the Board of Commissioners' denial of one of his business license applications violated his equal protection rights.