ANTHONY JACKSON, AKA ANTHONY RASHARD JOHNSON, APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 70870-COA

December 28, 2017 410 P.3d 1004

Appeal from a district court order revoking probation and an amended judgment of conviction. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Affirmed.

Philip J. Kohn, Public Defender, and *Maxwell A. Berkley*, Deputy Public Defender, Clark County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Krista D. Barrie*, Chief Deputy District Attorney, Clark County, for Respondent.

Before SILVER, C.J., TAO and GIBBONS, JJ.

OPINION

By the Court, GIBBONS, J.:

In this appeal, we address the limited nature of an appeal taken from an amended judgment of conviction. We conclude that, in an appeal taken from an amended judgment of conviction, the appellant may only raise challenges that arise from the amendments made to the original judgment of conviction. Because appellant Anthony Jackson does not challenge the amendments made to his original judgment of conviction, we affirm.

FACTS

Jackson pleaded guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to one count of possession of a dangerous weapon. The district court adjudicated him guilty of the dangerous weapon charge and sentenced him to 364 days in the county jail. The district court suspended the sentence, placed Jackson on probation for an indeterminate period not to exceed one year, and ordered the sentence to run concurrently with Jackson's sentence in a California case. Jackson did not pursue a direct appeal.

The State subsequently accused Jackson of violating the conditions of his probation. The district court conducted a probation revocation hearing and determined Jackson had violated his probation. The district court ordered Jackson's probation revoked, amended his jail sentence by reducing it from 364 days to 300 days, and awarded him 46 days' credit for time served. This appeal follows.

DISCUSSION

Jackson claims his sentence of "three hundred sixty-four (364) days concurrent with his California case, suspended and placed on probation for one year concurrent with his California case," constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and Article 1, Section 6 of the Nevada Constitution. Because Jackson's claim plainly challenges the constitutionality of the sentence imposed in his original judgment of conviction, we must consider whether an appellant may raise claims that arise from the original judgment of conviction in an appeal taken from an amended judgment of conviction.

In *Sullivan v. State*, the Nevada Supreme Court addressed a similar issue when it considered whether the entry of an amended judgment of conviction provided good cause to overcome the procedural bar to an untimely filed postconviction petition for a writ of habeas corpus. 120 Nev. 537, 96 P.3d 761 (2004). Sullivan filed his postconviction habeas petition more than one year after the remittitur issued on direct appeal, but because the petition was filed within one year of the entry of the amended judgment of conviction, the parties stipulated to treating the petition as timely, and the district court denied the petition on the merits. *Id*. at 539, 96 P.3d at 763.

The Nevada Supreme Court noted that a judgment of conviction may be amended at any time to correct an illegal sentence or clerical error and an amended judgment may be entered years or decades after entry of the original judgment of conviction. *Id*. at 540, 96 P.3d at 764. The court reasoned that restarting the one-year time period for all purposes after an amendment occurred would frustrate the purposes of NRS 34.726 and "would undermine the doctrine of finality of judgments by allowing petitioners to file post-conviction habeas petitions in perpetuity." *Id*. The court therefore concluded that the one-year statutory time limit for filing a postconviction habeas petition did not automatically restart upon the filing of an amended judgment of conviction. *Id*. at 540-41, 96 P.3d at 764.

The Nevada Supreme Court has "long emphasized the importance of the finality of judgments." *Trujillo v. State*, 129 Nev. 706, 717, 310 P.3d 594, 601 (2013); *see also Groesbeck v. Warden*, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984). The Nevada Supreme Court's reasoning in *Sullivan* with regard to the finality of judgments applies to the issue raised by this appeal. As the *Sullivan* court noted, an amended judgment of conviction can be entered years, or even decades, after entry of the original judgment of conviction. *See Sullivan*, 120 Nev. at 540, 96 P.3d at 764. Allowing a defendant in an appeal from an amended judgment of conviction to raise challenges that could have been raised on appeal from the original judgment of conviction would undermine the doctrine of finality of judgments by allowing a defendant to challenge the original judgment of conviction in perpetuity. The entry of an amended judgment of conviction

should not provide a basis for raising claims that could have, and should have, been raised on appeal from the original judgment of conviction. *See Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (providing that "claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings"), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999). Therefore, we conclude that in an appeal taken from an amended judgment of conviction, the appellant may only raise challenges that arise from the amendments made to the original judgment of conviction.

Jackson appeals from his amended judgment of conviction. Jackson does not challenge the revocation of his probation or the amendment of his sentence. Instead, he only challenges the constitutionality of the sentence imposed in the original judgment of conviction. We conclude this claim is not properly raised in this appeal. Accordingly, we affirm the amended judgment of conviction.

Silver, C.J., and Tao, J., concur.

FRANCO SORO, an Individual; MYRA TAIGMAN-FARRELL, an Individual; ISAAC FARRELL, an Individual; KATHY ARRINGTON, an Individual; and AUDIE EMBESTRO, an Individual, Petitioners, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE JERRY A. WIESE, District Judge, Respondents, and AMERICA FIRST FEDERAL CREDIT UNION, a Federally Chartered Credit Union, Real Party in Interest.

No. 72086-COA

December 28, 2017 411 P.3d 358

Original petition for writ of mandamus and/or prohibition arising from the district court's denial of a motion to dismiss in a foreclosure deficiency action.

Petition denied.

[Rehearing denied March 22, 2018]

Reid Rubinstein Bogatz and *Charles M. Vlasic, III, Jaimie Stilz*, and *I. Scott Bogatz*, Las Vegas, for Petitioners.

Ballard Spahr, LLP, and *Matthew D. Lamb* and *Joseph P. Sakai*, Las Vegas; *Ballard Spahr, LLP*, and *Mark R. Gaylord*, Salt Lake City, Utah, for Real Party in Interest.

Before Silver, C.J., Tao and Gibbons, JJ.

OPINION

By the Court, SILVER, C.J.:

In this opinion, we determine whether Utah's antideficiency statute applies extraterritorially to a Nevada deficiency action. Petitioners moved to dismiss the underlying case on the ground that it was time-barred by Utah's antideficiency statute, which they maintained applied to the dispute pursuant to the parties' choice-of-law provision. The district court considered that statute, concluded it did not apply extraterritorially, and denied petitioners' motion to dismiss. This original petition for a writ of mandamus and/or prohibition seeking to compel the dismissal of the underlying action followed.

The Nevada Supreme Court has notably addressed the application of antideficiency statutes in *Key Bank of Alaska v. Donnels*, 106 Nev. 49, 787 P.2d 382 (1990); *Branch Banking & Trust Co. v. Windhaven & Tollway, LLC*, 131 Nev. 155, 347 P.3d 1038 (2015); and *Mardian v. Michael & Wendy Greenberg Family Trust*, 131 Nev. 730, 359 P.3d 109 (2015). Read together, these cases provide that, in a deficiency action where the parties have an enforceable choice-of-law provision, before the district court applies the antideficiency statute from the parties' chosen jurisdiction, the court must first determine whether that statute, by its terms, has extraterritorial reach. *See Mardian*, 131 Nev. at 733-35, 359 P.3d at 111-12; *Branch Banking*, 131 Nev. at 159-61, 347 P.3d at 1041-42; *Key Bank*, 106 Nev. at 52-53, 787 P.2d at 384-85. In this opinion we clarify that, if a party seeks to apply another jurisdiction's antideficiency statute to a Nevada deficiency action, and the courts of that jurisdiction have addressed the statute's extraterritorial application, we will follow that jurisdiction's determination regarding this issue rather than independently construe the antideficiency statute to assess whether it can be applied extraterritorially. Here, because the Utah Supreme Court has already determined that Utah's antideficiency statute does not apply extraterritorially, that decision controls our resolution of this issue. As a result, we conclude the district court properly denied petitioners' motion to dismiss and we therefore deny the petition.

FACTS AND PROCEDURAL HISTORY

In 2002, real party in interest America First Federal Credit Union (America First) loaned petitioners Franco Soro, Myra Taigman-Farrell, Isaac Farrell, Kathy Arrington, and Audie Embestro (collectively, Soro) $2.9 million for the purchase of a mini-mart business. The loan was secured by real property in Mesquite, Nevada. The promissory note specified that Utah law governed the agreement and related loan documents.

Soro defaulted, and America First proceeded with a nonjudicial foreclosure sale of the Mesquite property in accordance with Nevada

law. On October 4, 2012, America First purchased the Mesquite property at a trustee's sale for a little over $1.2 million, resulting in a deficiency on the loan balance of approximately $2.4 million, including interest and fees.

Six months after the foreclosure sale, America First filed a deficiency action in Nevada under NRS 40.455(1). Soro then moved to dismiss the action pursuant to NRCP 12(b)(1), arguing that the agreement's forum selection clause divested Nevada of jurisdiction. The district court agreed, but on appeal the Nevada Supreme Court reversed, concluding that the forum selection clause was permissive and Nevada was a proper forum for a deficiency action. *See Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 359 P.3d 105 (2015).

On remand, Soro filed another motion to dismiss, this time under NRCP 12(b)(5), arguing America First's deficiency action was time-barred by Utah's three-month statute of limitations. Critically, although Nevada's antideficiency statute allows a party to bring a deficiency action within six months of the property's foreclosure sale, Utah's antideficiency statute imposes a three-month statute of limitations. *See* NRS 40.455(1); Utah Code Ann. § 57-1-32 (LexisNexis 2010). The district court concluded that Utah's antideficiency statute does not apply extraterritorially and denied the motion. Thereafter, Soro petitioned for a writ of mandamus and/or prohibition seeking to overturn the denial of the motion to dismiss.

ANALYSIS

In the petition, Soro contends that the district court should have dismissed the deficiency action because the complaint is time-barred by Utah's antideficiency statute. Specifically, Soro asserts that, under *Key Bank* and *Mardian*, the parties' choice-of-law provision in the promissory note requires the district court to apply Utah law, and consequently, America First was required to bring the deficiency action within three months of the foreclosure sale pursuant to Utah Code Ann. § 57-1-32 (LexisNexis 2010). Soro further contends that the district court erred by concluding that Utah Code Ann. § 57-1-32 (LexisNexis 2010) does not apply extraterritorially because, under *Key Bank* and *Branch Banking*, the Utah statute is illustrative, not exclusive. America First counters that *Mardian* and *Branch Banking* are inapposite and that, under *Key Bank*, Utah's antideficiency statute does not apply extraterritorially.

Propriety of writ relief

We first consider whether the petition for writ relief is proper. The grant of a writ petition is extraordinary relief that is rarely warranted, and, for reasons of judicial economy, we do not often entertain writ petitions challenging the denial of a motion to dismiss. *See Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344-45, 950

P.2d 280, 281 (1997). Nevertheless, we may exercise our discretion to consider petitions in cases where "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *State, Office of the Attorney Gen. v. Eighth Judicial Dist. Court (Anzalone)*, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002).

Key Bank, *Branch Banking*, and *Mardian* address the effect of a valid choice-of-law provision on a deficiency action and set forth a framework for analyzing the antideficiency statute from the chosen jurisdiction to determine whether it can apply extraterritorially. This case, however, presents a new situation because the Utah Supreme Court has already analyzed the extraterritorial application of the antideficiency statute at issue here, Utah Code Ann. § 57-1-32 (LexisNexis 2010), in *Bullington v. Mize*, 478 P.2d 500 (Utah 1970). Our supreme court has not addressed whether Nevada courts, in determining the extraterritorial reach of another state's antideficiency statute, must follow that jurisdiction's dispositive caselaw. We therefore exercise our discretion to address the petition and clarify this point in Nevada law. *See Anzalone*, 118 Nev. at 147, 42 P.3d at 238. We review de novo the district court's decision. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008) (addressing questions of law de novo); *see also Parametric Sound Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 417, 421, 401 P.3d 1100, 1104 (2017) (reviewing a question of law de novo in the context of a writ petition).

Whether Utah's antideficiency statute applies

The question before this court is whether Utah Code Ann. § 57-1-32 (LexisNexis 2010) applies to bar America First's deficiency action. Although Soro frames this issue as a conflict-of-laws question, contending that the parties' choice-of-law provision requires this court to apply Utah Code Ann. § 57-1-32 (LexisNexis 2010),[1] this argument bypasses the underlying question of whether that statute can project extraterritorially. *See Key Bank*, 106 Nev. at 52-53, 787 P.2d at 384-85 (considering whether Alaska's antideficiency statute applied to a Nevada deficiency action where Alaska law otherwise governed the lawsuit). In short, if Utah's statute cannot apply extraterritorially, then there is no conflict of law.

We begin our analysis by reviewing the three cases upon which Soro and America First rely: *Key Bank*, *Branch Banking*, and *Mardian*. In *Key Bank*, the parties contracted for a loan secured by a deed of trust on real property in Nevada. *Id.* at 51, 787 P.2d at 383. Under a choice-of-law provision contained in the promissory note, Alas-

[1]While America First disputes whether the Utah statute has extraterritorial reach, it does not dispute the enforceability of the underlying choice-of-law provision.

ka law governed the debt memorialized in that document. *See id.* at 52, 787 P.2d at 384. The borrowers in *Key Bank* defaulted, and the lender foreclosed on the property and later sued in Nevada to recover the deficiency. *See id.* at 51, 787 P.2d at 383. The parties disputed whether Alaska's antideficiency statute applied in light of their choice-of-law provision. *Id.* at 52, 787 P.2d at 384. The Nevada Supreme Court determined that Alaska law governed the action pursuant to the parties' choice-of-law provision, but ultimately concluded Alaska's antideficiency statute did not apply extraterritorially to bar the action. *Id.* at 52-53, 787 P.2d at 384-85. In reaching this decision, the court scrutinized the statute's structure and language and determined that the statute showed "a clear intent to limit the effect of the statute to foreclosures" within Alaska.[2] *Id.* at 53, 787 P.2d at 384-85. Thus, under *Key Bank*, the parties' valid choice-of-law provision will control, but, before applying the chosen jurisdiction's antideficiency statute to a Nevada deficiency action, the court must determine whether that statute, by its terms, can apply extraterritorially.

While *Key Bank* dealt with the extraterritorial application of another state's antideficiency statute to a Nevada deficiency action involving Nevada real property, *Branch Banking* and *Mardian* dealt with the application of Nevada's antideficiency statute, NRS 40.455, to Nevada deficiency actions where the foreclosure took place in another state. In these latter cases, the parties secured their loans with real property outside Nevada. *Mardian*, 131 Nev. at 731-32, 359 P.3d at 110; *Branch Banking*, 131 Nev. at 157, 347 P.3d at 1039. The parties in *Branch Banking* agreed Nevada law would govern the note, but Nevada and Texas would both have jurisdiction in the event of a future dispute, 131 Nev. at 157, 161, 347 P.3d at 1039, 1042, whereas in *Mardian* the parties' agreement included a Nevada choice-of-law provision, 131 Nev. at 731-32, 359 P.3d at 110. In each case, the borrower defaulted and the lender sued the borrower in Nevada to recover for a deficiency following the property's foreclosure sale. *Mardian*, 131 Nev. at 732-33, 359 P.3d at 110-11; *Branch Banking*, 131 Nev. at 157, 347 P.3d at 1039.

Branch Banking scrutinized NRS 40.455, Nevada's antideficiency statute, which at that time allowed for a deficiency judgment "within 6 months after the date of the foreclosure sale or the trustee's sale held pursuant to NRS 107.080." 131 Nev. at 158, 347 P.3d at 1040. The court considered whether this statute allowed a deficiency action to proceed in Nevada where the lender foreclosed on property located in another state and consequently did not foreclose "pursuant to NRS 107.080." *Id.* at 157, 347 P.3d at 1039. After ex-

[2]The court based its decision on the antideficiency statute's use of offsetting commas to highlight other Alaskan statutes, including a statute that expressly referenced deed of trust conveyances of property located specifically in Alaska. *Id.* at 52-53, 787 P.2d at 384-85.

amining the structure of the statute and its context in the statutory scheme, the court concluded the statute did not bar the Nevada deficiency action. *See id.* at 159-61, 347 P.3d at 1041-42. In particular, the court reasoned that NRS 40.455(1) did not specifically address nonjudicial foreclosure sales involving property within another state, and Nevada's statutory scheme contemplates a party's ability to foreclose on property located in another state and thereafter bring a deficiency action in Nevada. *See id.* at 160, 347 P.3d at 1041. Thus, *Branch Banking* provides additional framework for interpreting an antideficiency statute to determine whether it will bar a deficiency action.

In *Mardian*, the supreme court considered the effect of the parties' choice-of-law provision and thereafter determined whether the deficiency action was time-barred by Nevada's antideficiency statute. 131 Nev. at 733-35, 359 P.3d at 111-12. The court in *Mardian* applied *Key Bank* to conclude that the parties' choice-of-law provision controlled and extended *Key Bank*'s holding to statutory limitations periods, thus requiring the parties to abide by the limitations period set forth in Nevada's antideficiency statute. *Id.* at 734, 359 P.3d at 111. The court next addressed whether Nevada's antideficiency statute barred the action where the subject property was outside the forum and the lender did not follow Nevada's foreclosure procedures. *Id.* at 733-35, 359 P.3d at 111-12. Citing to *Branch Banking*, and without interpreting Nevada's antideficiency statute, the court in *Mardian* concluded that the lender's foreclosure in another state pursuant to that state's foreclosure rules did not bar the action. *Id.* at 735, 359 P.3d at 112. But citing to Nevada law addressing NRS 40.455's statute of limitations, the court ultimately concluded that the lender's failure to apply for a deficiency judgment within the statutory limitations period barred the action. *Id.* at 735-36, 359 P.3d at 112-13. Thus, *Mardian* reinforces that parties in a deficiency action are generally bound by their choice-of-law provision.[3]

In sum, under *Key Bank*, *Branch Banking*, and *Mardian*, the court presiding over a deficiency action must first determine whether the parties have an enforceable choice-of-law provision and, if so, thereafter determine whether the chosen jurisdiction's antideficiency statute can apply extraterritorially. On the second step, *Key Bank* and *Branch Banking* provide a framework for analyzing the statute's structure, language, and context to make that determination. But these cases do not address whether, before analyzing another state's antideficiency statute, Nevada courts must first consider whether the chosen jurisdiction's courts have already determined the statute's extraterritorial reach and, if so, apply that ruling.

[3]We have considered the arguments asserting that *Mardian* is inapplicable in the present case and reject those arguments as without merit in accordance with our decision.

In considering this question, we again turn to *Mardian*. There, the Nevada Supreme Court, in addressing whether Arizona or Nevada law applied, held "that because of the choice-of-law provision, Nevada law—particularly Nevada's limitations period, *see* NRS 40.455(1)—applie[d] in th[at] case." *Mardian*, 131 Nev. at 734, 359 P.3d at 111. And as detailed above, in determining whether the lender timely applied for a deficiency judgment, the court considered Nevada caselaw construing the applicable statute of limitations. *See id.* at 735-36, 359 P.3d at 112-13. Thus, *Mardian* demonstrates that, when parties in a deficiency action have a valid choice-of-law provision, their chosen state's antideficiency statutes, as well as its caselaw interpreting those statutes, will control the action. This implication is echoed in other Nevada cases where our supreme court has applied another state's caselaw based on a choice-of-law provision. *See Pentax Corp. v. Boyd*, 111 Nev. 1296, 1299-1301, 904 P.2d 1024, 1026-28 (1995) (applying Colorado's statutes and caselaw pursuant to a choice-of-law provision); *Tipton v. Heeren*, 109 Nev. 920, 922 n.3, 923-24, 859 P.2d 465, 466 n.3, 466-67 (1993) (concluding that a Wyoming choice-of-law provision controls, and considering Wyoming caselaw in construing Wyoming's statutes). In the present context, we therefore hold that if the parties have a valid choice-of-law provision, and the controlling state's courts have addressed whether that state's antideficiency statute projects extraterritorially, we will adhere to that caselaw and not independently interpret the statute.

Here, the parties agree their choice-of-law provision is valid, and we therefore conclude Utah law governs the deficiency action. Thus, we must next determine whether Utah Code Ann. § 57-1-32 (LexisNexis 2010), Utah's antideficiency statute, may apply extraterritorially to a deficiency action in Nevada. That statute states, in relevant part, that "[a]t any time within three months after any sale of property under a trust deed as provided in [Utah Code Ann. §§] 57-1-23, 57-1-24, and 57-1-27 [(LexisNexis 2010)], an action may be commenced to recover the balance due." The parties expend significant energy applying the analyses of the statutes at issue in *Key Bank* and *Branch Banking* to Utah Code Ann. § 57-1-32 (LexisNexis 2010) to argue whether that statute is illustrative or exclusive. However, in *Bullington*, 478 P.2d 500, the Utah Supreme Court previously addressed whether this statute applies extraterritorially, and we need not embark upon an exhaustive analysis of the statute under the framework set forth in *Key Bank* and *Branch Banking* if *Bullington* is determinative here.

In *Bullington*, the Utah Supreme Court considered whether Texas or Utah law applied to a deficiency action. 478 P.2d at 501. There, the borrower secured a deed of trust with real property in Texas. *Id.* After the borrower defaulted, the lenders foreclosed on the property, purchased it for $25,000, and sued in Utah to recover the unpaid

balance. *Id.* at 500-01. The borrower argued the purchase price was unconscionably low; but while Utah law took into account the property's fair market value in a deficiency action, Texas law did not. *Id.* at 501-02. In determining the underlying conflict of law question, the Utah Supreme Court addressed the 1953 version of Utah Code Ann. § 57-1-32 as a whole and considered whether "the language of [that statute] express[es] a legislative intent to extend its protection to all debtors whose obligations are secured by trust deeds, regardless of the situs of the land." *Id.* at 503. Noting that the statute's language "refers solely to the sale of property situated within Utah," the Utah Supreme Court concluded "the entire statutory scheme concerning trust deeds . . . could not have any extra-territorial effect," and, therefore, the court held "the statutory protection extended solely to debtors whose obligations were secured by trust deeds on land in Utah." *Id.*

As the relevant portion of Utah Code Ann. § 57-1-32 (LexisNexis 2010) has remained substantively unchanged since *Bullington* was decided,[4] we conclude that *Bullington*'s analysis still applies. And although *Bullington* concerned fair market value rather than the limitations period, the Utah Supreme Court addressed the statute as a whole and concluded that "the entire statutory scheme" does not have extraterritorial effect. 478 P.2d at 503. Thus, while *Bullington* did not specifically address the choice-of-law issue presented here, that difference does not change our analysis. Indeed, our application of *Bullington* to this matter is consistent with Utah's long-standing presumption against giving its statutes extraterritorial effect absent clear language requiring a contrary result. *See Nevares v. M.L.S.*, 345 P.3d 719, 727 (Utah 2015) (explaining that, under Utah law, "unless a statute gives a clear indication of an extraterritorial application, it has none" (internal quotation marks omitted)).

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[4]When *Bullington* was decided, the statute in relevant part read:

> At any time within three months after any sale of property under a trust deed, *as hereinabove provided*, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security . . . .

Bullington, 478 P.2d at 503 (quoting former Utah Code Ann. § 57-1-32 (1953)). In comparison, Utah Code Ann. § 57-1-32 (LexisNexis 2010) now reads, in relevant part:

> At any time within three months after any sale of property under a trust deed *as provided in Sections 57-1-23, 57-1-24, and 57-1-27*, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security. . . .

(Emphasis added.)

We have carefully reviewed the referenced statutes and their revisions since *Bullington*, and note those statutes still demonstrate the requirement of a substantial connection to Utah. Therefore, in the absence of any clear change in the statutory scheme or a pronouncement from the Utah Supreme Court indicating the law on this point has changed, *Bullington* remains in force and guides the outcome here pursuant to the parties' choice-of-law provision.

Because Utah's Supreme Court has decided Utah Code Ann. § 57-1-32 (LexisNexis 2010) does not project itself extraterritorially, we follow that precedent and do not independently construe the statute. The foreclosed-upon property was located in Nevada, not Utah, and pursuant to *Bullington*, Utah Code Ann. § 57-1-32 (LexisNexis 2010) does not apply. *Bullington*, 478 P.2d at 503. Accordingly, America First was not barred by Utah's three-month statute of limitations and timely filed its deficiency action in Nevada within the controlling six-month limitations period. We therefore conclude the district court correctly denied Soro's motion to dismiss, as America First timely filed suit in this case.

CONCLUSION

When a party seeks to apply another state's antideficiency statute to a Nevada deficiency action pursuant to a valid choice-of-law provision, the Nevada court must first look to the chosen jurisdiction's caselaw before independently construing the statute. If the courts of the chosen jurisdiction have already determined whether the statute projects extraterritorially, the Nevada court must apply that law. Under Utah law, Utah Code Ann. § 57-1-32 (LexisNexis 2010) does not apply extraterritorially and, therefore, does not bar the underlying action. Accordingly, the district court properly denied the motion to dismiss and, as a result, we deny this petition.[5]

TAO and GIBBONS, JJ., concur.

FRANK MILFORD PECK, APPELLANT, *v.* DAVID R. ZIPF, M.D.; AND MICHAEL D. BARNUM, M.D., RESPONDENTS.

No. 68664

December 28, 2017 407 P.3d 775

Appeal from a district court judgment on the pleadings in a medical malpractice action. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Affirmed.

[Rehearing denied April 3, 2018]

Holley, Driggs, Walch, Fine, Wray, Puzey & Thompson and *Rachel E. Donn* and *Andrea M. Gandara*, Las Vegas, for Appellant Frank Milford Peck.

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[5]In light of this opinion, we vacate the stay imposed on the district court proceedings in this matter, Eighth Judicial District Court Case No. A-13-679511-C, by our April 6, 2017, order.

Alverson Taylor Mortensen & Sanders and *David J. Mortensen, Candace C. Herling*, and *Brigette E. Foley*, Las Vegas, for Respondent Michael D. Barnum, M.D.

McCormick, Barstow, Sheppard, Wayte & Carruth, LLP, and *Jill M. Chase* and *Dylan P. Todd*, Las Vegas, for Respondent David R. Zipf, M.D.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, HARDESTY, J.:

NRS 41A.071 provides that a district court must dismiss a plaintiff's medical malpractice complaint if it is not accompanied by an expert affidavit. However, under NRS 41A.100(1), a plaintiff need not attach an expert affidavit for a res ipsa loquitur claim. In this appeal, we consider whether either statutory res ipsa loquitur or the common knowledge res ipsa loquitur doctrine provides an exception to the expert affidavit requirement for suit. We also must determine whether NRS 41A.071 is unconstitutional under the Equal Protection Clause or Due Process Clause, facially, or as applied to inmates or indigent persons.

We reiterate that the enumerated res ipsa loquitur exceptions in NRS 41A.100 supersede the common knowledge res ipsa loquitur doctrine. Because appellant's complaint failed to show that any object left in his body was the result of "surgery," the appellant's complaint did not satisfy the elements for the statutory exception of res ipsa loquitur. Thus, appellant's complaint was properly dismissed for lack of an expert affidavit. We further conclude that NRS 41A.071 does not violate equal protection or due process.

FACTS AND PROCEDURAL HISTORY

Appellant Frank Peck is, and has at all relevant times been, incarcerated at High Desert State Prison in Indian Springs. In December 2013, Peck was admitted to Valley Hospital. While at the hospital, Peck was under the care of respondents, Dr. David R. Zipf and Dr. Michael D. Barnum. In his complaint against the two doctors, Peck claimed that after his release from the hospital, he discovered a foreign object under the skin of his left hand.

In particular, Peck alleged one cause of action for medical malpractice claiming that Dr. Zipf and Dr. Barnum left a needle in his hand. In his complaint, Peck cited NRS 41A.100(1)(a) and *Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992), in which we referenced NRS 41A.100(1) and recognized that expert

testimony may not be necessary in medical malpractice cases where the alleged wrongdoing "is a matter of common knowledge of laymen." While Peck referenced the res ipsa loquitur doctrine, he did not claim that he had surgery. Doctors Zipf and Barnum moved for judgment on the pleadings, and the district court granted their motion, concluding that Peck's complaint did not meet the requirements of NRS 41A.100(1)(a), and thus, his failure to attach an affidavit of a medical expert to his complaint under NRS 41A.071 was fatal.

DISCUSSION

On appeal, Peck argues that the district court erred in dismissing his complaint for lack of an affidavit because his complaint did not require an affidavit under NRS 41A.100(1)(a). Peck further contends that even if he did not meet the requirements for a statutory res ipsa loquitur cause of action, his claim falls under the common knowledge res ipsa loquitur doctrine at common law. Peck also argues that the affidavit requirement in NRS 41A.071 violates his equal protection rights and deprives him of due process. We disagree with Peck's contentions and affirm the district court.

Standard of review

The district court may grant a motion for judgment on the pleadings "when material facts are not in dispute and the movant is entitled to judgment as a matter of law." *Bonicamp v. Vazquez*, 120 Nev. 377, 379, 91 P.3d 584, 585 (2004). A judgment on the pleadings is reviewed in the same manner as a dismissal under NRCP 12(b)(5). *See Sadler v. PacifiCare of Nev., Inc.*, 130 Nev. 990, 993-94, 340 P.3d 1264, 1266 (2014). Thus, this court accepts the factual allegations in the complaint as true and draws all inferences in favor of the nonmoving party. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (stating the standard of review for a motion to dismiss pursuant to NRCP 12(b)(5)). "[Q]uestions of law, including questions of constitutional interpretation and statutory construction," are reviewed de novo. *Lawrence v. Clark Cty.*, 127 Nev. 390, 393, 254 P.3d 606, 608 (2011).

NRS 41A.071's affidavit requirement applies to Peck's complaint

Under NRS 41A.071, "a medical malpractice complaint filed without a supporting medical expert affidavit is void ab initio." *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006). However, a medical expert's affidavit is not required if the claim falls into one of the enumerated res ipsa loquitur exceptions under NRS 41A.100(1). *Szydel v. Markman*, 121 Nev. 453, 459, 117 P.3d 200, 204 (2005). Peck did not submit an affidavit to the district court with his complaint. Thus, his complaint is "void ab initio" unless it falls into one of the enumer-

ated exceptions to the affidavit requirement. *Washoe Med. Ctr.*, 122 Nev. at 1304, 148 P.3d at 794; *see also* NRS 41A.100(1); *Szydel*, 121 Nev. at 459, 117 P.3d at 204.

NRS 41A.100(1)(a) provides that medical expert evidence is not required when "[a] foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following *surgery*." In his complaint, Peck alleged that a foreign object was left in his left hand and that relief was warranted under NRS 41A.100(1)(a); however, he did not describe the medical procedure he had or allege that the object was left in his body following a surgery. At oral argument, counsel for Peck argued that the insertion of an intravenous (IV) needle constitutes surgery or, alternatively, discovery was necessary to determine whether a surgery was taking place at the time the foreign object was allegedly left in Peck's hand.[1] On the other hand, counsel for Dr. Zipf argued that the insertion of an IV needle does not constitute surgery, and thus, Peck did not allege a cause of action under NRS 41A.100(1)(a). The word "surgery" is not defined in NRS 41A.100 or otherwise in NRS Chapter 41A. *See generally* NRS 41A.003-.120. Thus, we must determine what the word "surgery" means in NRS 41A.100(1)(a).

This court reviews issues of statutory construction de novo. *Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 707 (2009). Where a statute's plain language is clear, this court will not look beyond the plain language. *Id.* However, where a term in a statute is not defined, this court will look to its plain and ordinary meaning. *Jones v. Nev., State Bd. of Med. Exam'rs*, 131 Nev. 24, 27, 342 P.3d 50, 52 (2015). *Black's Law Dictionary* defines "surgery" as "that branch of medical science which treats of mechanical or operative measures for healing diseases, deformities, disorders, or injuries." *Surgery*, *Black's Law Dictionary* (6th ed. 1990). NAC 449.9743, a regulation pertaining to the operation and licensing of surgical centers, defines "surgery" as "the treatment

[1]In *Baxter v. Dignity Health*, 131 Nev. 759, 760, 764-65, 357 P.3d 927, 928, 931 (2015), we held that a complaint was not void for lack of a physically attached medical expert affidavit where that affidavit was filed the day after the complaint, and the complaint incorporated by reference the preexisting affidavit. At no time did Peck inform the district court that he had obtained an affidavit, nor did Peck incorporate by reference a medical expert affidavit in his complaint. Rather, Peck filed in this court a medical expert affidavit from a radiologist technician in which the radiologist technician only stated that the foreign object in Peck's hand may not appear on an x-ray. Unlike the factual circumstances that led to our holding in *Baxter*, Peck obtained this affidavit after the district court dismissed Peck's complaint and while he was pursuing this appeal. We note that Peck included his medical records with his opposition to the motion for judgment on the pleadings. The medical records indicate that Peck had a lumbar puncture, which demonstrated that he had viral meningitis. While in the hospital, Peck "went into an acute respiratory failure, requiring intubation and mechanical ventilation." Peck never argued that these medical procedures were "operative measures" or constituted "surgery" as required under NRS 41A.100.

of a human being by operative methods." These definitions support Doctors Zipf and Barnum's contention that the word "surgery" in NRS 41A.100(1)(a) does not include the insertion of an IV needle because that is not an "operative measure." Thus, Peck's medical malpractice claim required a medical expert's affidavit. *See Washoe Med. Ctr.*, 122 Nev. at 1304, 148 P.3d at 794.

Peck argues that NRS 41A.100(1) can be read separately from subsection (a) so that an allegation of surgery is not required. However, in reading the statute as a whole, NRS 41A.100 clearly states that an affidavit is not required "in any one or more of the following circumstances . . . ," and those enumerated res ipsa loquitur exceptions are listed in subsections (1)(a)-(e), one of which being that an object was left in the body following surgery. Moreover, Peck specifically identified this exception in NRS 41A.100(1)(a) in his complaint and did not reference any of the other enumerated exceptions. Accordingly, NRS 41A.100 requires that an expert affidavit be filed with Peck's complaint.

NRS 41A.100 codified and replaced the common law res ipsa loquitur doctrine

Peck argues that a medical expert affidavit was not required under the common law res ipsa loquitur doctrine, and thus, the district court erred in dismissing his complaint. At oral argument, counsel for Peck argued that Peck stated a claim for common law res ipsa loquitur because he cited *Fernandez v. Admirand*, 108 Nev. 963, 843 P.2d 354 (1992), which Peck's counsel argued is the case that created the common law res ipsa loquitur doctrine. However, while we stated in *Fernandez* that expert testimony is necessary in a medical malpractice case "unless the propriety of the treatment, or the lack of it, is a matter of common knowledge of laymen," we specifically referenced NRS 41A.100(1) for this assertion. 108 Nev. at 969, 843 P.2d at 358. Further, we have held that, in drafting NRS 41A.100(1), the Legislature specifically codified the res ipsa loquitur doctrine and determined that in those specific enumerated circumstances, a medical affidavit is not required. *Johnson v. Egtedar*, 112 Nev. 428, 433, 915 P.2d 271, 274 (1996) ("We believe the [L]egislature intended NRS 41A.100 to replace, rather than supplement, the classic res ipsa loquitur formulation in medical malpractice cases where it is factually applicable."); *see also Szydel*, 121 Nev. at 459-60, 117 P.3d at 204-05 (stating that any res ipsa claim filed without an expert affidavit must meet the prima facie requirements for a res ipsa loquitur case as set forth in NRS 41A.100(1)(a)-(e)); *Born v. Eisenman*, 114 Nev. 854, 859, 962 P.2d 1227, 1230 (1998) ("[T]he more traditional res ipsa loquitur doctrine has been replaced by NRS 41A.100."). Had the Legislature intended to allow medical malpractice claims to be filed without an expert affidavit in circumstances

where a foreign object was left in the body during a procedure other than surgery, the Legislature would have codified those situations.

Moreover, we "avoid construing statutes so that any provision or clause is rendered meaningless." *In re Estate of Thomas*, 116 Nev. 492, 495, 998 P.2d 560, 562 (2000). Interpreting NRS 41A.100(1) as merely supplementing the common law and allowing claims where a foreign object is left in the body in a procedure other than surgery would render NRS 41A.100(1)(a) meaningless. Therefore, "there is a fair repugnance between the common law and the statute, and both cannot be carried into effect." *W. Indies, Inc. v. First Nat'l Bank of Nev.*, 67 Nev. 13, 32, 214 P.2d 144, 153 (1950) (internal quotation marks omitted).

NRS 41A.071 does not violate equal protection or due process

Peck argues that the medical expert affidavit requirement violates the Equal Protection and Due Process Clauses of the Nevada and federal Constitutions. Specifically, in his opening brief, Peck argues that NRS 41A.071 (1) "creates an unconstitutional distinction between medical malpractice plaintiffs and other negligence plaintiffs," (2) unconstitutionally prevents indigent plaintiffs from accessing the courts, and (3) unconstitutionally prevents inmates from prosecuting medical malpractice claims. Doctors Zipf and Barnum disagree.

"Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. In order to meet that burden, the challenger must make a clear showing of invalidity." *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 796, 358 P.3d 234, 237-38 (2015) (internal quotation marks omitted). "When the law . . . does not implicate a suspect class or fundamental right, it will be upheld as long as it is rationally related to a legitimate government interest." *Zamora v. Price*, 125 Nev. 388, 395, 213 P.3d 490, 495 (2009).

No unconstitutional distinction exists

"[T]he right of malpractice plaintiffs to sue for damages caused by medical professionals does not involve a fundamental constitutional right." *Tam*, 131 Nev. at 798, 358 P.3d at 239 (alteration in original) (quoting *Barrett v. Baird*, 111 Nev. 1496, 1507, 908 P.2d 689, 697 (1995), *overruled on other grounds by Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 980 (2008)). Nor does Peck argue that a suspect class is implicated. Thus, NRS 41A.071 "need only be rationally related to a legitimate governmental purpose" to withstand a challenge based on equal protection or due process. *Id.*; *see also Arata v. Faubion*, 123 Nev. 153, 159, 161 P.3d 244, 248 (2007). "While the legislative history is helpful to understanding the purpose of enacting the statute, this court is not limited to the reasons

expressed by the Legislature; rather, if any rational basis exists, or can be hypothesized, then the statute is constitutional." *Tam*, 131 Nev. at 798 n.5, 358 P.3d at 239 n.5.

"NRS 41A.071 was enacted in 2002 as part of a special legislative session that was called to address a medical malpractice insurance crisis in Nevada." *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). Doctors were concerned that insurance providers were quoting medical malpractice insurance premiums at drastically increasing rates. *Id*. By enacting NRS Chapter 41A, the Legislature intended "to deter baseless medical malpractice litigation, fast track medical malpractice cases, and encourage doctors to practice in Nevada while also respecting the injured plaintiff[']s right to litigate his or her case and receive full compensation for his or her injuries." *Id*. at 405-06.

A previous version of NRS Chapter 41A required that medical malpractice complaints be heard by a screening panel prior to being filed in the district court, and the panel's findings were admissible in the district court proceedings. *Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1023, 102 P.3d 600, 602 (2004). In *Barrett v. Baird*, we determined that the screening panel provision was "rationally related to a legitimate governmental interest and [did] not violate equal protection." 111 Nev. at 1510-11, 908 P.2d at 699. The governmental interests related to the screening panel provision were "to minimize frivolous suits against doctors, to encourage settlement, and to lower the cost of malpractice premiums and health care." *Id*. at 1508, 908 P.2d at 697 (internal quotation marks omitted).

The Legislature replaced the screening panel provision with the medical expert affidavit requirement. *Borger*, 120 Nev. at 1026, 102 P.3d at 604 ("[T]he expert affidavit requirements of NRS 41A.071 are designed to account for the abolition of the screening panels and to ensure that parties file malpractice cases in good faith, *i.e.*, to prevent the filing of frivolous lawsuits."). The Legislature's intent in requiring medical expert affidavits was to "lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion." *Washoe Med. Ctr.*, 122 Nev. at 1304, 148 P.3d at 794 (internal quotation marks omitted). "According to NRS 41A.071's legislative history, the requirement that a complaint be filed with a medical expert affidavit was designed to streamline and expedite medical malpractice cases and lower overall costs, and the Legislature was concerned with strengthening the requirements for expert witnesses." *Id*. Under the former screening panel provision, the plaintiff could still proceed to trial if the panel concluded that the medical provider was not negligent. *See Borger*, 120 Nev. at 1023, 102 P.3d at 602. Under the medical expert affidavit requirement, however, the lack of an affidavit requires dismissal of the complaint. *See Washoe Med. Ctr.*, 122 Nev. at 1304, 148 P.3d at 794.

We conclude that this change does not impact our analysis under rational basis. As our prior decisions in *Barrett*, *Washoe Medical Center*, and *Zohar* establish, the Legislature's regulation of Nevada's health care system through the medical expert affidavit requirement in NRS 41A.071 is rationally related to the legitimate governmental interest of managing what was considered a "medical malpractice insurance crisis in Nevada." *Zohar*, 130 Nev. at 737, 334 P.3d at 405.

Peck urges this court to adopt the analysis of *Zeier v. Zimmer, Inc.*, 152 P.3d 861, 868 (Okla. 2006), in which the Supreme Court of Oklahoma held unconstitutional a similar affidavit requirement because the statute distinguished between medical malpractice plaintiffs and other negligence plaintiffs. However, the court invalidated the statute based on a unique provision of the Oklahoma Constitution that prohibits "special laws regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts." *Id.* at 868-69. Moreover, Peck does not argue that medical malpractice plaintiffs are a suspect class or that there is a fundamental right to medical malpractice damages. *See Barrett*, 111 Nev. at 1509, 908 P.2d at 698. Accordingly, we are not persuaded by *Zeier*.

Court access remains reasonably unfettered

Peck relies on our decision in *Barnes v. Eighth Judicial District Court*, 103 Nev. 679, 748 P.2d 483 (1987), for the proposition that NRS 41A.071 is overbroad and unconstitutionally restricts an indigent or incarcerated person's access to the courts by imposing a monetary barrier. In *Barnes*, three inmates attempted to file complaints against their attorneys for legal malpractice. 103 Nev. at 680, 748 P.2d at 484. The inmates filed motions under NRS 12.015(1), which allowed indigent plaintiffs to proceed without paying court costs, but the district court "denied the motions to proceed in forma pauperis because they were not supported by the affidavit of an attorney stating that the complaints had merit as required by NRS 12.015(1)." *Id.* at 680, 748 P.2d at 485.

The purpose of the attorney affidavit requirement was "to spare the state the expense of financing frivolous lawsuits filed by indigent persons." *Id.* at 684, 748 P.2d at 487. We determined that the statute also may have worked "to screen out meritorious actions that would otherwise be filed by persons who [could not] afford, or [were] otherwise precluded from obtaining, the required certificate of an attorney." *Id.* We further explained that "the classification scheme created by the statute [was] arbitrary and irrational" and "too broad in its sweep." *Id.* Thus, we determined that "by conditioning the waiver of filing fees on an indigent's ability to obtain the certificate of an attorney that the indigent's cause of action or defense has mer-

it, NRS 12.015 violates the equal protection guarantees contained in the Nevada and United States Constitutions." *Id.*

Barnes is distinguishable from Peck's case because NRS 41A.071 requires a medical expert affidavit for medical malpractice suits filed by anyone—not just indigent or incarcerated persons—whereas NRS 12.015 only required an affidavit for indigent plaintiffs. Moreover, "although an indigent has a right of reasonable access to the courts, the right of access is not unrestricted." *Id.* at 682, 748 P.2d at 486. While an affidavit is required to pursue medical malpractice claims, the lack of an affidavit does not preclude indigent plaintiffs specifically from accessing the courts in general. Thus, NRS 41A.071 does not create a classification scheme that violates equal protection.

Inmates are not unconstitutionally precluded from pursuing medical malpractice claims

Peck also argues that the affidavit requirement is unconstitutional under *Boddie v. Connecticut*, 401 U.S. 371 (1971). In that case, the Supreme Court determined that the imposition of court costs to indigent plaintiffs seeking divorces violated equal protection. However, the Court concluded that because of the importance of the "marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." *Boddie*, 401 U.S. at 374. Here, medical malpractice damages do not share the same hierarchy in value in our society as marriage does, and indigent or incarcerated individuals are not precluded from obtaining an expert opinion solely on the basis of their indigence or incarceration. Moreover, the state is not imposing a court cost or fee under NRS 41A.071. Accordingly, Peck's reliance on *Boddie* is misplaced.

Peck further relies on *Bounds v. Smith*, 430 U.S. 817 (1977), for the notion that prisoners have a constitutional right of access to the courts. We agree and have held the same. *See Miller v. Evans*, 108 Nev. 372, 374, 832 P.2d 786, 787 (1992). However, this right does not include unfettered access to pursue all civil actions. In *Lewis v. Casey*, the Supreme Court clarified *Bounds* and explained that the right of access to the courts requires providing resources "that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." 518 U.S. 343, 355 (1996). Moreover, inmates are not a suspect class, and there is no fundamental right to medical malpractice damages. *See Glauner v. Miller*, 184 F.3d 1053, 1054

(9th Cir. 1999) (noting that inmates are not a suspect class); *Tam*, 131 Nev. at 798, 358 P.3d at 239 (determining that there is no fundamental right to medical malpractice damages). Thus, NRS 41A.071 need only meet rational basis, which we conclude it does.

Other jurisdictions with expert affidavit requirements in medical malpractice actions agree that inmates and indigent plaintiffs are not excused from the affidavit requirements. *See Perry v. Stanley*, 83 S.W.3d 819, 825 (Tex. App. 2002) (holding that the requirement to file a medical affidavit with a complaint can properly be applied to inmates because they bear the burden of proof at trial, which requires expert testimony); *Gill v. Russo*, 39 S.W.3d 717, 718-19 (Tex. App. 2001) (holding that a statute requiring an expert report to be filed within 180 days of an inmate's filing of a medical malpractice suit did not violate the open courts provision of the Texas Constitution, despite the inmate's arguments that he could not interview physicians from prison and did not have enough money to obtain the reports); *see also O'Hanrahan v. Moore*, 731 So. 2d 95, 96-97 (Fla. Dist. Ct. App. 1999) (rejecting a prisoner's request to declare unconstitutional a pre-suit requirement for a medical expert opinion to initiate his medical malpractice action); *Ledger v. Ohio Dep't of Rehab. & Corr.*, 609 N.E.2d 590, 593-95 (Ohio Ct. App. 1992) (holding that an inmate's medical malpractice action was properly dismissed with prejudice for failure to meet that state's statutory affidavit requirement). Notably, Peck was able to obtain a medical expert affidavit after submitting his complaint, which demonstrates that his indigence and incarceration did not prevent him from acquiring the requisite documents needed for a medical malpractice claim.

Accordingly, we conclude that NRS 41A.071 is rationally related to a legitimate governmental interest and does not violate equal protection or due process requirements.

CONCLUSION

Based on the foregoing, we affirm the district court's order granting Doctors Zipf and Barnum's motion for judgment on the pleadings because Peck failed to include a medical expert affidavit with his medical malpractice complaint.

PARRAGUIRRE and STIGLICH, JJ., concur.

X'ZAVION HAWKINS, AN INDIVIDUAL, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOANNA KISHNER, DISTRICT JUDGE, RESPONDENTS, AND GGP MEADOWS MALL, A DELAWARE LIMITED LIABILITY COMPANY; MYDATT SERVICES, INC., DBA VALOR SECURITY SERVICES, AN OHIO CORPORATION; AND MARK WARNER, AN INDIVIDUAL, REAL PARTIES IN INTEREST.

No. 71759

December 28, 2017 407 P.3d 766

Original petition for a writ of mandamus challenging a district court order awarding attorney fees, as a sanction, for work done by later-disqualified attorneys.

Petition granted.

Injury Lawyers of Nevada and *David J. Churchill* and *Jolene J. Manke*, Las Vegas, for Petitioner.

Backus, Carranza & Burden and *Edgar Carranza*, Las Vegas, for Real Parties in Interest Mydatt Services, Inc., dba Valor Security Services; and Mark Warner.

Lee, Hernandez, Landrum, Garofalo and *David S. Lee* and *Charlene Renwick*, Las Vegas, for Real Parties in Interest GGP Meadows Mall; Mydatt Services, Inc., dba Valor Security Services; and Mark Warner.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, HARDESTY, J.:

In this petition for extraordinary writ relief, we address what the district court should have considered when awarding attorney fees sought for work done by a disqualified firm. We conclude that the district court must consider the factors from the Restatement (Third) of the Law Governing Lawyers § 37 cmt. d (2000) when awarding attorney fees sought for a disqualified law firm's work.

FACTS AND PROCEDURAL HISTORY

At Meadows Mall in Las Vegas, petitioner X'Zavion Hawkins was shot multiple times by another patron while attending an event. Hawkins consulted with attorney Paul Shpirt at the Eglet Law Group concerning the shooting. Shpirt initially agreed to represent Haw-

kins, but later declined representation after reviewing the evidence. Hawkins retained a different attorney, who filed suit against real parties in interest GGP Meadows Mall; Mydatt Services, Inc., dba Valor Security Services; and Mark Warner (collectively, Meadows Mall) for premises liability and failure to provide adequate security.

Shpirt left the Eglet Law Group and began working at Lewis Brisbois Bisgaard & Smith (LBBS). In the underlying action, Meadows Mall retained LBBS to assist its separately retained counsel with its defense in the matter. Meadows Mall then sought discovery sanctions and moved to dismiss Hawkins' complaint based on Hawkins changing his version of events, providing false information, and/or omitting information required by NRCP 16.1 from his discovery responses.

When LBBS discovered the conflict stemming from Shpirt's prior representation of Hawkins and the firm's current representation of Meadows Mall, LBBS screened Shpirt from the case. However, LBBS did not notify Hawkins of the conflict. When Hawkins discovered the conflict involving Shpirt, he moved to disqualify LBBS. While that motion was pending, the district court scheduled an evidentiary hearing to determine whether to dismiss Hawkins' complaint. LBBS participated in the evidentiary hearing and argued for dismissal. The district court denied the motion to dismiss, but it granted as a discovery sanction a curative jury instruction for Hawkins' discovery abuses.

Thereafter, the district court disqualified LBBS because the firm failed to notify Hawkins and failed to obtain his informed consent regarding the conflict pursuant to RPC 1.9 (duties to former clients) and RPC 1.10(e) (imputation of conflicts of interest). Meadows Mall substituted LBBS with Backus, Carranza & Burden.

Following the order imposing sanctions for Hawkins' discovery abuses, Meadows Mall sought attorney fees, requesting $29,201 for LBBS; $13,681.50 for its other retained counsel; and $11,442.50 for Backus, Carranza & Burden. At the hearing on the motion for attorney fees, the district court expressed concern over the amounts requested. Meadows Mall explained that it had to do extra work to ensure that none of the work that was negatively impacted by LBBS's conflict was used. Counsel for Hawkins requested supplemental briefing to consider whether a disqualified law firm could receive attorney fees. Both parties provided supplemental briefing, and the district court ordered Hawkins to pay $41,635 for Meadows Mall's attorney fees, which was less than the total amount requested but which included $19,846 for work done by LBBS. The district court concluded that it had discretion to award attorney fees as sanctions, rejected Hawkins' contention that awarding fees to LBBS would be inappropriate, and noted that it reduced each of the law firms' awards from the amount requested because of "the number

of lawyers and law firms involved in the Motion and Hearing at issue . . . [and] to be consistent with the nature and scope of the record and applicable law."

The sole issue we address in this opinion is whether the district court abused its discretion in failing to consider LBBS's disqualified status in awarding sanctions in the nature of attorney fees.[1]

DISCUSSION

Hawkins maintains that a disqualified law firm which, like LBBS, violates its duty of loyalty to a former client should not collect attorney fees for the work it completed while violating that duty and that, therefore, Meadows Mall should not be awarded such fees as a sanction against him. Meadows Mall argues that the district court had broad discretion to impose sanctions against Hawkins for his failure to comply with the discovery obligations, and thus, the sanctions were appropriate. We conclude that the district court failed to analyze the Restatement (Third) of the Law Governing Lawyers factors regarding attorney fees sought for a disqualified law firm, and we therefore grant writ relief.

Writ relief is warranted

It is solely within our discretion whether to entertain a writ of mandamus. *Anse, Inc. v. Eighth Judicial Dist. Court*, 124 Nev. 862, 867, 192 P.3d 738, 742 (2008). "A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion." *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 907-08 (2008) (internal quotation marks and alteration omitted). "A writ of mandamus is an extraordinary remedy that will not issue if the petitioner has a plain, speedy, and adequate remedy at law." *State v. Second Judicial Dist. Court*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002). However, we will consider a writ of mandamus even where there is an adequate remedy at law "under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." *Id*. Because this case involves an important issue of law and judicial economy is served by our prompt consid-

[1]Hawkins also challenges the district court's decision to entertain the motion to dismiss despite the pendency of his disqualification motion and the jury instruction sanction. However, the district court denied the motion to dismiss, which resolves the issue in Hawkins' favor. Moreover, it does not appear from the record that the parties have drafted the challenged jury instruction. Thus, the jury instruction issue is not ripe for this court's review. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) ("This court's duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment.").

eration of that issue, given its isolation from the merits of the claims below, we grant this petition to clarify the appropriate factors a district court should consider when imposing sanctions that include attorney fees sought for a disqualified law firm.

Factors courts must consider before awarding attorney fees as a sanction

The district court's decision to impose discovery sanctions is committed to its discretion. *GNLV Corp. v. Serv. Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995). The district court has authority to impose sanctions through NRCP 37 and its inherent equitable powers, including "sanctions for discovery and other litigation abuses not specifically proscribed by statute." *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). Discovery sanctions can include an order to pay "reasonable expenses incurred . . . including reasonable attorney's fees." NRCP 37(c)(2).

In this writ petition, Hawkins does not dispute that he violated his discovery obligations. Rather, he contends that awarding fees to a disqualified law firm, LBBS, was inappropriate. In his supplemental briefing to the district court, Hawkins provided California authority that relied on the Restatement (Third) of the Law Governing Lawyers § 37 (2000), but the district court expressly rejected that authority.[2] The Restatement provides that "[a] lawyer's improper conduct can reduce or eliminate the fee that the lawyer may reasonably charge." Restatement (Third) of the Law Governing Lawyers § 37 cmt. a (2000). The Restatement also includes factors for the district court to consider in analyzing "whether violation of duty warrants fee forfeiture." *Id.* § 37 cmt. d. The factors are (1) "[t]he extent of the misconduct," (2) "[w]hether the breach involved knowing violation or conscious disloyalty to a client," (3) whether forfeiture is "proportionate to the seriousness of the offense," and (4) "[t]he adequacy of other remedies." *Id.*

The Restatement further explains that for flagrant violations, forfeiture is justified even where no harm is proved, but for minor violations, merely reducing the fee may be warranted. *Id.* "The remedy of fee forfeiture presupposes that a lawyer's clear and serious

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[2]Hawkins relied on *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co.*, 198 Cal. Rptr. 3d 253 (Ct. App. 2016), *review granted and opinion superseded*, 368 P.3d 922 (Cal. 2016). In *Sheppard*, an attorney disqualified because of a conflict of interest sought attorney fees, and the client asserted the conflict of interest as a defense to payment of fees. *Id.* at 272. The California Court of Appeal determined that the attorney was not entitled to fees because the attorney was involved in an actual conflict and "[i]t is the general rule in conflict of interest cases that where an attorney violates his . . . ethical duties to the client, the attorney is not entitled to a fee for his . . . services." *Id.* at 274 (internal quotation marks omitted). We note that the California Supreme Court granted the petition for review in that case, and thus we do not rely on the court of appeal's decision.

violation of a duty to a client destroys or severely impairs the client-lawyer relationship and thereby the justification of the lawyer's claim to compensation." *Id*. § 37 cmt. b. Additionally, "[f]orfeiture is . . . a deterrent," and it allows courts to impose a sanction where damages from attorney misconduct are difficult to measure. *Id*. The Ninth Circuit has reasoned that, where an attorney simultaneously represents clients with conflicting interests without getting written informed consent, "[a]n attorney cannot recover fees for such conflicting representation . . . because payment is not due for services not properly performed." *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1358 (9th Cir. 1998) (internal quotation marks and citation omitted); *see also State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. 743, 749 n.6, 357 P.3d 338, 342 n.6 (2015) ("The representation of clients with conflicting interests and without informed consent is a particularly egregious ethical violation that may be a proper basis for complete denial of fees." (quoting *Rodriguez v. Disner*, 688 F.3d 645, 655 (9th Cir. 2012))). Moreover, "[a] court has broad equitable power to deny attorneys' fees (or to require an attorney to disgorge fees already received) when an attorney represents clients with conflicting interests." *Rodriguez*, 688 F.3d at 653.

Meadows Mall argues that this case is distinguishable from Hawkins' provided authority because, here, the attorney fees were ordered in the form of sanctions from the opposing party to the disqualified law firm's former client, whereas in *Sheppard* and other cases applying the Restatement factors, the attorney was directly seeking attorney fees from the client. We acknowledge that these factors have been analyzed in cases involving attorneys seeking fees from clients and that this writ involves a different context. Nevertheless, we determine that it is appropriate to consider the Restatement factors when the district court orders payment of attorney fees in the form of sanctions to a disqualified law firm's former client because the policy underlying fee forfeiture applies without regard to for whom the court orders the attorney fees paid; a party should not be awarded attorney fees that ultimately are not due the attorney. *See id*. at 654 (stating that "payment is not due for services not properly performed" (internal quotation marks omitted)); *see also Silbiger v. Prudence Bonds Corp.*, 180 F.2d 917, 920 (2d Cir. 1950) ("Certainly by the beginning of the Seventeenth Century it had become a common-place that an attorney must not represent opposed interests; and the usual consequence has been that he is debarred from receiving any fee from either, no matter how successful his labors." (footnote omitted)).

CONCLUSION

We therefore hold that when imposing sanctions in the form of attorney fees, a district court must analyze and apply the factors from

the Restatement (Third) of the Law Governing Lawyers § 37 cmt. d (2000) in determining whether an award of attorney fees based on work done by a disqualified law firm is reasonable. The district court did not do so here when imposing sanctions in the form of attorney fees for work done by LBBS, a disqualified law firm. As the district court awarded the attorney fees without the benefit of our guidance on this issue, we grant the petition and direct the clerk of this court to issue a writ of mandamus directing the district court to vacate its order granting the motion for attorney fees and to reconsider the motion in light of this opinion.[3]

PARRAGUIRRE and STIGLICH, JJ., concur.

DANIEL JAMES RODRIGUEZ, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 71920

December 28, 2017 407 P.3d 771

Appeal from a judgment of conviction, pursuant to a jury verdict, of battery with the use of a deadly weapon. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Affirmed.

Martin H. Wiener, Reno, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Stephan Hollandsworth*, Deputy District Attorney, Washoe County, for Respondent.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, STIGLICH, J.:

At issue in this appeal is the definition of "deadly weapon" within the context of battery. Daniel Rodriguez contends the jury instruction that led to his conviction for battery with the use of a deadly weapon was erroneous because the object he used to stab his victim—a screwdriver—is not designed to be inherently dangerous. We disagree because, within the context of battery, "deadly weapon" includes an instrument which, under the circumstances in which

[3]Given our resolution of this writ petition, we hereby vacate the stay imposed by our April 11, 2017, order.

it is used, is readily capable of causing substantial bodily harm or death. The jury instructions accurately stated that definition. Therefore, we affirm.

FACTS AND PROCEDURAL HISTORY

Appellant Daniel Rodriguez used a screwdriver to stab a 66-year-old man in the neck. The screwdriver was four to six inches long. It broke through the victim's skin, causing bleeding and one night of hospitalization. The State charged Rodriguez with battery with the use of a deadly weapon, causing substantial bodily harm, against a person at least sixty years of age.

Prior to trial, Rodriguez repeatedly contested the "deadly weapon" allegation, arguing that a screwdriver could not meet the narrow definition of "deadly weapon" he claimed applies to NRS 200.481(2)(e), which governs the crime of battery with the use of a deadly weapon. The district court rejected Rodriguez's motions to dismiss the deadly weapon allegation.

When it came time to settle jury instructions, Rodriguez and the State submitted competing "deadly weapon" definitions. Rodriguez submitted an "inherently dangerous" definition:

> A deadly weapon is any instrument which, if used in the ordinary manner contemplated by its design or construction, will, or is likely to cause a life-threatening injury or death.

The State offered a "functional" definition:

> A "deadly weapon" is defined as any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

The district court instructed the jury according to the State's definition.

The jury convicted Rodriguez of battery with the use of a deadly weapon but found substantial bodily harm did not result. He was sentenced according to the statutory guidelines, NRS 200.481(2)(e)(1), with an enhancement because his victim was over the age of sixty, NRS 193.167.

The sole issue on appeal is whether the jury instructions accurately defined "deadly weapon" within the context of NRS 200.481(2)(e), battery with the use of a deadly weapon.

DISCUSSION

Rodriguez argues that the district court abused its discretion by instructing the jury on the "functional" definition of deadly weapon, to wit, that a deadly weapon includes any "instrument . . . which, under the circumstances in which it is used . . . is readily capable

of causing substantial bodily harm or death." We review a district court's settling of jury instructions for an abuse of discretion or judicial error, but we review de novo whether those instructions correctly state the law. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

Rodriguez contends that, within the context of NRS 200.481(2)(e), the Legislature intended to define "deadly weapon" according to the inherently deadly definition, as opposed to the broader functional definition applied by the district court. Both of these definitions have roots in Nevada caselaw. According to the functional definition, virtually any object can constitute a "deadly weapon," so long as it is used in a "deadly manner." *Zgombic v. State*, 106 Nev. 571, 573, 798 P.2d 548, 549 (1990) (discussing both tests and ultimately adopting inherently dangerous definition for sentence enhancement statute purposes), *superseded by statute*, 1995 Nev. Stat., ch. 455, § 1, at 1431. Under the inherently dangerous definition, by contrast, a screwdriver would not qualify as a "deadly weapon" because a screwdriver is "not *intended* by [ ] nature or design to be used to cause injury." *Hutchins v. State*, 110 Nev. 103, 111, 867 P.2d 1136, 1141 (1994) (reviewing sentence enhancement under inherently dangerous test). To the extent that the Legislature's intent is unclear, Rodriguez urges this court to apply the rule of lenity to resolve ambiguity in his favor.

"The ultimate goal of interpreting statutes is to effectuate the Legislature's intent." *In re CityCenter Constr. & Lien Master Litig*., 129 Nev. 669, 673, 310 P.3d 574, 578 (2013). When interpreting a statute, our starting point is the statute's plain meaning. *See Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983).

NRS 200.481 criminalizes battery, the "willful and unlawful use of force or violence upon the person of another." NRS 200.481(1)(a). Absent aggravating factors, battery is a misdemeanor, NRS 200.481(2)(a), but it becomes a category B felony if the batterer used a "deadly weapon," NRS 200.481(2)(e). "Deadly weapon" is not defined within the statute, and we find no clues within the statute itself as to how the term should be defined. Therefore, the plain language of NRS 200.481(2)(e) is ambiguous as to what constitutes a "deadly weapon."

When a statute's plain language is ambiguous, "we turn to other legitimate tools of statutory interpretation." *Castaneda v. State*, 132 Nev. 434, 439, 373 P.3d 108, 111 (2016). Of relevance here is the presumption that, "[w]hen a legislature adopts language that has a particular meaning or history . . . the legislature intended the language to have meaning consistent with previous interpretations of the language." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 580-81, 97 P.3d 1132, 1135-36 (2004).

In 1971, when the Legislature enacted NRS 200.481(2)(e), *see* 1971 Nev. Stat., ch. 612, §§ 1-3, at 1384-85, the functional defi-

nition was one of two accepted "deadly weapon" definitions within Nevada caselaw. As early as 1870, this court defined objects as "deadly weapons" if they satisfied *either* the inherently dangerous *or* the functional test. *State v. Napper*, 6 Nev. 113, 115 (1870) (defining deadly weapon as "a weapon deadly either in its nature, or capable of being used in a deadly manner"); *see also State v. McNeil*, 53 Nev. 428, 436, 4 P.2d 889, 890 (1931) ("[W]e can easily conceive of many circumstances in which a given weapon could be equally deadly in many ways, regardless of the purpose for which it is mainly intended to be used."); *State v. Davis*, 14 Nev. 407, 413 (1879) ("It was peculiarly within the province of the jury, under the facts of this case, to determine, as a fact, whether the club in defendant's hand, as it was used by him, was likely to produce fatal consequences or not."). Thus, because our caselaw defined "deadly weapon" according to the functional definition when the Legislature enacted NRS 200.481(2)(e), we presume that the Legislature intended the functional definition to apply. *See Beazer Homes*, 120 Nev. at 580-81, 97 P.3d at 1135-36.

Rodriguez cites to *Zgombic v. State* as support for applying the inherently dangerous definition. 106 Nev. at 574, 798 P.2d at 550. In *Zgombic*, we rejected the functional definition for "deadly weapon" within the context of NRS 193.165.[1] *Id*. NRS 193.165 provides enhanced sentences for crimes committed with a deadly weapon, but it does not apply to crimes like NRS 200.481(2)(e) that contain "deadly weapon" as a "necessary element" of the underlying crime. NRS 193.165(4). In rejecting the functional definition, we reasoned, "NRS 193.165 is designed to deter injuries caused by *weapons*, not by *people*," so "interpreting the deadly weapon clause in NRS 193.165 by means of a functional test was not what our legislature intended." *Zgombic*, 106 Nev. at 574, 576, 798 P.2d at 550-51.

But *Zgombic* is inapposite for two reasons. First, *Zgombic* explicitly exempted statutes like NRS 200.481(2)(e) from its holding. *Id.* at 574, 798 P.2d at 550 ("We have no dispute with [ ] cases which use the functional test to define a deadly weapon when a deadly weapon is an element of a crime. Indeed, that is the interpretation generally followed in Nevada."). Second, five years after *Zgombic* was decided, our Legislature superseded its holding by amending NRS 193.165 to define "deadly weapon" according to *both* the inherently dangerous *and* the functional definitions. 1995 Nev. Stat., ch. 455, § 1, at 1431. The Legislature's rejection of *Zgombic* indicates its continued approval of the functional definition.

Finally, Rodriguez directs us to NRS 193.165 itself. NRS 193.165(6) contains an introductory clause that limits its definitions of "deadly weapon" to "this section." Because NRS 200.481(2)(e)

[1]At the time *Zgombic* was decided, NRS 193.165 did not define "deadly weapon." 1981 Nev. Stat., ch. 780, § 1, at 2050.

is exempt from NRS 193.165's enhancement provisions, Rodriguez argues that extending the definitions to NRS 200.481(2)(e) contravenes NRS 193.165(6)'s express limitation. This court rejected a similar argument in *Funderburk v. State*, 125 Nev. 260, 262, 212 P.3d 337, 338-39 (2009). In that case, Samaja Funderburk was convicted of burglary while in possession of a deadly weapon for burglarizing a McDonald's with a BB gun. *Id.* at 261-62, 212 P.3d at 338; *see also* NRS 205.060(4) (burglary while in possession of a deadly weapon). This court rejected Funderburk's argument that NRS 193.165(6)'s definitions are inapplicable to crimes that include "deadly weapon" as an element of the crime. *Funderburk*, 125 Nev. at 262 n.4, 212 P.3d at 339 n.4. Instead, we held those definitions to be "instructive" within the context of charges of burglary while in possession of a deadly weapon. *Id.* at 261, 212 P.3d at 337. As relevant here, then, *Funderburk* demonstrates that although NRS 193.165(6)'s definitions do not *necessarily* extend beyond NRS 193.165, nothing *prevents* them from helping to define "deadly weapon" within other statutes.

In sum, the Legislature intended "deadly weapon" within NRS 200.481(2)(e) to be interpreted broadly, according to both the functional definition and the inherently dangerous definition. Because we find the Legislature's intent to be sufficiently clear on this issue, we decline Rodriguez's invitation to apply the rule of lenity. *See State v. Lucero*, 127 Nev. 92, 99, 249 P.3d 1226, 1230 (2011) ("[T]he rule [of lenity] only applies when other statutory interpretation methods . . . have failed to resolve a penal statute's ambiguity.").

Therefore, the district court had discretion to determine which definition of "deadly weapon" was appropriate given the facts of this case. Given that a screwdriver clearly fails the inherently dangerous definition, *see Hutchins*, 110 Nev. at 111, 867 P.2d at 1141, the district court properly exercised its discretion in instructing the jury according to the functional definition. As we find no legal error or abuse of the district court's discretion in settling the jury instructions, and Rodriguez does not challenge the sufficiency of the evidence supporting his conviction, we affirm Rodriguez's conviction of battery with the use of a deadly weapon.

CONCLUSION

Because this court has consistently defined "deadly weapon" according to both the functional and the inherently dangerous definitions, the district court acted within its discretion in settling the jury instructions in the context of battery according to the functional definition. Accordingly, we affirm Rodriguez's conviction for battery with the use of a deadly weapon.

HARDESTY and PARRAGUIRRE, JJ., concur.