AEROGROW INTERNATIONAL, INC., PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE, RESPONDENTS, AND BRADLEY LOUIS RADOFF; FRED M. ADAMCYZK; THOMAS C. ALBANESE; WILLIAM A. ALMOND, III; MICHAEL S. BARISH; GEORGE C. BETKE, JR. 2019 TRUST; DIANA BOYD; ANNE CAROL DECKER; THOMAS H. DECKER; THE DEUTSCH FAMILY TRUST; JOHN C. FISCHER; ALFREDO GOMEZ; ALFREDO GOMEZ FMT CO CUST IRA ROLLOVER; LAWRENCE GREENBERG; PATRICIA GREENBERG; KAREN HARDING; H.L. SEVERANCE, INC. PROFIT SHARING PLAN & TRUST; H.L. SEVERANCE, INC. PENSION PLAN & TRUST; DANIEL G. HOFSTEIN; KEVIN JOHNSON; CANDACE KAYE; LAURA J. KOBY; CAROLE L. McLAUGHLIN; BRIAN PEIERLS; JOSEPH E. PETER; ALEXANDER PERELBERG; AMY PERELBERG; DANA PERELBERG; GARY PERELBERG; LINDA PERELBERG; THE REALLY COOL GROUP; RICHARD ALAN RUDY REVOCABLE LIVING TRUST; JAMES D. RICKMAN, JR.; JAMES D. RICKMAN, JR. IRREVOCABLE TRUST; PATRICIA D. RICKMAN IRREVOCABLE TRUST; ANDREW REESE RICKMAN TRUST; SCOTT JOSEPH RICKMAN IRREVOCABLE TRUST; MARLON DEAN ALESSANDRA TRUST; BRYAN ROBSON; WAYNE SICZ IRA; WAYNE SICZ ROTH IRA; THE CAROL W. SMITH REVOCABLE TRUST; THOMAS K. SMITH; SURAJ VASANTH; CATHAY C. WANG; LISA DAWN WANG; DARCY J. WEISSENBORN; THE MARGARET S. WEISSENBORN REVOCABLE TRUST; THE STANTON F. WEISSENBORN IRA; THE STANTON F. WEISSENBORN REVOCABLE TRUST; THE STANTON F. WEISSENBORN IRREVOCABLE TRUST; THE NATALIE WOLMAN LIVING TRUST; ALAN BUDD ZUCKERMAN; JACK WALKER; STEPHEN KAYE; THE MICHAEL S. BARISH IRA; AND THE ALEXANDER PERELBERG IRA, REAL PARTIES IN INTEREST.

No. 82895

December 9, 2021 499 P.3d 1193

Original petition for a writ of mandamus challenging a district court order directing compliance with Nevada's Dissenter's Rights Statutes.

Petition granted.

[Rehearing denied March 15, 2022]

[En banc reconsideration denied May 13, 2022]

Brownstein Hyatt Farber Schreck, LLP, and *Kirk B. Lenhard, Maximilien D. Fetaz*, and *Travis F. Chance*, Las Vegas; *Jones Day* and *Ashley F. Heintz*, Atlanta, Georgia; *Jones Day* and *Marjorie P. Duffy*, Columbus, Ohio, for Petitioner.

Marquis Aurbach Coffing and *Alexander K. Calaway* and *Terry A. Coffing*, Las Vegas, for Real Party in Interest Bradley Louis Radoff.

Simons Hall Johnston PC and *Kendra J. Jepsen* and *J. Robert Smith*, Reno, for Real Parties in Interest Fred M. Adamcyzk; Thomas C. Albanese; William A. Almond, III; Michael S. Barish; George C. Betke, Jr. 2019 Trust; Diana Boyd; Anne Carol Decker; Thomas H. Decker; the Deutsch Family Trust; John C. Fischer; Alfredo Gomez; Alfredo Gomez FMT Co Cust IRA Rollover; Lawrence Greenberg; Patricia Greenberg; Karen Harding; H.L. Severance, Inc. Profit Sharing Plan & Trust; H.L. Severance, Inc. Pension Plan & Trust; Daniel G. Hofstein; Kevin Johnson; Candace Kaye; Laura J. Koby; Carole L. McLaughlin; Brian Peierls; Joseph E. Peter; Alexander Perelberg; Amy Perelberg; Dana Perelberg; Gary Perelberg; Linda Perelberg; the Really Cool Group; Richard Alan Rudy Revocable Living Trust; James D. Rickman, Jr.; James D. Rickman, Jr. Irrevocable Trust; Patricia D. Rickman Irrevocable Trust; Andrew Reese Rickman Trust; Scott Joseph Rickman Irrevocable Trust; Marlon Dean Alessandra Trust; Bryan Robson; Wayne Sicz IRA; Wayne Sicz Roth IRA; the Carol W. Smith Revocable Trust; Thomas K. Smith; Suraj Vasanth; Cathay C. Wang; Lisa Dawn Wang; Darcy J. Weissenborn; the Margaret S. Weissenborn Revocable Trust; the Stanton F. Weissenborn IRA, the Stanton F. Weissenborn Revocable Trust; the Stanton F. Weissenborn Irrevocable Trust; the Natalie Wolman Living Trust; Alan Budd Zuckerman; Jack Walker; Stephen Kaye; the Michael S. Barish IRA; and the Alexander Perelberg IRA.

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

OPINION

By the Court, Parraguirre, J.:

NRS 92A.300 through .500 are colloquially referred to as Nevada's "Dissenter's Rights Statutes." They provide the framework by which stockholders of a corporation may dissent from certain actions the corporation plans to undertake, such as when the corporation plans to merge with another corporation. As relevant here, NRS 92A.410, .420, .430, and .440 generally set forth a four-step process by which a stockholder who objects to a proposed merger

may seek the fair value of the stockholder's shares from the corporation if the stockholder believes the proposed price for those shares, as set forth in the corporation's proposed merger, is inadequate. In the event that a stockholder (the beneficial stockholder) owns his or her shares indirectly, such as through a brokerage firm (the stockholder of record),[1] a fifth statute, NRS 92A.400(2)(a), requires the beneficial stockholder to obtain the stockholder of record's consent before the beneficial stockholder may dissent from the merger.

At issue in this matter is when, in the four-step process, a beneficial stockholder must obtain the consent of the stockholder of record. The issue is governed by NRS 92A.400(2)(a), which provides that "[a] beneficial stockholder may assert dissenter's rights as to shares held on his or her behalf only if the beneficial stockholder . . . [s]ubmits to the subject corporation the written consent of the stockholder of record to the dissent *not later than the time the beneficial stockholder asserts dissenter's rights*." (Emphasis added.) As explained below, we conclude that NRS 92A.400(2)(a), when read in conjunction with the four-step process outlined in NRS 92A.410-.440, unambiguously requires a beneficial holder to obtain the record holder's consent at step two, which is before the vote on the merger is held. Consequently, the district court in the underlying litigation erred in concluding that the real party in interest stockholders (RPIs) did not need to obtain the stockholders of record's consents until step four and after the petitioner corporation's merger vote was held. We therefore issue a writ of mandamus directing the district court to vacate its order, wherein it: (1) waived RPIs' obligation to provide consents from their stockholders of record; (2) required petitioner to comply with the step-three notification process; and (3) permitted RPIs to exercise their step-four dissenter's rights.

STATUTORY OVERVIEW

For context, a brief description of the above-mentioned four-step process is warranted. Under step one, NRS 92A.410(1) requires the corporation to provide stockholders of record with notice of the meeting at which the merger vote will take place and to notify the stockholders of record that they "may be entitled to assert dissenter's rights." Under step two, NRS 92A.420(1) requires a stockholder who "wishes to assert dissenter's rights" to notify the corporation before the merger vote is taken that the stockholder "inten[ds] to demand payment for his or her shares if the proposed action is effectuated." At step three, and within ten days after the vote is taken and the merger has been approved, NRS 92A.430 requires

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[1]In the event of such an ownership arrangement, Nevada's Dissenter's Rights Statutes refer to the actual stockholder as the "[b]eneficial stockholder" and the brokerage firm as the "[s]tockholder of record." *See* NRS 92A.305 (defining "Beneficial stockholder"); NRS 92A.330 (defining "Stockholder of record").

the corporation to notify stockholders of record and "any beneficial stockholder who has previously asserted dissenter's rights" that the stockholder must demand payment for the stockholder's shares within a set amount of time. Finally, at step four, NRS 92A.440(1) provides additional procedures that a stockholder who has received the step-three notice "and who wishes to exercise dissenter's rights" must follow in order to demand payment for the stockholder's shares.

FACTS AND PROCEDURAL HISTORY

Nonparty SMG Growing Media, Inc. (SMG) owned approximately 80-percent of the common stock in petitioner AeroGrow International, Inc. (AeroGrow). SMG, in turn, is wholly owned by nonparty Scotts Miracle-Gro Company (Scotts). In 2020, Scotts and SMG decided to merge AeroGrow with SMG, by SMG buying the roughly 20-percent remaining shares of stock from AeroGrow's minority shareholders for $3 per share. In January 2021, AeroGrow notified its shareholders under NRS 92A.410's step one that a vote on the proposed merger agreement would take place in February 2021.

Before that vote took place, AeroGrow received dozens of notices from minority shareholders, including RPIs, indicating that under the second step set forth in NRS 92A.420, they intended to dissent from the merger and demand payment in excess of the proposed $3-per-share buyout price. Some of the notices AeroGrow received were accompanied by written consents from the stockholders of record, but the notices submitted by RPIs were not.

Thereafter, the shareholders voted to approve the merger between AeroGrow and SMG, and AeroGrow promptly tendered to RPIs their respective $3-per-share payments. AeroGrow then sent NRS 92A.430's step-three notices to the dissenting shareholders who had previously provided written consents, but because AeroGrow had given RPIs their $3-per-share payments, it did not send the step-three notices to RPIs.

Thereafter, RPIs filed lawsuits against AeroGrow and its directors. The suits, which were eventually consolidated, generally alleged that AeroGrow and its directors had breached their fiduciary duties in connection with the merger. Following the consolidation, RPIs filed an amended complaint that asserted a claim for declaratory relief alleging that AeroGrow violated the Dissenter's Rights Statutes. RPIs then filed a "Joint Motion to Compel/Determine Compliance with NRS Chapter 92A, or Alternatively, Injunctive Relief." In their motion, RPIs sought an order from the district court (1) declaring that AeroGrow violated the Dissenter's Rights Statutes by not sending RPIs the NRS 92A.430 step-three notices, (2) waiving RPIs' obligation to obtain consents from their stockholders of record, and (3) compelling AeroGrow to send RPIs the notices so that they could exercise their dissenter's rights under

NRS 92A.440's step four. AeroGrow opposed the motion, arguing generally that it did not violate the Dissenter's Rights Statutes because RPIs failed to provide consents from their stockholders of record at step two and that, consequently, AeroGrow did not need to send RPIs the step-three notices. The district court granted RPIs' motion in its entirety. In its order, the court (1) found that AeroGrow had violated the Dissenter's Rights Statutes by failing to provide RPIs with the step-three notices, (2) waived RPIs' obligation to obtain consents from their stockholders of record, and (3) compelled AeroGrow to provide RPIs with the step-three notices within ten days from entry of the order. In essence, the order enjoined AeroGrow from proceeding with NRS 92A.440's step-four demand-for-payment process until AeroGrow afforded RPIs the opportunity to participate in that process.

Shortly thereafter, AeroGrow filed the instant petition for a writ of mandamus. AeroGrow contemporaneously filed a motion to stay enforcement of the district court's order. This court granted AeroGrow's stay motion and directed RPIs to file an answer.

DISCUSSION

"This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously." *Scarbo v. Eighth Judicial Dist. Court*, 125 Nev. 118, 121, 206 P.3d 975, 977 (2009); *see* NRS 34.160. We have previously equated a "manifest abuse of discretion" with "[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011) (alteration in original) (quoting *Steward v. McDonald*, 958 S.W.2d 297, 300 (Ark. 1997)). Thus, while it is entirely within this court's discretion whether to entertain a writ petition, *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991), and while an appeal from a final judgment is generally an adequate legal remedy precluding writ relief, *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004), writ relief may nevertheless be warranted when there is "a clear error . . . that unless immediately corrected will wreak irreparable harm," *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 820, 407 P.3d 702, 706 (2017) (quoting *In re Linee Aeree Italiane* (*Alitalia*), 469 F.3d 638, 640 (7th Cir. 2006)).

We conclude that this standard is met here. Although AeroGrow may eventually be able to challenge RPIs' ability to participate in the dissenter's rights process in the context of a final judgment, allowing RPIs to participate in this protracted process if they are not authorized to do so would cause AeroGrow irreparable harm. Namely, AeroGrow observes (and RPIs do not dispute) that without

writ relief, AeroGrow will be required to "allow an additional 57 stockholders [i.e., RPIs], holding more than 1.7 million shares, to proceed through the dissenter's process," which is "more than double the total number of current dissenting shares." In other words, it may be impossible for AeroGrow to adequately complete the dissenter's rights process with the non-RPI dissenting shareholders, who followed the appropriate procedures, if RPIs are erroneously permitted to participate in the process. Accordingly, we elect to entertain AeroGrow's writ petition.

AeroGrow's petition presents an issue regarding the construction of NRS 92A.400-.440, which is an issue we review de novo. *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 40, 175 P.3d 906, 908 (2008) ("Even when raised in a writ petition, this court reviews questions of statutory interpretation de novo."). This court interprets statutes by their plain meaning unless there is ambiguity, the plain meaning would provide an absurd result, or the plain meaning "clearly was not intended." *Young v. Nev. Gaming Control Bd.*, 136 Nev. 584, 586, 473 P.3d 1034, 1036 (2020) (internal quotation marks omitted); *see also Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007) ("[W]hen a statute's language is plain and its meaning clear, the court will apply that plain language.").

As indicated, NRS 92A.400(2)(a) provides that "[a] beneficial stockholder may assert dissenter's rights as to shares held on his or her behalf only if the beneficial stockholder . . . [s]ubmits to the subject corporation the written consent of the stockholder of record to the dissent *not later than the time the beneficial stockholder asserts dissenter's rights*." (Emphasis added.) The issue here is *when* in the four-step process a beneficial stockholder "assert[s]" his or her dissenter's rights and, consequently, *when* the beneficial stockholder must obtain the consent of the stockholder of record to assert his or her dissenter's rights. AeroGrow contends that a beneficial stockholder "assert[s]" dissenter's rights at NRS 92A.420's step two. NRS 92A.420 provides, in relevant part, that

> [i]f a proposed corporate action creating dissenter's rights is submitted to a vote at a stockholders' meeting, *a stockholder who* ***wishes to assert*** *dissenter's rights* with respect to any class or series of shares . . . must deliver to the subject corporation, *before the vote is taken*, written notice of the stockholder's ***intent to demand payment*** for his or her shares if the proposed action is effectuated.

NRS 92A.420(1)(a) (emphases added). NRS 92A.420(3) further provides that "[a] stockholder who does not satisfy the requirements of . . . NRS 92A.400 [i.e., the statute requiring consent from the stockholder of record] is not entitled to payment for his or her shares under this chapter." In essence, AeroGrow contends that NRS 92A.420's reference to "assert[ing] dissenter's rights . . . before the

vote is taken" means that "assert[ion]" takes place at step two. And because RPIs failed to submit consents from the shareholders of record when they notified AeroGrow of their intent to dissent from the proposed merger, AeroGrow contends that RPIs necessarily failed to comply with NRS 92A.400(2)(a).

In contrast, RPIs contend that NRS 92A.420's references to "wishes to assert" and "intent to demand payment" necessarily mean that *actually* "assert[ing]" comes at a later point in time, i.e., at NRS 92A.440's step four when the dissenting stockholder actually demands payment. NRS 92A.440 provides, in relevant part, that

> [a] stockholder who receives a dissenter's notice pursuant to NRS 92A.430 [i.e., step three] *and who **wishes to exercise*** dissenter's rights must . . . [d]emand payment; . . . [c]ertify whether the stockholder or beneficial owner on whose behalf he or she is dissenting, as the case may be, acquired beneficial ownership of the shares before the date required to be set forth in the dissenter's notice for this certification; and . . . [d]eposit the stockholder's certificates, if any, in accordance with the terms of the notice.

NRS 92A.440(1) (emphasis added). In essence, RPIs contend that a stockholder "assert[s]" dissenter's rights when he or she "demand[s] payment" at step four.

Considering both interpretations, we agree with AeroGrow that a beneficial stockholder "assert[s]" his or her dissenter's rights at step two and that, consequently, the stockholder must submit his or her consent from the stockholder of record at that point. While RPIs' proffered construction is not wholly unreasonable, we are not persuaded by it, as it treats "assert" as being synonymous with "exercise," even though NRS 92A.400-.440 use those terms distinctly.[2] *See Labastida v. State*, 115 Nev. 298, 302-03, 986 P.2d 443, 446 (1999) (recognizing that a statute's use of two different terms "evinces the legislature's intent that different meanings apply to the two terms"). This distinction is most prevalent in NRS 92A.430's step three, which requires the corporation to "deliver a written dissenter's notice to . . . any beneficial stockholder *who has previously **asserted** dissenter's rights pursuant to NRS 92A.400*." (Emphasis added.) In other words, the Legislature expressly provided that at step three, a corporation must only send dissenter's notices to beneficial stockholders who have *already asserted* their dissenter's

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[2]We agree with RPIs that "wishes to assert," as it is used in NRS 92A.420, could connote actually "assert[ing]" at a later point in time. However, NRS 92A.440 also uses the term "wishes to" in outlining the actions to be taken by a stockholder who "wishes to exercise dissenter's rights." Because the Dissenter's Rights Statutes do not expressly set forth a subsequent point in time when a stockholder actually "exercise[s]" his or her dissenter's rights, RPIs' proffered construction of "wishes to" would render it impossible for a stockholder ever to "exercise" his or her dissenter's rights. Thus, the most sensible reading of "wishes to" connotes present, not future, action.

rights, which makes it impossible for a beneficial stockholder to *first assert* dissenter's rights at step four.[3]

Further reinforcing our conclusion that "assertion" occurs at step two is NRS 92A.420(3), which provides that "[a] stockholder who does not satisfy the requirements of . . . NRS 92A.400 [i.e., the statute requiring consent from the stockholder of record] is not entitled to payment for his or her shares under this chapter." If the Legislature had intended for the stockholder of record's consent to be obtained at NRS 92A.440's step four, it stands to reason that the Legislature would not have clarified in NRS 92A.420's step two that the failure to obtain such consent would preclude the stockholder from being paid for his or her shares.

Accordingly, we conclude that NRS 92A.400-.440 unambiguously provide that a beneficial stockholder "asserts" dissenter's rights at step two and that the stockholder must provide the consent from his or her stockholder of record at that point.[4] *Leven*, 123 Nev. at 403, 168 P.3d at 715 ("[W]hen a statute's language is plain and its meaning clear, the court will apply that plain language."). The district court therefore erred in construing the statutes as permitting RPIs to submit their consents after the merger vote was taken and in waiving RPIs' statutory obligation to obtain those consents. Accordingly, the district court's order constituted a manifest abuse of discretion, *Armstrong*, 127 Nev. at 932, 267 P.3d at 780, which, without immediate correction, will cause AeroGrow immediate harm, thereby entitling AeroGrow to extraordinary relief, *Archon Corp.*, 133 Nev. at 820, 407 P.3d at 706. We therefore grant the petition and direct the clerk of this court to issue a writ of mandamus directing the district court to vacate its May 5, 2021, Order Granting Plaintiff's and Plaintiff-Intervenors' Joint Motion to Compel/Determine Compliance with NRS 92A, and to proceed with the underlying litigation consistent with the above analysis.

Stiglich and Silver, JJ., concur.

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[3]RPIs contend that despite the Legislature's express distinction between "assert" and "exercise," we should construe NRS 92A.400-.440 consistently with the 1984 Model Business Corporation Act, which provides that a beneficial stockholder need not submit the stockholder of record's consent until step four. Model Bus. Corp. Act Ann. § 13.03 (Am. Bar Ass'n, amended 2016). We are not persuaded by this contention. *See* Norman Singer & Shambie Singer, *2B Sutherland Statutory Construction* § 52:5 (7th ed. 2016) (observing that "when a legislature models a statute after a uniform act, but does not adopt particular language, courts conclude the omission was 'deliberate,' or 'intentional' ").

[4]We are not persuaded by RPIs' arguments that this result is absurd or "clearly was not intended," *Young*, 136 Nev. at 586, 473 P.3d at 1036 (internal quotation marks omitted), such that we should ignore the statutes' plain meaning.

SOPHIA MONTANEZ, APPELLANT, *v.* SPARKS FAMILY HOSPITAL, INC., A DELAWARE CORPORATION, DBA NORTHERN NEVADA MEDICAL CENTER, RESPONDENT.

No. 81312

December 9, 2021 499 P.3d 1189

Appeal from a district court order dismissing a complaint in a medical malpractice action. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Affirmed.

[Rehearing denied January 10, 2022]

[En banc reconsideration denied February 2, 2022]

Bradley Paul Elley, Incline Village, for Appellant.

John H. Cotton & Associates, Ltd., and *John H. Cotton* and *Adam A. Schneider*, Las Vegas, for Respondent.

Before the Supreme Court, CADISH, PICKERING, and HERNDON, JJ.

OPINION

By the Court, HERNDON, J.:

NRS 41A.071 provides that "the district court shall dismiss" an action for professional negligence if the action is filed without the requisite affidavit from a medical expert. NRS 41A.100(1)(a), however, allows an exemption from the medical expert affidavit requirement when "[a] foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery." The district court concluded that NRS 41A.100(1)(a) is ambiguous as to whether a "foreign substance" includes bacteria, as appellant Sophia Montanez asserted in her complaint.

In this opinion, we clarify that NRS 41A.100(1)(a) is not ambiguous, and "foreign substance" as used within this statute does not include bacteria. Thus, we conclude that Montanez's medical malpractice claim was not exempt from the affidavit requirement, and her failure to include such an affidavit with her complaint rendered her medical malpractice claim void ab initio. We further conclude that Montanez's premises liability claim sounds in medical malpractice and was therefore also subject to the affidavit requirement and similarly void ab initio. We thus affirm the dismissal of the action.

FACTS AND PROCEDURAL HISTORY

In 2018, Sophia Montanez underwent a surgical procedure on her right eye at the Northern Nevada Medical Center (NNMC). Shortly

after surgery, her eye became infected, and she is now permanently blind in that eye. Montanez filed a complaint seeking damages for her injury, alleging that NNMC was liable for medical malpractice and for a premises liability claim. NNMC filed a motion to dismiss the complaint for failure to attach a medical expert affidavit. Montanez opposed the motion, arguing that a medical expert affidavit was not required because the bacteria that entered her eye was a foreign substance such that her medical malpractice claim was exempt under NRS 41A.100(1)(a). As for the premises liability claim, Montanez argued that her injuries could have been caused by a mistake that was not medical in nature, but rather "the failure of [NNMC] to have a clean building." She argued that without the benefit of discovery, she had no way of knowing whether the bacteria entered her body due to professional negligence or "simply . . . a business-owner's failure to keep their building clean," which justified her separate premises liability claim. The district court granted NNMC's motion to dismiss, finding that NRS 41A.100(1)(a) was ambiguous but that Montanez's medical malpractice claim was not exempt from the affidavit requirement under NRS 41A.100(1)(a) because "[t]he circumstances surrounding this case will require expert testimony." The court therefore found that Montanez's medical malpractice claim was void ab initio and dismissed it. The district court further found that the gravamen of Montanez's premises liability claim sounded in medical malpractice and therefore dismissed that claim as well.

DISCUSSION

Standard of review

"This court reviews a district court's order granting a motion to dismiss for failure to state a claim under a rigorous, de novo standard of review." *Slade v. Caesars Entm't Corp.*, 132 Nev. 374, 379, 373 P.3d 74, 78 (2016) (internal quotations omitted). A complaint should be dismissed for failure to state a claim only "if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). "[T]his court will recognize all factual allegations in [the plaintiff's] complaint as true and draw all inferences in [the plaintiff's] favor." *Id.* A district court's decision that reaches the correct result, even if for the wrong reason, will be affirmed. *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010).

"Statutory interpretation is a question of law, which this court reviews de novo." *Branch Banking & Tr. Co. v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158, 347 P.3d 1038, 1040 (2015) (internal quotations omitted). "[I]f a statute's language is clear and unambiguous, it must be given its plain meaning, unless doing so

violates the spirit of the act. A statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons." *Griffith v. Gonzales-Alpizar*, 132 Nev. 392, 394, 373 P.3d 86, 87-88 (2016) (internal citation omitted) (internal quotations omitted).

Bacteria is not a "foreign substance" under NRS 41A.100(1)(a)

"[A] medical malpractice complaint filed without a supporting medical expert affidavit is void ab initio, meaning it is of no force and effect." *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006). NRS 41A.100, however, exempts the plaintiff from providing the affidavit in certain circumstances, including when "[a] foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery." NRS 41A.100(1)(a).

We hold that the district court was incorrect in its finding that NRS 41A.100(1)(a) is ambiguous, because it is clear on the statute's face that "foreign substance" was intended to mean something that a doctor purposefully implanted or used during surgery that was then left in the body unintentionally. This is consistent with *Cummings v. Barber*, in which we stated that NRS 41A.100(1)(a) applies to foreign objects "implanted or used" during the at-issue surgery. 136 Nev. 139, 143, 460 P.3d 963, 967 (2020). Indeed, we have used "foreign substance" to refer to objects such as a surgical needle, *Szydel v. Markman*, 121 Nev. 453, 455, 117 P.3d 200, 201 (2005); surgical clips, *Cummings*, 136 Nev. at 140-41, 460 P.3d at 965-66; and wire fragments, *id.*; *see also Jaramillo v. Ramos*, 136 Nev. 134, 135, 460 P.3d 460, 462 (2020).

That said, the district court was correct in that Montanez's claim did not fall within the purview of NRS 41A.100(1)(a). As stated above, the statute is clear on its face that it applies to foreign objects "implanted or used" during surgery; bacteria falls into neither of these categories. Moreover, interpreting "foreign substance" as including bacteria would be contrary to the "spirit of the act," *Griffith*, 132 Nev. at 394, 373 P.3d at 87-88 (internal quotation omitted), since the purpose of the exceptions to the affidavit requirement is "to relieve a plaintiff of the burden and expense of obtaining an expert witness in cases where negligence can be shown based on common knowledge alone." *Cummings*, 136 Nev. at 142, 460 P.3d at 966-67. There are many ways that bacteria could be introduced into and remain in the body during and/or post-surgery, causing a subsequent infection—some of which do not result from the medical provider's negligence. Whether or not a bacterial infection existing in the body post-surgery was caused by a medical provider's professional negligence is beyond the purview of the average person's common knowledge, and thus it is outside the intended scope of the exceptions to the affidavit requirement.

We therefore conclude that although the district court was incorrect in finding that the statute was ambiguous, it was correct in its ultimate conclusion that Montanez's medical malpractice claim should have included a medical expert affidavit and was therefore void ab initio. We therefore affirm the district court's dismissal of Montanez's medical malpractice claim. *Saavedra-Sandoval*, 126 Nev. at 599, 245 P.3d at 1202.[1]

Montanez's premises liability claim sounds in medical malpractice and therefore required an expert affidavit to be actionable

"When the duty owing to the plaintiff by the defendant arises from the physician-patient relationship or is substantially related to medical treatment, the breach thereof gives rise to an action sounding in medical malpractice as opposed to simple negligence." *Papa v. Brunswick Gen. Hosp.*, 132 A.D.2d 601, 603 (N.Y. App. Div. 1987), *cited with approval in Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 642, 403 P.3d 1280, 1284 (2017). A claim is for medical malpractice "if the jury can only evaluate the plaintiff's claims after presentation of the standards of care by a medical expert." *Szymborski*, 133 Nev. at 642, 403 P.3d at 1284. However, if "the reasonableness of the health care provider's actions can be evaluated by jurors on the basis of their common knowledge and experience, then the claim is likely based in ordinary negligence." *Id.* at 642, 403 P.3d at 1284-85. "The distinction between medical malpractice and negligence may be subtle in some cases, and parties may incorrectly invoke language that designates a claim as either medical malpractice or ordinary negligence, when the opposite is in fact true." *Id.* at 642, 403 P.3d at 1285. Because of this, "we must look to the gravamen or substantial point or essence of each claim rather than its form to see whether each individual claim is for medical malpractice or ordinary negligence." *Id.* at 643, 403 P.3d at 1285 (internal quotation omitted).

Montanez argues that her injury could be attributable to NNMC's failure to keep its facilities clean, and this is separate from any form of medical malpractice. We conclude, to the contrary, that the level of cleanliness that a medical provider must maintain is *inherently linked* to the provision of medical treatment; this is reflected in the statutes enacted by the Nevada Legislature that regulate medical infection prevention protocol. *See* NRS 439.865 (requiring that Nevada health facilities develop an internal patient safety plan that includes an infection control program to protect the health and safety of patients treated at that medical facility); NRS 439.873 (requiring that a medical facility designate an officer or employee to serve as infection control officer of that medical facility). Where

[1]Because we conclude that bacteria is not included within the scope of NRS 41A.100(1)(a), we need not reach Montanez's other arguments in which she takes issue with the district court's factual analysis.

the level of cleanliness relates to the medical services provided, the essence of the claim requires a medical expert affidavit because it sounds in medical malpractice. *See Szymborski*, 133 Nev. at 642, 403 P.3d at 1284 (holding that when the duty that the defendant owes to the plaintiff is substantially related to medical treatment, a breach of such duty sounds in medical malpractice).

Thus, the gravamen of the premises liability claim sounds in medical malpractice, not common negligence, and the claim is also subject to the medical expert affidavit requirement. *See id.*; *see also* NRS 41A.071. As a result, this claim cannot be severed from Montanez's first claim and allowed to proceed.[2] Therefore, we conclude that the district court was correct in dismissing Montanez's premises liability claim.

CONCLUSION

The exceptions to the affidavit requirement provided in NRS 41A.100 were enacted for the purpose of allowing plaintiffs to file claims wherein negligence could be deduced with common knowledge alone. Any terms used within the statute, then, should be interpreted according to this purpose. We hold that NRS 41A.100(1)(a) is unambiguous and does not include bacteria in the definition of "foreign substance." We therefore conclude that the district court was correct in dismissing Montanez's medical malpractice claim. We further conclude that Montanez's premises liability claim sounds in medical malpractice, and thus the district court was also correct in dismissing that claim. Accordingly, we affirm the district court's order dismissing Montanez's complaint.

Cadish and Pickering, JJ., concur.

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[2]Moreover, Montanez's argument that the only expert that she would be able to find to provide an affidavit would be a "professional janitor" is unavailing. Montanez could have found an expert to testify in an affidavit as to the cleanliness protocols and standards that hospitals are supposed to follow and, consequently, whether professional negligence as to these protocols would have caused a bacterial infection like Montanez experienced—however, she did not.

CHRISTIAN STEPHON MILES, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 79554

December 23, 2021 500 P.3d 1263

Appeal from a judgment of conviction, pursuant to a jury verdict, of sex trafficking of a child under 18 years of age, first-degree kidnapping, living from the earnings of a prostitute, and child abuse, neglect, or endangerment. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge, and James Bixler, Senior Judge.

Reversed and remanded.

Mario D. Valencia, Henderson, for Appellant.

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

Before the Supreme Court, EN BANC.

OPINION

By the Court, STIGLICH, J.:

This case concerns the warnings a trial court must give to a criminal defendant who has expressed a desire to exercise his right, under *Faretta v. California*, 422 U.S. 806 (1975), to waive the right to counsel and represent oneself. In this opinion, we emphasize that a *Faretta* canvass must ensure that a defendant decides whether to waive counsel with eyes open. The canvass must safeguard against the unacceptable danger that defendants would choose to represent themselves with an incomplete understanding of the risks they face. Inadequate warnings harm not only the defendant, but also the credibility of our justice system.

We hold today that a trial court should not ignore a defendant's lack of understanding about the charges and potential sentences that becomes evident during the canvass. While no specific questions are required, the trial court should not disregard a defendant's evident lack of understanding. Here, because the trial court's canvass did not ensure that the defendant understood the aggregate mandatory minimum sentence he potentially faced or the risks and disadvantages of waiving the right to counsel, we reverse and remand. We further observe that the trial court inappropriately disparaged the defendant's choice to waive counsel during the canvass. While it is important that the trial court ensure that a defendant understands the risks of deciding to waive counsel, the court must conduct its canvass in a courteous manner, consistent with the respect due to

the defendant's exercise of a constitutional right and the decorum and impartiality demanded by the judicial process.

FACTS AND PROCEDURAL HISTORY

Appellant Christian Stephon Miles was charged with sex trafficking of a child under 18 years of age, first-degree kidnapping, living from the earnings of a prostitute, and child abuse, neglect, or endangerment. The victim, who was 16 years old at the time of the crimes, testified that Miles contacted her to entice her to engage in prostitution, helped her to run away from home and to remove an ankle bracelet she was required to wear in connection with a previous prostitution arrest, and advertised her sexual services on Craigslist.

Well before trial, Miles became dissatisfied with the attorney assigned to him, and he moved for permission to represent himself. The trial court immediately began to discourage Miles from doing so, calling self-representation "the stupidest thing in the world," "a bonehead move," and "a nail in your coffin." But Miles was insistent, and the court engaged in a *Faretta* canvass, stating that "I'll try and make it quick."[1]

The court explained to Miles that an attorney trains in the law and has the skills and experience to properly defend a case; Miles acknowledged that his legal training was limited to reading litigation manuals "and trial books." The court probed Miles' understanding of his Fifth Amendment right not to testify and the consequences of waiving that right. The court explained in particular that the State might be able to introduce Miles' prior conviction for pandering to impeach him as a witness, and Miles said he understood. The court also asked Miles to explain the difference between peremptory and for-cause challenges to jurors. Miles' responses to these questions indicated a generally accurate, if rough, understanding of trial procedure.

The court also asked Miles to state the elements of sex trafficking. Miles answered: "Recruiting—recruiting, enticing a person to commit sex trafficking, conspiracy; it's a whole bunch, Your Honor. I don't know off the top of my head, but there's a whole bunch of elements, Your Honor." The court did not inquire further as to Miles' understanding of the substantive law underlying sex trafficking and did not ask Miles whether he understood the elements of the other charges.

The court also asked Miles to state the range of punishment for the crimes he was charged with. Miles replied:

> THE DEFENDANT: Five to life, life.
>
> THE COURT: Life. You could be—if you're convicted on first-degree kidnapping in Count 2, you could be sentenced to life. Do you understand that?

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[1]Eighth Judicial District Court Senior Judge James Bixler conducted the canvass in question.

> [THE PROSECUTOR]: And Your Honor, Count 1 is non-probationable, and he does have to register as a sex offender if he's convicted.
>
> THE COURT: You understand all that?
>
> THE DEFENDANT: Whereas sex trafficking is registered—you have to register—
>
> [THE PROSECUTOR]: And non-probationable.
>
> THE DEFENDANT: —I'm aware of that.
>
> THE COURT: You're going to prison. You get convicted, you're going to prison.
>
> THE DEFENDANT: I'm aware of that.

No other discussion of the potential sentence occurred during the *Faretta* canvass. At the conclusion of the canvass, the court observed, "You've already answered the rest of these questions. You've already explained why you want to represent yourself and why you think you can do a better job; and I tried to talk you out of it . . . ." The court reluctantly granted Miles' motion.

Miles represented himself at trial. A jury found him guilty of all charges. The court sentenced him to 5 years to life on the sex trafficking charge, 5 years to life on the kidnapping charge, 19 to 48 months on the living-off-the-earnings charge, and 24 to 72 months on the child abuse charge. The court ordered the minimum sentences for each charge to run consecutively, for a total of 163 months to life. Miles appealed, and the court of appeals affirmed the judgment of conviction. *Miles v. State*, No. 79554-COA, 2021 WL 398992 (Nev. Ct. App. Jan. 29, 2021) (Amended Order of Affirmance and Order Denying Rehearing). We granted Miles' subsequent petition for review under NRAP 40B.

DISCUSSION

Background of the Faretta *right*

A criminal defendant may waive one's right to counsel and represent oneself. *See generally Faretta v. California*, 422 U.S. 806 (1975). The right to represent oneself, and to refuse appointed counsel of the State's choosing, stems from "that respect for the individual which is the lifeblood of the law." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1507 (2018) (internal quotation marks omitted); *see McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984) (recognizing that the right to represent oneself "exists to affirm the accused's individual dignity and autonomy").

Dissenting from *Faretta*, Justice Blackmun observed that "[i]f there is any truth to the old proverb that 'one who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a constitutional right on one to make a fool of himself." 422 U.S. at 852. Justice Blackmun was surely correct that a criminal defendant

can rarely, if ever, represent oneself as effectively as a trained attorney. Yet the right to represent oneself is firmly embedded in our law as a fundamental aspect of the right to control one's own defense. Accordingly, courts and legislatures have developed various safeguards to ensure that defendants who choose to exercise that right are well-informed enough not to make fools of themselves—even if their choice is, in an objective sense, likely unwise.

The need for at least some safeguards has been recognized from the beginning, when the Supreme Court of the United States wrote that a defendant who chooses to waive counsel "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* at 835 (quoting *Adams v. United States*, 317 U.S. 269, 279 (1942)). Thus, "an accused who chooses self-representation must satisfy the court that his waiver of the right to counsel is knowing and voluntary." *Vanisi v. State*, 117 Nev. 330, 337-38, 22 P.3d 1164, 1170 (2001). A court does not show respect for individual dignity and autonomy by allowing an individual who has not knowingly and voluntarily waived counsel—or, to put it another way, who has waived counsel with eyes closed—to represent oneself. A conviction obtained after an invalid waiver of the right to counsel—that is, one that fails to demonstrate that the defendant knowingly, intelligently, and voluntarily waived the right—is per se invalid and is not subject to harmless-error analysis. *Hooks v. State*, 124 Nev. 48, 57-58 & n.23, 176 P.3d 1081, 1086-87 & n.23 (2008).

Determining whether a waiver is valid is not a mechanical task. The Supreme Court of the United States has not "prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel." *Iowa v. Tovar*, 541 U.S. 77, 88 (2004). Likewise, "this court has 'rejected the necessity of a mechanical performance of a *Faretta* canvass.'" *Hooks*, 124 Nev. at 55, 176 P.3d at 1085 (quoting *Graves v. State*, 112 Nev. 118, 125, 912 P.2d 234, 238 (1996)). Despite not requiring any "mechanical performance" of a script, we have nevertheless repeatedly "urge[d] the district courts to conduct a thorough inquiry of a defendant who wishes to represent himself and to make findings as to whether the defendant's waiver of the right to counsel is knowing, intelligent, and voluntary." *Id*. at 55-56, 176 P.3d at 1085 (internal quotation marks omitted); *see Wayne v. State*, 100 Nev. 582, 585, 691 P.2d 414, 416 (1984). Certain "areas of suggested inquiry are set forth in SCR 253(3), including the defendant's understanding of the charges and the possible penalties." *Hooks*, 124 Nev. at 54, 176 P.3d at 1085; *see* SCR 253(3)(g) (directing that court may inquire into "[d]efendant's understanding of the possible penalties or punishments, and the total possible sentence the defendant could receive"). After the canvass, the district court must make specific findings concerning whether the defendant waives "the right to counsel freely, voluntarily and knowingly,

and [with] a full appreciation and understanding of the waiver and its consequences." SCR 253(4)(b).

Ordinarily, "[w]e give deference to the district court's decision to allow the defendant to waive his right to counsel," no matter what specific questions the court asks. *Hooks*, 124 Nev. at 55, 176 P.3d at 1085. Other appellate courts have justified deference to the trial court by acknowledging the tension inherent in the simultaneous guarantees of a right to counsel and a right to represent oneself. *See, e.g.*, *United States v. Ziegler*, 1 F.4th 219, 226 (4th Cir. 2021); *United States v. Garey*, 540 F.3d 1253, 1265-66 (11th Cir. 2008). These appellate courts have been concerned that too searching an inquiry into the trial court's decision will lead to unworkable results. Once the trial court has conducted a canvass, it is put in an awkward position by the convergence of these two rights. The court risks reversal if it *allows* the defendant to self-represent, because the canvass might be found insufficient to show a knowing and voluntary waiver. But on the other hand, it risks reversal if it *refuses* the defendant's request, because the defendant has a right to self-represent and that right is not extinguished by an insufficient canvass over which the defendant has little to no control. This leaves trial courts "with the narrowest of channels along which to navigate the shoals of possible error." *People v. Bush*, 213 Cal. Rptr. 3d 593, 609 (Ct. App. 2017).

The canvass must show the defendant generally understood the risk of self-representation

When a defendant waives counsel and agrees to proceed to trial alone, the defendant is giving up an important and specifically enumerated constitutional right. "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights" like the right to counsel. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (internal quotation marks omitted); *see United States v. Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2004). We have previously protected this presumption by requiring that a defendant seeking to waive counsel show that the decision was made "with a clear comprehension of the attendant risks." *Graves*, 112 Nev. at 124, 912 P.2d at 238. The decision must also be made with "a full understanding of the disadvantages." *Id.* Where the defendant does not generally understand the aggregate potential sentence posed by the charges collectively, we conclude that the defendant cannot be said to clearly comprehend the risks of waiving counsel. *See Arrendondo v. Neven*, 763 F.3d 1122, 1131 (9th Cir. 2014) (concluding that defendants must know the range of potential punishments to "understand the magnitude of the loss they face").[2]

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[2]*But see Bush*, 213 Cal. Rptr. 3d at 605-07 (disagreeing with *Arrendondo* and holding that not even an advisement of the maximum sentence is constitutionally required in every case).

Here, Miles acknowledged that he faced a sentence of "[f]ive to life." On this basis, Miles could have reasonably believed that he would be eligible for parole after 5 years. The trial court did not ask Miles whether he understood that the minimum sentences could be ordered to run consecutively, nor did it explain that he might not have an opportunity to face the parole board for 12 years. The canvass thus did not show whether Miles understood that the potential aggregate sentence exceeded "[f]ive to life." When a defendant faces a maximum sentence of life in prison, a difference of years in parole eligibility can be dramatic. A sentence of 5 years to life and a sentence of 12 years to life are simply not the same sentence. A defendant who is willing to proceed without counsel when anticipating facing the parole board in a few years may well want a lawyer if it is known there may not be another chance to argue for his freedom for decades. We agree with Miles that this understanding was necessary to a knowing and voluntary waiver of his right to counsel. Accordingly, we cannot conclude that the trial court's determination that Miles validly waived his right to counsel was reasonable in light of the inadequate inquiry into Miles' understanding of the sentences he faced if convicted.

The trial court should conduct the canvass carefully and address a defendant's lack of understanding, if such affirmatively appears

We turn now to the trial court's discussion of the elements of the crimes charged. This is a suggested area of inquiry under SCR 253(3)(f). The trial court was not required to discuss any particular topics under that rule. It did so, however, by asking Miles to state the elements of sex trafficking. Miles' answer—"Recruiting—recruiting, enticing a person to commit sex trafficking, conspiracy; it's a whole bunch, Your Honor—" showed a serious lack of understanding of the charge of sex trafficking. The trial court made no effort to address Miles' lack of understanding, but simply moved on, as if it had checked a box.

To be sure, we are mindful that Miles' "technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." *Graves*, 112 Nev. at 124, 912 P.2d at 237-38 (quoting *Faretta*, 422 U.S. at 836). A *Faretta* canvass is not a law school exam that the defendant must pass or be denied the right to represent oneself, and Miles' inability to state the elements of sex trafficking—while no doubt injurious to his *ability* to defend himself—did not nullify his *right* to try to defend himself.

But a *Faretta* canvass is also not a list of questions to be asked without consideration of the answers. A canvass is a conversation. When the defendant's responses affirmatively indicate a lack of understanding, the trial court should follow up by pointing out the defendant's error. When the defendant's error involves the elements

of the crime, the trial court can inform the defendant that this lack of understanding is one of the disadvantages of representing oneself. The trial court should seek to ensure that the defendant makes the decision with eyes open as to those disadvantages. The defendant will be ill-suited to assess the wisdom of representing oneself if the defendant acts on incorrect information. Faced with the defendant's own mistakes, the defendant may well accept the assistance of counsel. If the defendant still insists upon proceeding pro se, it will have been done with the correct information.

Here, the trial court asked Miles to state the elements of sex trafficking, and Miles did not do so. This should have given the trial court pause. Instead, the trial court changed the subject and moved on without comment. We stress that the trial court was not obligated to delve into the elements of the charged crimes, *cf. Arajakis v. State*, 108 Nev. 976, 980, 843 P.2d 800, 802 (1992) (noting that *Faretta* "does not require the trial court to explain the elements of the charged offense"), but once it did, that inquiry revealed that Miles did not understand the sex trafficking charge and thus may not have appreciated the disadvantages of self-representation. And the inadequacy of the trial court's canvass appears again in its conclusion. Rather than specifically determining whether Miles understood the rights that he was waiving and the consequences of waiver, as SCR 253(4)(b) requires, the court simply noted that Miles answered the questions posed and indicated that he believed he could do a better job in the face of the court's efforts to dissuade him.

When these errors—i.e., the trial court's failure to address Miles' expressed lack of understanding about the potential sentences and the elements of sex trafficking—are taken together, we are unable to say with any confidence that Miles' waiver of the right to counsel was knowing and voluntary. As an invalid waiver of the right to counsel is not subject to harmless-error analysis, we reverse.[3]

The trial court should refrain from disparaging the defendant's choice to waive counsel

Finally, we must note our strong disapproval of the trial court's tone in addressing Miles when he first sought to proceed pro se. The trial court warned Miles that self-representation was "a bonehead move," "the stupidest thing in the world," "so dumb and so stupid," and "a bad decision." The trial court also warned Miles

[3]Miles also argues that (1) his sentence is cruel and unusual in violation of the state and federal constitutions; (2) NRS 176.035(1) is unconstitutionally vague in that it gives district judges unfettered discretion to order sentences to be served consecutively or concurrently, and the court of appeals' opinion to the contrary in *Pitmon v. State*, 131 Nev. 123, 352 P.3d 655 (Ct. App. 2015), should be overruled; and (3) the court was required to sua sponte revoke Miles' right to self-representation when he allegedly abused that right. We have considered these arguments and find them without merit.

that "[t]he State would love to have you represent yourself, because they know . . . the only thing you're going to do is screw yourself." The trial judge has a duty to "maintain, especially in a jury trial, that restraint which is essential to the dignity of the court and to the assurance of an atmosphere of impartiality." *United States v. Allen*, 431 F.2d 712, 713 (9th Cir. 1970); *see also Holderer v. Aetna Cas. & Sur. Co.*, 114 Nev. 845, 850, 963 P.2d 459, 463 (1998) (finding judicial misconduct where trial judge trivialized the proceedings with facetious comments); *Parodi v. Washoe Med. Ctr., Inc.*, 111 Nev. 365, 367, 892 P.2d 588, 589 (1995). The Nevada Code of Judicial Conduct specifically requires a judge to "be patient, dignified, and courteous to litigants," and the canvass here should have adhered to this obligation more stringently. NCJC 2.8(B); *cf. In re Disciplinary Proceeding Against Eiler*, 236 P.3d 873, 878-79 (Wash. 2010) (upholding judicial suspension in part based on deriding pro se litigants' intelligence).

Although courts must impress on the defendant the risks of self-representation, the trial court should not disparage the defendant for his exercise of a constitutional right. We urge trial courts to remain objective in discussing the wisdom of a defendant's decision whether to forgo counsel and proceed pro se.

CONCLUSION

When a criminal defendant desires to waive the right to counsel, the trial court must ensure that decision is made knowingly and voluntarily. The trial court must conduct a careful canvass and ensure that a defendant understands the risks and disadvantages of self-representation. While no specific questions are constitutionally required, a trial court that learns during the canvass that the defendant may not understand the charges or the potential sentences should address that lack of understanding. In this instance, the court should have addressed Miles' errors and informed him that the court would not assist him in this regard and that his lack of understanding would put him at a disadvantage in representing himself. Because the trial court did not further address Miles' apparent lack of understanding of the potential aggregate sentence and the elements of sex trafficking, we reverse the judgment of conviction and remand for proceedings consistent with this opinion.

Hardesty, C.J., and Parraguirre, Cadish, Silver, Pickering, and Herndon, JJ., concur.

CITY OF HENDERSON; AND CCMSI, APPELLANTS, *v.* BRIAN WOLFGRAM, AN INDIVIDUAL, RESPONDENT.

No. 80982

December 23, 2021 501 P.3d 422

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

Affirmed.

Lewis Brisbois Bisgaard & Smith, LLP, and *Daniel L. Schwartz* and *Joel P. Reeves*, Las Vegas, for Appellants.

Greenman Goldberg Raby & Martinez and *Jason D. Mills*, Las Vegas, for Respondent.

Before the Supreme Court, HARDESTY, C.J., STIGLICH, J., and GIBBONS, Sr. J.[1]

OPINION

By the Court, HARDESTY, C.J.:

Nevada's workers' compensation statutes place limitations on a claimant's ability to reopen a closed claim. One limitation is that a claimant must file an application to reopen a claim within one year of the claim's closing unless the injury incapacitated the claimant from earning "full wages" for a specified amount of time. NRS 616C.400(1); *see* NRS 616C.390(4)-(5). In this case, we are asked to determine whether respondent's inability to earn overtime due to his industrial injury equates to being incapacitated from earning "full wages," such that he can seek to reopen his claim more than one year after its closing. For the reasons stated below, we agree with the district court and appeals officer that respondent was incapacitated from earning "full wages" and therefore affirm the order denying the employer and its insurer's petition for judicial review.[2]

FACTS AND PROCEDURAL HISTORY

While working for appellant City of Henderson as a firefighter, respondent Brian Wolfgram filed a workers' compensation claim for issues related to his hands and elbows. The City, via its insurer, appellant CCMSI (collectively, the City), accepted the claim. During

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[1]THE HONORABLE MARK GIBBONS, Senior Justice, participated in the decision of this matter under a general order of assignment.

[2]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

Wolfgram's medical treatment, his doctor placed him on light-duty restrictions for a little more than two weeks. While the City paid Wolfgram his normal base salary during that time, it prohibited him from volunteering for overtime. Wolfgram sought no other benefits, and his claim closed on January 26, 2015.

On February 6, 2017, based on medical advice that his hand and elbow issues may be recurring, Wolfgram requested to reopen his claim. The City denied the request and Wolfgram appealed. The appeals officer ultimately found that Wolfgram's inability to earn overtime while on light duty meant that he was incapacitated from earning full wages for the time specified under NRS 616C.400(1). And, because Wolfgram satisfied NRS 616C.400(1)'s period of incapacitation, the appeals officer concluded that NRS 616C.390(5) permitted Wolfgram to submit an application to reopen his claim more than a year after it had closed, otherwise referred to as "lifetime reopening rights." However, due to a lack of supporting medical evidence, the appeals officer denied Wolfgram's request to reopen his claim at that time. The City petitioned for judicial review of the appeals officer's finding that Wolfgram's inability to earn overtime while on light duty meant that he had not earned his full wages under NRS 616C.400(1). The district court denied judicial review after a hearing, concluding that Nevada law provided overwhelming support for the appeals officer's decision. The City now appeals.

DISCUSSION

We, like the district court, review administrative agency decisions "for clear error or an arbitrary and capricious abuse of discretion" and defer to an agency's findings of fact and "fact-based conclusions of law . . . if they are supported by substantial evidence." *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008) (citation and internal quotation marks omitted). "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion." *Id.* at 362, 184 P.3d at 384; *see also* NRS 233B.135(3)-(4) (defining substantial evidence and discussing judicial review of agency decisions). We review purely legal questions, such as statutory interpretation issues, de novo. *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011).

The City argues that the appeals officer erred in concluding Wolfgram did not receive his full wages under NRS 616C.400(1) because he received the entirety of his base pay while on light duty. It asserts that overtime is voluntary and therefore speculative and points out that Wolfgram never made a claim for lost wages. Wolfgram responds that the appeals officer's decision is a correct statement of the law and supported by substantial evidence. He further asserts that it does not matter if overtime was voluntary when

the record shows that he regularly worked overtime immediately before the injury and that the City prohibited him from working overtime while on light duty.

NRS 616C.390 addresses the reopening of closed workers' compensation claims. As pertinent here, the statute provides that a claimant must seek to reopen a claim "within 1 year after the date on which the claim was closed if . . . [t]he claimant did not meet the minimum duration of incapacity as set forth in NRS 616C.400 as a result of the injury."[3] NRS 616C.390(5)(a). If the claimant meets NRS 616C.400's minimum duration of incapacitation, however, then an insurer must reopen the claim, despite more than a year passing since its closing, if the claimant meets other enumerated criteria. NRS 616C.390(5) ("If an application to reopen a claim . . . is made pursuant to this subsection, the insurer shall reopen the claim if the requirements set forth in . . . subsection 1 are met.").

NRS 616C.400(1) sets forth the minimum duration of incapacitation as when "an injury . . . incapacitate[s] the employee for at least 5 consecutive days, or 5 cumulative days within a 20-day period, from earning full wages." Both parties present reasonable arguments as to whether "full wages" includes the ability to earn overtime, and we therefore conclude the statute is ambiguous in this respect.[4] *See Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001) (holding that a statute is ambiguous if it "is susceptible to more than one natural or honest interpretation"). We therefore will construe it "consistently with what reason and public policy would indicate the Legislature intended," as "the Legislature's intent is the controlling factor." *Id.* And we will avoid constructions that would lead to an absurd result. *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599-600, 959 P.2d 519, 521 (1998) (holding that the interpretation "should be in line with what reason and public policy would indicate the [L]egislature intended, and should avoid absurd results").

"[F]ull wages" is not defined in the workers' compensation statutes or in the Nevada Administrative Code, and the phrase predates any available legislative history. We faced a similar lack of legislative history in interpreting a workers' compensation statute in *Banegas*. 117 Nev. at 226, 19 P.3d at 247-48 (noting that the statutory language before the court "remain[ed] largely unchanged since

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[3]The statute sets forth conjunctive requirements. If a claimant fails to meet the minimum duration of incapacity *and* did not receive a permanent partial disability rating, he must seek to reopen the claim within one year. NRS 616C.390(5)(a)-(b). The parties agree that Wolfgram did not receive a permanent partial disability rating for his claim but dispute whether he met the minimum duration of incapacity.

[4]The parties agree that the time period within which the City prohibited Wolfgram from earning overtime exceeded 5 days within a 20-day period. *See* NRS 616C.400(1). We therefore need not address that portion of the statute.

the original industrial insurance statutes were adopted in 1913" and that committee minutes related to the statutory provision were "virtually nonexistent"). Regardless, we concluded in *Banegas* that we could still discern the Legislature's intent behind the language at issue "by reviewing the [statutory scheme] as a whole." *Id.* at 228, 19 P.3d at 249. We take the same approach to confront the statutory interpretation issue in this case.

To that end, we find the definitions of "[w]ages" and "average monthly wage" in the workers' compensation scheme informative. The statute addressing the reopening of claims defines "[w]ages" as "any remuneration paid by an employer to an employee" to include "[c]ommissions and bonuses." NRS 616C.390(11)(c)(1). This suggests that "full wages" may include more than just an employee's base pay. Similarly, NAC 616C.420 defines a claimant's "average monthly wage" as "the total gross value of *all* money, goods and services received by an injured employee from his or her employment to compensate for his or her time or services." (Emphasis added.) And NAC 616C.423(1)(n) explicitly includes "[p]ayment[s] for overtime" as money that must be included when calculating an employee's "average monthly wage." *See also* NRS 233B.040(1)(a) (providing that the Nevada Administrative Code has "the force of law"); *Banegas*, 117 Nev. at 227, 19 P.3d at 248 (recognizing that "the Legislature may authorize administrative agencies to make rules and regulations supplementing legislation"). To conclude that "full wages" as used in NRS 616C.400(1) is always limited to the employee's base pay would therefore be contrary to how "wages" is used elsewhere in the statutory scheme, leading to an absurd result. It appears, instead, that the Legislature's intent was that "full wages" could include more than just a claimant's base pay. We therefore hold that "full wages" as used in NRS 616C.400(1) can include overtime pay.

We now turn to the appeals officer's conclusion that Wolfgram's injury incapacitated him from earning full wages within the meaning of NRS 616C.400(1) because he could not work overtime. Despite overtime being voluntary, the City does not dispute that it precluded Wolfgram from working overtime while he was on light duty due to his injury. And evidence in the record shows that, in the 12 weeks preceding his industrial injury, Wolfgram worked 96 hours of overtime, making up approximately 15 percent of his pay in that time period.[5] This constitutes substantial evidence supporting the appeals officer's conclusion that Wolfgram regularly worked overtime in the time period immediately preceding his injury such that, by not being able to work overtime while on light duty, he

[5]This would be the time period used to calculate a claimant's average monthly wage. *See* NAC 616C.435(1) (providing that, generally, "a history of earnings for a period of 12 weeks must be used to calculate an average monthly wage").

was incapacitated from earning his full wages. *See Law Offices of Barry Levinson*, 124 Nev. at 362, 184 P.3d at 384; *see also Look's Case*, 185 N.E.2d 626, 628 (Mass. 1962) (holding that an injury incapacitates an employee when it causes "an impairment of earning capacity" and, thus, the question is whether the record supports a finding that the employee's "injury has lessened his ability to work"); *Phipps v. Campbell, Wyant & Cannon Foundry, Div. of Textron, Inc.*, 197 N.W.2d 297, 305-06 (Mich. Ct. App. 1972) (holding, under a similar statute, that an employee did not earn full wages when his average daily wage decreased during the period of incapacitation). Accordingly, the appeals officer did not err in concluding that Wolfgram had lifetime reopening rights for his claim.

CONCLUSION

We conclude that the Legislature intended that "full wages" as used in NRS 616C.400(1) may include payments for overtime. And, because substantial evidence otherwise supports the appeals officer's findings in this case, we affirm the district court's order denying the petition for judicial review.

Stiglich, J., and Gibbons, Sr. J., concur.

OELLA RIDGE TRUST, Appellant, *v.* SILVER STATE SCHOOLS CREDIT UNION, a Nevada Corporation, Respondent.

No. 81584

December 23, 2021 500 P.3d 1253

Appeal from a district court order granting a motion to dismiss in a declaratory relief action challenging attorney fees imposed under a deed of trust. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Affirmed.

Kerry P. Faughnan, North Las Vegas, for Appellant.

Hutchison & Steffen, LLC, and *Michael R. Brooks*, Las Vegas, for Respondent.

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

OPINION

By the Court, Silver, J.:

Appellant purchased real property at an HOA foreclosure sale, taking that property subject to respondent's deed of trust. That deed of trust allows respondent to add any reasonable expenses incurred protecting its interest in the property, including attorney fees, to the secured debt. Although a party seeking an award of attorney fees within the confines of a district court case must comply with NRCP 54(d)(2)'s filing deadline, the deed of trust here entitled respondent to add the attorney fees it accrued in protecting its interest in the property to the secured debt without moving for those fees in court. Because appellant's property is subject to the deed of trust, and because appellant sought to pay off the note secured by the deed of trust, the district court correctly found that respondent may add those attorney fees to the amount of indebtedness owed under the note secured by the deed of trust.

FACTS AND PROCEDURAL HISTORY

The property at issue in the underlying case was purchased in 2004. In 2010, the homeowner's association (HOA) recorded a delinquent assessment lien, and the HOA subsequently foreclosed in 2012. Appellant Oella Ridge Trust purchased that property at the HOA lien foreclosure sale for approximately $4,700 and thereafter moved to quiet title. Respondent Silver State Schools Credit Union, the holder of the first deed of trust on the property, opposed

the action, but the district court found in Oella Ridge's favor. We reversed that decision on appeal, concluding the HOA's foreclosure sale did not extinguish Silver State's deed of trust because the HOA's lien did not have superpriority status. *See Silver State Sch. Credit Union v. Oella Ridge Tr.*, No. 76382, 2019 WL 3061742 (Nev. July 11, 2019) (Order of Reversal and Remand). On remand, the district court entered judgment in Silver State's favor, ordering that "Oella Ridge owns the property subject to Silver State School's first position Deed of Trust."

After the district court entered its final judgment, Oella Ridge requested that Silver State inform it of the note's payoff amount. Silver State responded with a payoff amount that included attorney fees of more than $96,500, in addition to the remaining principal balance of approximately $138,000. When Silver State declined to remove those attorney fees from the payoff amount, Oella Ridge filed a complaint for declaratory relief, seeking a declaration that the fees were unreasonable and that Silver State had waived any request for attorney fees by failing to timely seek fees during the course of the quiet title litigation. The district court granted partial summary judgment in Silver State's favor, concluding the deed of trust allowed Silver State to add the attorney fees as additional debt to the note secured by the deed of trust. But the district court also determined that insufficient evidence existed to confirm the fees' reasonableness and ordered supplemental briefing.

Silver State's supplemental briefing addressed the reasonableness of the fees and attached supporting documentation. The district court thereafter dismissed the complaint with prejudice. Oella Ridge appeals, arguing Silver State waived its right to seek attorney fees by failing to timely file a motion for those fees following the quiet title action, as required by NRCP 54(d)(2).[1]

DISCUSSION

We treat the district court's decision, as the parties do, as one for summary judgment, which we review de novo, considering the pleadings and other evidence on file in the light most favorable to the nonmoving party. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (addressing the standard for reviewing summary judgments); *Schneider v. Cont'l Assurance Co.*, 110 Nev. 1270, 1271, 885 P.2d 572, 573 (1994) (explaining that where the district court considers more than the pleadings in granting a motion

[1]Oella Ridge also raises arguments under NRS 18.010 and NRS 18.110, but as Oella Ridge did not raise these arguments below, we do not consider them on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

to dismiss, this court will treat the dismissal as a grant of summary judgment). Summary judgment is appropriate if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law. *Wood*, 121 Nev. at 729, 121 P.3d at 1029.

When the facts in a case are not in dispute, contract interpretation is a question of law, which we review de novo. *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013). "[W]e construe a contract that is clear on its face from the written language, and it should be enforced as written." *Masto v. Second Judicial Dist. Court*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009).

Pertinent here, section 9 of the deed of trust provides for attorney fees reasonably incurred to protect Silver State's interest in the property:

> If . . . there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding . . . for enforcement of a lien which may attain priority over this Security Instrument . . .) . . . then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including . . . (b) appearing in court; and (c) *paying reasonable attorneys' fees to protect its interest in the Property* and/or rights under this Security Instrument. . . .
>
> *Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument*. These amounts shall bear interest at the Note rate from date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

(Emphases added.)

As an initial matter, we conclude that this section applies to Oella Ridge. Critically, because Oella Ridge purchased the property at an HOA foreclosure sale, it took title subject to the deed of trust and pursuant to the promissory note, neither of which were extinguished by the HOA foreclosure sale. As Oella Ridge does not contend that it is not subject to the deed of trust, we need say no more on this point.

Next, section 9 plainly allows Silver State to act to protect its interest in the property. This includes "pay[ing] for whatever is reasonable or appropriate" to protect that interest. Contracts involving real estate are subject to general contract laws, and because we construe this plain language by its common meaning, Miller & Starr, *Cal. Real Estate*, § 1:1 & 1:62 (4th ed. 2021), we interpret it as allowing Silver State to pay property-related costs such as continued taxes, utility fees, late fees and interest—or, as pertinent here, its reasonable attorney fees incurred in defending its interest in the

property. Section 9 further provides that any amount disbursed by Silver State under that section *shall* be added to the debt secured by the deed of trust. Other courts addressing provisions with this same or similar language have interpreted the language as providing the lender with a right to costs as opposed to an award of attorney fees. In *Hart v. Clear Recon Corp.*, the court explained that an identical provision in a deed of trust was "a provision that attorney's fees, like any other expenses the lender may incur to protect its interest, will be added to the secured debt." 237 Cal. Rptr. 3d 907, 911 (Ct. App. 2018). The court further recognized that a number of federal district courts have reached this same conclusion in unpublished orders and determined that the lender may therefore "convert the amounts spent on attorneys' fees into additional debt secured by the mortgage." *Id.* at 911 (quotation marks omitted). Even among courts that do not bar attorneys from seeking attorney fees under similar provisions through a motion for attorney fees following the proceedings, courts still recognize that fees under the language of similar provisions "are the costs of collection or costs incurred to protect the bank's interest in the mortgaged property and its rights under the security interest. . . . [and] are part of [the] contractual debt." *Richardson v. Wells Fargo Bank, N.A.*, 740 F.3d 1035, 1038-39 (5th Cir. 2014). These cases therefore support that a lender may use a deed of trust to secure any attorney costs incurred in protecting the lender's interest, even against one who is not the "borrower,"[2] where, as here, a nonborrower seeks to pay off the loan balance.

We agree and conclude this provision enables Silver State to add its attorney fees to the secured debt at the time Silver State disburses those amounts. Although Oella Ridge is not personally liable for attorney fees under the deed of trust, if Oella Ridge wishes to pay off the note, then it must pay any costs Silver State added to the secured debt pursuant to the deed of trust. Key here, the HOA foreclosed on its lien, and the deed of trust and promissory note were not extinguished. Had the foreclosure sale been on the deed of trust itself, we might reach a different conclusion in light of Nevada's one action rule. *See* NRS 41.430(1).

Indeed, Oella Ridge neither offers an alternative interpretation of the contractual language nor argues that it is not bound by section 9. Instead, Oella Ridge argues that Silver State's request for the payment of attorney fees is untimely and therefore waived. But we are not persuaded by Oella Ridge's argument that NRCP 54(d)(2)

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[2]We recognize that *Hart* and the cases it cites regard a lender foreclosing against the original borrower and are therefore factually distinguishable from many Nevada cases where the HOA forecloses on an underwater property and a third-party investor purchases the home at the HOA foreclosure sale. Nevertheless, these cases support the lender's ability to add its costs, including attorney fees, to the underlying debt pursuant to the deed of trust.

required Silver State to file a motion for attorney fees within a certain time period before it could add those fees to the secured debt. Although the American rule bars a court from awarding attorney fees unless allowed by a statute, rule, or agreement, *Pardee Homes of Nev. v. Wolfram*, 135 Nev. 173, 177, 444 P.3d 423, 426 (2019), and NRCP 54(d)(2) requires a party seeking attorney fees to timely move for such fees at a case's conclusion, the procedural posture of this case does not implicate those rules. Oella Ridge's obligation to pay the attorney fees in this case did not arise from a judgment or from an order on a motion for attorney fees where NRCP 54(d)(2) would apply. Instead, the obligation arose directly from the deed of trust's section 9 provision stating that reasonable attorney fees, along with other expenses incurred to protect Silver State's interest, are *automatically* added to the secured debt. As a result, NRCP 54(d)(2)'s language governing the timing of "claims" for attorney fees in civil cases is inapplicable in this case.[3]

Oella Ridge argues that our holding will deprive purchasers like itself of any right to have a court review such attorney fees for their reasonableness, timeliness, or good faith and fair dealing. Not so. A purchaser is free to contest the reasonableness of attorney fees added to the indebtedness securing a deed of trust in district court or to contest the deed of trust's application to the purchaser. Here, for example, Oella Ridge contested the fees' reasonableness below, and in response, Silver State submitted both an analysis of its fees and supporting documentation. The district court granted summary judgment after considering that additional argument and evidence.[4] Thus, Oella Ridge was able to obtain court review of the fees, even though Silver State did not move for an attorney fees award following the judgment.

Oella Ridge took the property subject to the deed of trust, and because Silver State was entitled to its reasonable fees under the deed of trust, Silver State properly added its reasonable fees to the indebtedness secured by the deed of trust. We therefore conclude the district court did not err by granting summary judgment.

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[3]To reiterate, if Silver State wanted to hold Oella Ridge *personally liable* for the attorney fees, it would have needed to seek those fees in the previous quiet title action and in compliance with NRCP 54(d)(2). However, if Oella Ridge wishes to pay off the note then it must pay any costs Silver State added to the secured debt pursuant to the deed of trust, and Silver State need not have sought those fees in the previous action.

[4]Although the district court did not make express findings as to the fees' reasonableness, the record before this court supports the district court's conclusion that there was no triable issue of fact regarding the fees' reasonableness. *See Sierra Glass & Mirror v. Viking Indus., Inc.*, 107 Nev. 119, 125, 808 P.2d 512, 515 (1991) ("If the court makes no ruling, findings may be implied when clearly supported by the record."). And Oella Ridge does not contest the fees' reasonableness on appeal.

CONCLUSION

The deed of trust in this case permitted Silver State to automatically add to the secured debt its reasonable attorney fees incurred in protecting its interest in the property. Although Oella Ridge sought to pay off the unpaid loan balance secured by the deed of trust and questioned the attorney fees added to the debt, Silver State did not seek an order for attorney fees within a civil district court case, making NRCP 54(d)(2) and its timing requirements inapplicable. We affirm the district court's order granting summary judgment and dismissing Oella Ridge's complaint for declaratory relief.

Parraguirre and Stiglich, JJ., concur.