MONICA C. JONES, Appellant, *v.* U.S. BANK NATIONAL ASSOCIATION, as Trustee for TBW MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3, Respondent.

No. 78054

April 2, 2020 460 P.3d 958

Appeal from a district court judgment in a real property action. Eighth Judicial District Court, Clark County; David Barker, Judge.

Affirmed.

Kern Law, Ltd., and *Robert J. Kern*, Las Vegas, for Appellant.

Wright, Finlay & Zak, LLP, and *R. Samuel Ehlers* and *Lindsay Robbins*, Las Vegas, for Respondent.

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

[6]Although LVMPD argues that the district court erred by including prelitigation fees in the award, our review of the record and the district court's order confirms that the district court *did not* include prelitigation fees and costs in the award.

OPINION

By the Court, Stiglich, J.:

NRS 104.3309 provides a procedure to enforce a lost, destroyed, or stolen note. Under the statute's plain language, the enforcing party must show by a preponderance of the evidence that it either had the right to enforce the note when it lost possession or acquired ownership of the note from a party that had the right to enforce it, that the note was not lost as a result of a transfer or lawful seizure, and that the note cannot be reasonably obtained. As a matter of first impression, we hold this showing may be made by a lost-note affidavit and other secondary evidence as necessary to demonstrate, under the circumstances specific to that particular instrument, that the enforcing party is entitled to enforce the lost instrument. Because the NRS 104.3309 analysis is intrinsically fact-based, it should take into account all relevant considerations to determine whether an action may proceed in the absence of the original note.

In this case, respondent U.S. Bank acquired the deed of trust secured by appellant Monica Jones' residence and sought to foreclose on the defaulted loan. The original lender, however, did not execute an assignment of the note to U.S. Bank when the lender assigned the deed of trust to U.S. Bank, and the loan servicer swore an affidavit certifying that the note was lost. Because U.S. Bank presented evidence to meet its burden to show that the original note was lost, that it was entitled to enforce the note because it had been assigned the deed of trust and there was no evidence of an intent to transfer the deed of trust without the note, that Jones had defaulted, and that it was entitled to foreclose on the deed of trust, the district court correctly granted summary judgment in U.S. Bank's favor. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

Monica Jones purchased a residence using a mortgage loan. The note promised repayment to lender Taylor, Bean & Whitaker, and the deed of trust named as beneficiary Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Taylor, Bean & Whitaker. Taylor, Bean & Whitaker went bankrupt in 2009, and Jones ceased making payments on her mortgage the same year.

The original note was lost. The loan servicer Ocwen Loan Servicing's 2016 lost-note affidavit certified that it was the authorized servicing agent and stated the note contents (borrower name, original lender, original loan amount, address of secured property, and date of note). Ocwen represented that it made a good-faith, diligent search to locate the original note and that the original note could not be reasonably obtained as it was not in Ocwen's possession and was either lost or destroyed. Ocwen further certified that it did not

believe that the original note had been satisfied, pledged, assigned, transferred, lawfully seized, or hypothecated. MERS assigned the deed of trust to U.S. Bank in 2017.

U.S. Bank sought a judicial foreclosure and moved for summary judgment, attaching Ocwen's lost-note affidavit and a copy of the note that corroborated Ocwen's description of the note's terms. The district court granted summary judgment in favor of U.S. Bank, finding that U.S. Bank was entitled to enforce the note, entering a judgment against the property, and authorizing the foreclosure sale of the property. Jones appeals.

DISCUSSION

We review a district court's summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment under NRCP 56(c) was appropriate if the pleadings and other evidence on file, viewed in a light most favorable to Jones, demonstrated that U.S. Bank was entitled to judgment as a matter of law and that no genuine issue of material fact remained in dispute. *Id.* Further, statutory interpretation is a question of law that we review de novo. *Leven v. Frey*, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007). "Generally, when a statute's language is plain and its meaning clear, the courts will apply that plain language." *Id.* at 403, 168 P.3d at 715.

In order to foreclose, a party must be entitled to enforce both the deed of trust and the promissory note. *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 520, 286 P.3d 249, 259 (2012). The Legislature has provided a procedure to enable a party that is entitled to enforce a note or other instrument to do so where the original instrument has been lost, destroyed, or stolen. *See* NRS 104.3309.[1] A party that does not possess a note may enforce it if (1) the party was entitled to enforce it when possession was lost or it acquired ownership from a prior owner who was entitled to enforce it when it was lost, (2) possession was not lost due to transfer or lawful seizure, and (3) the enforcing party cannot reasonably obtain possession of the note because it was destroyed, cannot be located, or is wrongfully possessed by an unknown person or a person who cannot be found or is not amenable to service. NRS 104.3309(1). The enforcing party must prove both the terms of the note and its right to enforce it by a preponderance of the evidence. *See* NRS 104.3309(2) (providing that "[a] person seeking enforcement of [a note] under [NRS 104.3309(1)] must prove the terms of the instrument and his

[1]Before the Legislature's 2005 amendment, the statute permitted enforcement of a lost note only by the party that owned the note when it was lost. *See* 2005 Nev. Stat., ch. 439, § 6, at 1999. The 2005 amendment also permitted enforcement by another party that acquired ownership from the party that owned the note when it was lost. *See id.*

or her right to enforce the instrument"); NRS 104.3103(1)(i) (defining "Prove" as meeting the burden of establishing a fact); NRS 104.1201(2)(h) (defining "Burden of establishing" as showing the existence of a fact by a preponderance); *cf. Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 165, 232 P.3d 433, 435 (2010) ("[A] preponderance of the evidence is all that is needed to resolve a civil matter unless there is clear legislative intent to the contrary."). Lastly, the district court may not provide relief under this procedure unless the person required to pay under the note is adequately protected from claims on the note by a third party. NRS 104.3309(2).

Jones argues that U.S. Bank did not prove that it was entitled to foreclose because U.S. Bank did not show that it had possessed the note, had the note transferred to it, or had the right to enforce the note and that summary judgment was therefore improper.[2] U.S. Bank counters that the MERS assignment sufficed to convey the right to foreclose on the defaulted mortgage. We agree with U.S. Bank. The deed of trust authorized MERS, acting as the beneficiary of the deed of trust and as the lender's agent, to assign the deed of trust to U.S. Bank. *See Edelstein*, 128 Nev. at 522, 286 P.3d at 260-61. Transferring a deed of trust, however, also transfers the obligation that it "secures unless the parties to the transfer agree otherwise." *See id.* at 518, 286 P.3d at 258 (quoting Restatement (Third) of Prop.: Mortgages § 5.4(b) (1997)).

We look closely to the facts of the loan and its default in applying NRS 104.3309. We discern here that U.S. Bank has shown by a preponderance that the parties did not intend to deviate from the general presumption that the note traveled with the deed of trust based on the evidence below. *See Cogswell v. CitiFinancial Mortg. Co.*, 624 F.3d 395, 403 (7th Cir. 2010) (recognizing that foreclosure may proceed based on a lost-note affidavit accompanied by copies of the original instruments). The copy of the note, the deed of trust, the assignment to U.S. Bank, and the loan servicer's affidavit support the inference that all interested note and deed holders intended to convey the right to enforce the note to U.S. Bank with the right

[2]We agree with U.S. Bank that Jones waived the statute of limitations challenge stated in the notice of appeal yet omitted from the appellate briefs, as Jones proffered no argument on this issue. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011).

While U.S. Bank is also correct that Jones raises standing for the first time on appeal, Jones argued below that U.S. Bank was not entitled to enforce the note, which is the gravamen of Jones' challenge to U.S. Bank's standing. *See Edelstein*, 128 Nev. at 514, 286 P.3d at 255 (discussing standing to foreclose). As the district court had the opportunity to address the gravamen of Jones' challenge, U.S. Bank's argument that Jones did not argue standing below and thus waived it fails. *See Lum v. Stinnett*, 87 Nev. 402, 412, 488 P.2d 347, 353 (1971) (concluding that an argument was not waived where its gravamen had been argued below). Nevertheless, as Jones' standing challenge turns on U.S. Bank's entitlement to enforce the note, we focus our inquiry accordingly.

to enforce the deed of trust. The original lender is defunct, and there is no record of a transfer to a successor-in-interest other than U.S. Bank. And further, Jones stated at the summary judgment hearing that she did not know what entity had the right to receive payments on the note after the original lender ceased conducting business, indicating that no third party had since made claims on the note. The record thus offers little to suggest that another party will assert claims against Jones on the note, and U.S. Bank has committed to protect Jones against any such claimants as NRS 104.3309(2) requires. Jones' contention that U.S. Bank may not prevail unless the lost-note affidavit, standing alone, satisfied NRS 104.3309 is mistaken; although the affidavit may be used to meet the NRS 104.3309 elements, whether NRS 104.3309 has been satisfied is based on all of the evidence and exhibits submitted to the district court, not just the affidavit. *See A.I. Credit Corp. v. Gohres*, 299 F. Supp. 2d 1156, 1159 (D. Nev. 2004) (recognizing that the loss of a note does not alter the owner's rights but renders secondary evidence necessary to prove the note's terms and enforce it). Accordingly, we conclude that in being assigned the deed of trust by the original deed of trust beneficiary and in the absence of evidence that the now-lost note had been transferred from the original lender, U.S. Bank showed that it acquired ownership of the note from the lender who was entitled to enforce the note when it was lost.

We conclude as well that U.S. Bank has shown by a preponderance that the note was not lost due to a transfer or lawful seizure and that the note cannot be located. U.S. Bank represented that it was not aware of any transfer of the note and that the note could not be located. The original deed of trust beneficiary's assignment of the deed of trust absent any indication that the deed of trust was being transferred split from the note supports the inference that the note had not been previously transferred or seized and that MERS was exercising its authority to transfer the note with the deed of trust. The attached lost-note affidavit certified that the loan servicer was not aware of any transfer of the note as well. Further, the conclusion that the note had not been transferred and could not be located is bolstered by Jones' representation that she did not know to whom to make mortgage payments, supporting an inference that no other party has claimed a right to enforce the note during the ten years that its debt has been in default. Accordingly, we conclude that the district court properly determined that U.S. Bank has satisfied NRS 104.3309 and may enforce the lost note.

CONCLUSION

We conclude that U.S. Bank met its burden by producing a lost-note affidavit and other evidence to show by a preponderance that it had acquired the right to enforce the note from a party entitled to

enforce it when it was lost, that the note was not lost due to a prior transfer or lawful seizure, and that the note could not be located. U.S. Bank thus satisfied NRS 104.3309. As U.S. Bank was entitled to enforce the deed of trust and the note, it was entitled to seek a judicial foreclosure on Jones' default. We conclude that no genuine issues of material fact remained and accordingly affirm the district court's judgment.

Gibbons and Silver, JJ., concur.

ROSAISET JARAMILLO, as Special Administrator of the Estate of Maria Jaramillo, Appellants, *v.* SUSAN R. RAMOS, M.D., F.A.C.S., Respondent.

No. 77385

April 2, 2020 460 P.3d 460

Appeal from a district court summary judgment in a medical malpractice action. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Reversed and remanded.

Bradley, Drendel & Jeanney and *William C. Jeanney*, Reno, for Appellants.

Lemons, Grundy & Eisenberg and *Edward J. Lemons* and *Alice Campos Mercado*, Reno, for Respondent.

Before the Supreme Court, Parraguirre, Hardesty and Cadish, JJ.

OPINION

By the Court, Cadish, J.:

Nevada's res ipsa loquitur statute, NRS 41A.100, creates a rebuttable presumption of negligence in certain medical malpractice actions. In this appeal, we examine how the res ipsa loquitur doctrine works in the summary judgment context, and in particular, we consider whether a plaintiff relying on NRS 41A.100's presumption for a prima facie case of negligence must provide expert testimony to survive a defendant's summary judgment motion. We conclude that such a plaintiff does not. Rather, all a plaintiff must do to proceed to trial is establish the facts that entitle her to NRS 41A.100's rebuttable presumption of negligence. Whether a defendant success-

fully rebuts the presumption with expert testimony or other direct evidence thus becomes a question of fact for the jury.

FACTS

Maria Jaramillo got a mammogram showing that a mass in her left breast had grown since her last exam. To confirm these findings, respondent Dr. Susan R. Ramos performed a wire localization, during which she inserted a wire into Maria's left breast and removed the mass. At a follow-up appointment, an ultrasound revealed that a wire fragment remained in Maria's left breast. Maria had the wire surgically removed but later died of unrelated causes. Appellant Rosaiset Jaramillo, special administrator to the estate of Maria Jaramillo, sued Dr. Ramos for medical malpractice under NRS 41A.100(1), Nevada's res ipsa loquitur provision.

In her complaint, Jaramillo asserted that Dr. Ramos breached the professional standard of care by unintentionally leaving a wire in Maria's left breast. She did not attach a medical expert affidavit, arguing that one was not required under NRS 41A.100(1)(a), which provides that medical expert testimony "is not required and a rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented that . . . [a] foreign substance . . . was unintentionally left within the body of a patient following surgery."

Dr. Ramos answered and disclosed that she had retained Dr. Andrew B. Cramer, an expert witness, to testify at trial about the standard of care. She attached Dr. Cramer's declaration, in which he opined that the wire left in Maria's breast "is something that can happen without negligence on the part of the surgeon." Jaramillo did not retain an expert witness to refute Dr. Cramer's testimony.

Dr. Ramos moved for summary judgment, and the district court granted it, finding that Dr. Ramos had rebutted the presumption of negligence by providing expert testimony about the standard of care. And in the absence of contrary expert testimony from Jaramillo, the court concluded that "it is *uncontroverted* that the unintentional leaving of a wire fragment in [Jaramillo's] body was not a result of negligence." (Emphasis added.)

DISCUSSION

We review the district court's grant of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when the record shows that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Id.* (citing NRCP 56(c)). "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 731, 121 P.3d at 1031. All evidence, "and any reasonable infer-

ences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.* at 729, 121 P.3d at 1029.

Jaramillo argues that because she relied on NRS 41A.100(1), she was not required to provide expert testimony to proceed to a jury trial. NRS 41A.100(1), Nevada's res ipsa loquitur provision, provides the general rule that a plaintiff must present expert testimony or other medical materials to establish negligence in a medical malpractice case. This provision, however, carves out five factual circumstances where a plaintiff is exempt from the above requirement and is instead entitled to a rebuttable presumption of negligence. NRS 41A.100(1)(a)-(e). Jaramillo filed her malpractice action under NRS 41A.100(1)(a), which provides one such exception when "[a] foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery."[1] In her complaint, she pleaded facts entitling her to NRS 41A.100(1)(a)'s res ipsa loquitur theory of negligence. Specifically, she alleged that Dr. Ramos unintentionally left a wire in Maria's left breast following surgery.

Nonetheless, the district court concluded that once Dr. Ramos provided expert testimony to rebut the presumption of negligence, Jaramillo was required to submit expert testimony of her own to survive summary judgment. We conclude that in doing so, the district court misread Nevada caselaw and thus erred.

We have repeatedly held that the only evidence a plaintiff must present at trial to establish NRS 41A.100(1)'s rebuttable presumption of negligence is "some evidence of the existence of one or more of the factual predicates enumerated in [NRS 41A.100(1)(a)-(e)]." *Johnson v. Egtedar*, 112 Nev. 428, 434, 915 P.2d 271, 274 (1996); *see also Szydel v. Markman*, 121 Nev. 453, 460, 117 P.3d 200, 204 (2005) (explaining that "[t]hese are factual situations where the negligence can be shown without expert medical testimony"). Thus, we have held that NRS 41A.100(1) expressly excuses a plaintiff from the requirement to submit an expert affidavit with a medical mal-

[1]NRS 41A.100(1)(a) provides:

> 1. Liability for personal injury or death is not imposed upon any provider of health care based on alleged negligence in the performance of that care unless evidence consisting of expert medical testimony, material from recognized medical texts or treatises or the regulations of the licensed medical facility wherein the alleged negligence occurred is presented to demonstrate the alleged deviation from the accepted standard of care in the specific circumstances of the case and to prove causation of the alleged personal injury or death, except that such evidence is not required and a rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented that the provider of health care caused the personal injury or death occurred in any one or more of the following circumstances:
>
> (a) A foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery[.]

practice complaint. *Szydel*, 121 Nev. at 459, 117 P.3d at 204 (holding that the expert affidavit requirement in NRS 41A.071 does not apply to res ipsa cases brought under NRS 41A.100(1)'s res ipsa loquitur provision). We reasoned that "[i]t would be unreasonable to require a plaintiff to expend unnecessary effort and expense to obtain an affidavit from a medical expert when expert testimony is not necessary for the plaintiff to succeed at trial." *Id.* at 460, 117 P.3d at 204.

Although *Szydel* addressed the requirement for expert testimony in the limited context of filing a complaint, requiring a plaintiff to obtain expert testimony to survive summary judgment would be equally unreasonable given that such testimony is not necessary to succeed at trial. Further, NRS 41A.100(1) is an evidentiary rule.[2] As such, it applies with equal force at summary judgment proceedings, wherein a moving party's burden of production depends on the burden of persuasion at trial. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (explaining the burdens of proof and persuasion that apply when considering a motion for summary judgment).

We therefore clarify that NRS 41A.100(1), which relieves a plaintiff of the requirement to present expert testimony at trial, similarly relieves a plaintiff of this requirement at summary judgment. Thus, all a plaintiff must do to survive summary judgment is present evidence that the facts giving rise to NRS 41A.100(1)'s presumption of negligence exist—i.e., that at least one of the factual circumstances enumerated in NRS 41A.100(1)(a)-(e) exists.

The question thus becomes whether Jaramillo presented sufficient evidence that the facts giving rise to NRS 41A.100(1)'s presumption existed. We conclude that she did. In her complaint, Jaramillo alleged that Dr. Ramos unintentionally left a wire in Maria's left breast after surgery. At summary judgment, she supported these allegations with evidence. Specifically, she presented an ultrasound and mammogram report, both of which postdated the surgery and referenced the wire that remained in Maria's left breast. Dr. Ramos did not dispute this evidence or argue that she intentionally left the wire in

[2]The district court misread *Szydel* and erroneously characterized NRS 41A.100(1)'s presumption of negligence as a threshold matter instead of an evidentiary rule. In *Szydel*, however, we explained that "the plain language of NRS 41A.071 provides a threshold requirement for medical malpractice pleadings and does not pertain to evidentiary matters at trial, as does NRS 41A.100(1)." 121 Nev. at 458, 117 P.3d at 203. The phrase "as does NRS 41A.100(1)" modifies the nearest preceding clause, meaning NRS 41A.100(1), unlike NRS 41A.071, pertains to evidentiary matters at trial. We further clarified any remaining ambiguity as to NRS 41A.100(1)'s nature throughout the majority and dissenting opinions. *See Szydel*, 121 Nev. at 458, 117 P.3d at 203 ("NRS 41A.100(1) permits a jury to infer negligence without expert testimony at trial . . . ."); *see id.* at 461, 117 P.3d at 205 (Hardesty, J., dissenting) ("NRS 41A.100 . . . is a rule of evidence . . . .").

Maria's body. Thus, the undisputed facts directly parallel the factual circumstance enumerated in NRS 41A.100(1)(a), which establishes a presumption of negligence where "[a] foreign substance . . . was unintentionally left within the body of a patient following surgery." Jaramillo thus successfully established that NRS 41A.100(1)'s rebuttable presumption of negligence applies.

That Dr. Ramos presented direct evidence in the form of an expert declaration to rebut the presumption of negligence does not entitle her to summary judgment as a matter of law. Such evidence instead created a factual question as to the existence of negligence, which is to be determined by the jury. *See* NRS 47.200 (listing different jury instructions depending on the strength of the direct evidence); *see also Butler v. Bayer*, 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007) (observing that summary judgment is seldom affirmed in negligence cases "because, generally the question of whether a defendant was negligent in a particular situation is a question of fact for the jury to resolve"). Further, such evidence did not shift the burden of proof back to Jaramillo to present additional evidence. The Legislature has expressly determined that evidence establishing one of the five factual circumstances enumerated in NRS 41A.100(1)(a)-(e), which Jaramillo provided, is sufficient for the jury to presume that the injury or death was caused by negligence, even in the absence of expert testimony. NRS 41A.100(1); *see Johnson*, 112 Nev. at 434, 915 P.2d at 274 (explaining that in these five factual circumstances, "the legislature has, in effect, already determined that [such circumstances] ordinarily do not occur in the absence of negligence"). Accordingly, we conclude that a reasonable trier of fact could have returned a verdict for Jaramillo based solely on the evidence she presented giving rise to the presumption.

To be clear, our holding does not preclude summary judgment in all res ipsa cases brought under NRS 41A.100(1). For example, a defendant could present evidence disputing the existence of the facts giving rise to the presumption (e.g., that there was no foreign object inside the patient's body after surgery, or if there was, that it was left there intentionally). *See Cuzze*, 123 Nev. at 602-03, 172 P.3d at 134 (providing that a defendant "moving for summary judgment may satisfy the burden of production by . . . submitting evidence that negates an essential element of the [plaintiff's] claim"). If such evidence is so strong as to leave no genuine issue as to whether the presumption applies, the defendant would be entitled to summary judgment. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029 (explaining that a party is entitled to summary judgment where there is no genuine issue of material fact). Alternatively, a defendant could point out the plaintiff's failure to present evidence that establishes the facts giving rise to the presumption. *See Cuzze*, 123 Nev. at 602-03, 172 P.3d at 134 (providing that a defendant "moving for summa-

ry judgment may satisfy the burden of production by . . . pointing out . . . that there is an absence of evidence to support the nonmoving party's case" (internal quotation marks omitted)). If the plaintiff fails to respond with evidence that demonstrates a genuine issue of material fact as to whether the presumption applies, the defendant would be entitled to summary judgment. *See id.* at 603, 172 P.3d at 134 (explaining that to defeat summary judgment, the nonmoving party "must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact").

Here, however, the expert declaration Dr. Ramos presented to support her summary judgment motion did not conclusively negate the statutory presumption of negligence or show a lack of evidence for the presumption to apply. It merely created a material factual dispute for trial on the issue of negligence, which would otherwise be presumed. Because we conclude that a genuine issue of material fact exists on the issue of negligence, we reverse the district court's grant of summary judgment and remand for further proceedings consistent with this opinion.

Parraguirre and Hardesty, JJ., concur.

MELISSA CUMMINGS, Appellant, *v.* ANNABEL E. BARBER, M.D., Individually; and UNIVERSITY MEDICAL CENTER, a Nevada Entity, Respondents.

No. 76972

April 2, 2020 460 P.3d 963

Appeal from a district court order granting summary judgment in a medical malpractice action. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Reversed and remanded.

Kirk T. Kennedy, Las Vegas, for Appellant.

Carroll, Kelly, Trotter, Franzen, McBride & Peabody and *Heather S. Hall* and *Robert C. McBride*, Las Vegas, for Respondent Annabel E. Barber, M.D.

Pitegoff Law Office Inc. and *Jeffrey I. Pitegoff*, Las Vegas, for Respondent University Medical Center.

Before the Supreme Court, Parraguirre, Hardesty and Cadish, JJ.

OPINION

By the Court, Cadish, J.:

Nevada's res ipsa loquitur statute carves out factual circumstances where a plaintiff need not present expert testimony to establish negligence in a medical malpractice case. Central to this appeal is NRS 41A.100(1)(a), which carves out one such exception where a foreign substance is unintentionally left inside a patient's body following surgery. Here, we consider whether NRS 41A.100(1)(a) applies where a surgeon fails to remove a foreign object that was implanted and left inside a patient's body during a *previous* surgery. We conclude that although NRS 41A.100(1) generally applies only to objects left in the patient's body during the at-issue surgery, it can also apply in cases where, as here, the sole purpose of the at-issue surgery is to remove medical devices and related hardware implanted during a previous surgery. We therefore reverse the district court's summary judgment, which was based on an erroneous conclusion that NRS 41A.100(1)(a) did not apply as a matter of law.

FACTS

In September 2013, Dr. Annabel E. Barber implanted a gastric stimulator into Melissa Cummings's stomach to help with gastroparesis. Dr. Barber surgically removed the gastric stimulator in June 2014 but did not remove some surgical clips and wire fragments associated with it.[1] Cummings sued Dr. Barber and University Medical Center (UMC) for medical malpractice. She alleged that Dr. Barber and UMC breached the professional standard of care by overlooking or unintentionally leaving surgical clips in her body following the June 2014 surgery.

Cummings did not attach a medical expert affidavit to her complaint and instead relied on NRS 41A.100(1), Nevada's res ipsa loquitur provision. Under NRS 41A.100(1)(a), medical expert testimony "is not required and a rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented that . . . [a] foreign substance . . . was unintentionally left within the body of a patient following surgery."

After filing her answer, Dr. Barber disclosed that she had retained Dr. Andrew Warshaw, an expert witness, to testify at trial about the standard of care. She provided Dr. Warshaw's expert report, in which he explained that the foreign objects in Cummings's stomach were wire fragments, not surgical clips, and that leaving them inside

[1]Cummings did not discover the wire fragments until 2017 when a surgeon performing an appendectomy found and removed them without difficulty. Thus, her original complaint does not expressly reference the wires.

Cummings's stomach was not negligent.[2] Cummings did not retain an expert to refute Dr. Warshaw's testimony, prompting Dr. Barber to move for summary judgment.[3]

In her motion, Dr. Barber argued that she *intentionally* left the surgical clips and wire fragments in Cummings's stomach following the 2014 surgery (i.e., the at-issue surgery) because removal would be too risky, and that Cummings therefore could not establish the facts giving rise to NRS 41A.100(1)'s presumption of negligence.[4] In the absence of NRS 41A.100(1)'s presumption, she argued, Cummings was required to provide expert testimony to establish her negligence claim.

The district court granted summary judgment, finding that NRS 41A.100(1)(a) did not apply as a matter of law. Specifically, it found that NRS 41A.100(1) does not apply when, during a removal procedure, the surgeon fails to remove an object implanted and left in a patient's body during a *previous* surgery. The district court therefore concluded that Cummings was required to present an expert affidavit to establish negligence, and that her failure to do so warranted summary judgment for Dr. Barber. Because it found that NRS 41A.100(1)(a) did not apply as a matter of law, it did not address the factual question of whether Dr. Barber's failure to remove the surgical clips and wire fragments was intentional. Cummings now appeals.

DISCUSSION

Statutory interpretation

In a typical retained-foreign-object case, the plaintiff alleges that a surgeon unintentionally left an object implanted or used during the at-issue surgery inside a patient's body. *See, e.g.*, *Szydel v. Markman*, 121 Nev. 453, 457-58, 117 P.3d 200, 203 (2005) (applying NRS 41A.100(1)(a) where a surgeon unintentionally left a needle inside a patient's breast when performing a breast lift operation). Here, however, Dr. Barber did not implant or use the retained ob-

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[2]Relevant here is Dr. Warshaw's explanation:

> The residual wire fragments are innocent, probably forever encapsulated in fibrous tissue. They are most definitely not the cause of any pain. Removal, should it be attempted, would be complex, difficult, invasive and serve no useful purpose.
>
> I find no basis whatsoever for the complaint that clips (or wires) left behind after the 6/6/2014 operation are causing pain or that their presence is evidence of negligence by the surgeon, Dr. Barber.

[3]UMC joined Dr. Barber's motion for summary judgment.

[4]The term "at-issue surgery" refers to the surgery complained of in the plaintiff's complaint. Here, the June 2014 removal surgery is the surgery complained of in Cummings's complaint, so we refer to it throughout as the at-issue surgery.

jects during the at-issue surgery. She implanted the gastric stimulator and associated hardware in a previous surgery, and then failed to remove all of the hardware during the at-issue surgery. Thus, we must consider whether NRS 41A.100(1)(a) applies where, as here, a surgeon performing a removal procedure fails to remove an object implanted and left inside a patient's body during a previous surgery.

Because this is a question of statutory interpretation, we review it de novo. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). "When interpreting a statute, legislative intent is the controlling factor." *Id.* (internal quotation marks omitted). "Absent an ambiguity, this court follows a statute's plain meaning." *Kay v. Nunez*, 122 Nev. 1100, 1104, 146 P.3d 801, 804-05 (2006). Further, "[we] resolve[ ] any doubt as to legislative intent in favor of what is reasonable, and against what is unreasonable." *Hunt v. Warden*, 111 Nev. 1284, 1285, 903 P.2d 826, 827 (1995); *see also Tate v. State, Bd. of Med. Exam'rs*, 131 Nev. 675, 678, 356 P.3d 506, 508 (2015) ("Statutes should be construed so as to avoid absurd results.").

NRS 41A.100(1)(a)'s plain language provides that a plaintiff need not provide expert testimony to establish negligence "where evidence is presented that . . . [a] foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery." The Legislature clearly intended 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. *See Johnson v. Egtedar*, 112 Nev. 428, 434, 915 P.2d 271, 274 (1996) (explaining that the Legislature already determined that certain circumstances simply do not occur absent negligence); *see also Szydel*, 121 Nev. at 459-60, 117 P.3d at 204 (explaining that under NRS 41A.100(1), the expert affidavit requirement does not apply where a juror's common knowledge is sufficient to support a finding of negligence).

The district court interpreted NRS 41A.100(1)(a) narrowly to apply only to objects implanted or used during the at-issue surgery. Nothing in NRS 41A.100(1)(a)'s plain language, however, creates such a limit. Further, the district court's narrow interpretation precludes application where the sole purpose of the at-issue surgery is removal of a medical device implanted in a previous surgery. In such a case, the operating surgeon should be aware of any objects retained during the previous surgery such that a juror could conclude, based on common knowledge alone, that a surgeon's failure to remove all related hardware constitutes negligence. We decline to adopt an interpretation of NRS 41A.100(1)(a) that precludes application where negligence can be shown based on common knowledge alone because such preclusion is clearly inconsistent with the Legislature's intent.

The interpretation for which Cummings advocates, however, is overly broad. She argues that NRS 41A.100(1)(a) applies to foreign objects implanted or used during *any* previous surgery, even when the purpose of the later surgery is *not* to remove a previously implanted device. We decline to adopt such a broad reading of the statute. Not only is it inconsistent with the Legislature's intent to carve out narrow exceptions to the expert testimony requirement in medical malpractice cases, *see* NRS 41A.100(1)(a)-(e) (enumerating only five factual circumstances where negligence can be shown without expert testimony), it would produce an absurd result. Under Cummings's broad interpretation, a surgeon could be liable for actions made by different doctors during unrelated surgical procedures. We have never held that a surgeon has an affirmative duty to discover foreign objects implanted by a different surgeon in an unrelated surgery, and we decline to do so here.

We therefore clarify that NRS 41A.100(1)(a)'s application is not limited to foreign objects implanted or used only during the at-issue surgery. Nor does it extend to foreign objects implanted or used during *any* surgery. Rather, we interpret NRS 41A.100(1)(a) to apply to foreign objects implanted or used during the at-issue surgery *and* foreign objects implanted or used during a previous surgery where the purpose of the at-issue surgery is removal of the foreign devices and related hardware implanted or used during the previous surgery. Such an interpretation is consistent with the Legislature's intent to relieve a plaintiff of the expert testimony requirement where a juror's common knowledge is sufficient to support a finding of negligence. Further, it appropriately limits NRS 41A.100(1)(a) to only those circumstances where the purpose of the at-issue surgery is removal of a foreign device. In such circumstances, imposing liability for failure to remove the foreign device and all related hardware is neither absurd nor unreasonable.

Having clarified NRS 41A.100(1)(a)'s reach, we conclude that the district court erred when it found that Cummings was precluded, as a matter of law, from relying on NRS 41A.100(1)(a)'s presumption merely because the retained objects were implanted during a previous surgery. The sole purpose of Cummings's at-issue surgery was to remove the gastric stimulator implanted during the previous surgery. Thus, a jury could conclude, based on common knowledge alone, that Dr. Barber's failure to remove the hardware associated with the gastric stimulator constituted negligence.[5]

[5]The district court relied on *Kinford v. Bannister*, 913 F. Supp. 2d 1010, 1017 (D. Nev. 2012), to find that NRS 41A.100(1) applies only where a foreign object is used or implanted during the at-issue surgery. In light of our holding here, we conclude that *Kinford* is not a correct statement of Nevada law in this context.

Summary judgment

The question thus becomes whether Cummings presented sufficient evidence to survive summary judgment, which we review de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when the record shows that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Id.* To satisfy the burden of production, the party moving for summary judgment must either "submit[ ] evidence that negates an essential element of the [plaintiff's] claim" or "point[ ] out . . . that there is an absence of evidence to support the nonmoving party's case." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (internal quotation marks omitted). Dr. Barber did neither.

In support of her summary judgment motion, Dr. Barber submitted Dr. Warshaw's expert report, wherein he opined that removal of the wire fragments would be "complex, difficult, [and] invasive," and that Dr. Barber's failure to remove them thus did not constitute negligence. Cummings, however, presented countervailing evidence that the surgeon who discovered the wires in 2017 removed them "without difficulty," thereby refuting Dr. Warshaw's expert opinion. Dr. Barber also submitted an affidavit wherein she stated that she intentionally left the wire fragments in Cummings's stomach because they were embedded and removal would be risky. Cummings presented evidence, however, that Dr. Barber's report following the 2014 surgery did not mention that any wires were intentionally left in Cummings's stomach, let alone explain the risks involved with removal.[6] Because Dr. Barber did not conclusively negate the statutory presumption of negligence or show a lack of evidence for the presumption to apply, we conclude that she failed to satisfy her burden under *Cuzze*.

We further conclude that, contrary to the district court's finding, Cummings was not required to provide expert testimony to survive summary judgment. We recently clarified that because a plaintiff relying on NRS 41A.100(1)'s presumption of negligence need not present expert testimony at trial, imposing such a requirement at the summary judgment stage would be unreasonable. *Jaramillo v. Ramos*, 136 Nev. 134, 137, 460 P.3d 460, 464 (2020). Thus, "all a plaintiff must do to survive summary judgment is present evidence that the facts giving rise to NRS 41A.100(1)'s presumption of negligence exist—i.e., that at least one of the factual circumstances enumerated in NRS 41A.100(1)(a)-(e) exists." *Id.*; *see also Johnson*,

[6]In fact, Dr. Barber indicated in her surgical report that she removed the wires. She noted that "[t]he stimulator was then able to be removed easily, and the leads were gently tugged, until they were removed from the stomach. Both were removed easily."

112 Nev. at 434, 915 P.2d at 274 (requiring that a plaintiff "present some evidence of the existence of one or more of the factual predicates enumerated in [NRS 41A.100(1)]").

We conclude that the evidence Cummings presented—i.e., the surgical report and evidence that the surgeon who discovered the wires in 2017 removed them "without difficulty"—sufficiently establishes the facts giving rise to NRS 41A.100(1)'s presumption; specifically, that Dr. Barber unintentionally left wire fragments in Cummings's stomach following surgery. That Dr. Barber presented an expert report to rebut the presumption of negligence did not entitle her to summary judgment as a matter of law, nor did it shift the burden of proof back to Cummings to present expert testimony of her own. *See Jaramillo*, 136 Nev. at 138, 460 P.3d at 464. Dr. Warshaw's expert report "instead created a factual question as to the existence of negligence, which is to be determined by the jury." *Id.*

Because we conclude that a genuine issue of material fact exists on the issue of negligence, we reverse the district court's summary judgment and remand for further proceedings consistent with this opinion.

Parraguirre and Hardesty, JJ., concur.

ROBERT G. REYNOLDS, an Individual; and DIAMANTI FINE JEWELERS, LLC, a Nevada Limited Liability Company, Appellants, *v.* RAFFI TUFENKJIAN, an Individual; and LUXURY HOLDINGS LV, LLC, a Nevada Limited Liability Company, Respondents.

No. 78187

April 9, 2020 461 P.3d 147

Motion to substitute in as real parties in interest and dismiss appeal from a district court order granting summary judgment in a tort and breach of contract action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Motion granted in part; appeal dismissed in part.

Marx Law Firm PLLC and *Bradley M. Marx*, Las Vegas, for Appellants.

Marquis Aurbach Coffing and *Terry A. Moore* and *Christian T. Balducci*, Las Vegas, for Respondents.

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

OPINION

By the Court, Silver, J.:

A pending motion in this case provides us the opportunity to address the extent to which a judgment debtor's rights of action are subject to execution to satisfy a judgment. Respondents have filed a motion to substitute themselves in place of appellants and to voluntarily dismiss this appeal because they purchased appellants' rights and interests in the underlying district court action at a judgment execution sale. We agree with respondents in part. Although Nevada's judgment execution statutes permit a judgment creditor (respondents) to execute on a debtor's (appellants) personal property, including the right to recover a debt, money, or thing in action, those statutes limit the title the sheriff can convey at an execution sale to only that title which the debtor could convey himself. Nevada law, in turn, restricts the right to convey certain claims by making them unassignable. Accordingly, we hold that a judgment debtor's claims that are unassignable similarly cannot be purchased at an execution sale. As such, respondents did not purchase the rights to appellants' unassignable claims. Thus, we grant in part respondents' motion and dismiss this appeal as to appellants' assignable claims—negligent misrepresentation and breach of contract.

FACTS AND PROCEDURAL HISTORY

Appellants Robert G. Reynolds and Diamanti Fine Jewelers, LLC, brought the underlying action against respondents Raffi Tufenkjian and Luxury Holdings LV, LLC. Appellants alleged breach of contract, fraud, and tort claims related to their purchase of a jewelry store from respondents, arguing that they relied on respondents' false representations of the store's value to their detriment. The district court entered summary judgment for respondents, finding no genuine issues of material fact regarding respondents' alleged misrepresentations or appellants' justifiable reliance upon any of respondents' statements. The district court also awarded respondents $57,941.92 in attorney fees and costs pursuant to a provision in the parties' contract.

Appellants appealed the judgment but did not obtain a stay of execution on the award of attorney fees and costs, claiming they could not afford to post a supersedeas bond. While the appeal was pending, respondents obtained a writ of execution, which, in relevant part, allowed them to execute against Reynolds' personal property. The writ therefore directed the sheriff to "levy and seize upon any and all causes of action, claims, allegations, assertions or defenses of" appellants, including those in the underlying district court action.

At the sheriff's sale, respondents purchased, for $100, "all the rights, title and interest of" appellants in the district court action.

Respondents now move to substitute themselves in place of appellants pursuant to NRAP 43 (allowing substitution of a party on appeal) and to voluntarily dismiss the appeal under NRAP 42(b) (allowing parties to voluntarily dismiss an appeal), on the basis that they now own the claims on appeal. Appellants respond that the Nevada Legislature did not intend for NRS 10.045, which defines personal property to include "things in action," to allow a party to purchase such "things in action" as a means to eliminate a litigant's appellate rights. They argue that granting the motion would prevent parties who may not have the financial ability to satisfy a contested judgment from asserting their rights to an appeal.

This court ordered the parties to submit supplemental briefing on the issue of whether each of appellants' claims were properly assigned to respondents as a result of the execution sale. *See Reynolds v. Tufenkjian*, Docket No. 78187 (Order for Supplemental Briefing, Nov. 1, 2019). Respondents argue that all of the claims were properly assigned based on statutory law, while appellants argue that, because the claims were personal to Reynolds, they were not assignable, and that this court should void the execution sale on public policy grounds.

DISCUSSION

Only assignable things in action are subject to execution under Nevada law

NRS 21.320 allows a district court to order a judgment debtor's nonexempt property "be applied toward the satisfaction of the judgment" against him. NRS 21.080(1) provides that property liable to such execution includes all of the judgment debtor's personal property. *But see* NRS 21.090 (listing property exempt from execution). The definition of "[p]ersonal property" includes "things in action." NRS 10.045.

Nevada's general policy is that a statute specifying property that is liable to execution "must be liberally construed for the benefit of creditors." *Sportsco Enters. v. Morris*, 112 Nev. 625, 630, 917 P.2d 934, 937 (1996) (citing 33 C.J.S. *Executions* § 18 (1942)). Referencing that general policy and the definition of a "thing in action" as "a right to bring an action to recover a debt, money, or thing," *Gallegos v. Malco Enters. of Nev., Inc.*, 127 Nev. 579, 582, 255 P.3d 1287, 1289 (2011) (quoting *Chose in Action*, *Black's Law Dictionary* (9th ed. 2009)), this court has concluded that "rights of action held by a judgment debtor are personal property subject to execution in satisfaction of a judgment," *id.* at 582, 255 P.3d at 1289. But in *Butwinick v. Hepner*, this court determined that "a 'thing in action' subject to execution . . . does not include a party's defenses to an action," 128 Nev. 718, 723, 291 P.3d 119, 121-22 (2012), because a party's defensive rights do not constitute a "right to bring an ac-

tion to recover a debt, money, or thing," *id.* at 722, 291 P.3d at 122 (quoting *Chose in Action*, *Black's Law Dictionary* (9th ed. 2009)).

In this case, respondents contend that, by purchasing appellants' "things in action" at the sheriff's sale, they are entitled to substitute themselves for appellants in this appeal as the now-owners of the claims being appealed. This would only be true, however, if "things in action" encompasses all of appellants' underlying claims. In this vein, appellants argue that claims that are personal in nature are not included in "things in action" and, therefore, respondents do not own appellants' personal claims and this court should deny the motion to substitute. They further argue that allowing the purchase of their claims improperly impedes on their appellate rights and therefore violates public policy.

Some jurisdictions that permit execution upon a debtor's "things in action" narrowly interpret the term to only include claims that, under that jurisdiction's law, the debtor could otherwise assign to another party. *See, e.g.*, *Holt v. Stollenwerck*, 56 So. 912, 913 (Ala. 1911) (holding that "things in action" only includes assignable rights of action); *Wittenauer v. Kaelin*, 15 S.W.2d 461, 462-63 (Ky. Ct. App. 1929) (concluding that the term "chose in action" does not include any right of action that may not be assigned). Other jurisdictions apply a broader interpretation of "things in action" to include any claim for damages, without concern for the claim's assignability otherwise. *See, e.g.*, *O'Grady v. Potts*, 396 P.2d 285, 289 (Kan. 1964) (characterizing a tort claim as a chose in action and therefore personal property); *Chi., Burlington & Quincy R.R. Co. v. Dunn*, 52 Ill. 260, 264 (1869) ("A right to sue for an injury, is a right of action—it is a thing in action, and is property . . . ."). For the reasons set forth below, we agree with the former approach and hold that "things in action" only includes those claims that the judgment debtor has the power to assign.

Nevada is one of several jurisdictions that prohibits the assignability of certain causes of action, regardless of how the assignment is accomplished.[1] *See, e.g.*, *Chaffee v. Smith*, 98 Nev. 222, 223-24, 645 P.2d 966, 966 (1982) (generally prohibiting the assignment of

[1]Respondents argue that their acquisition of Reynolds' things in action at a sheriff's execution sale was a purchase, not an assignment, such that any restrictions on the assignability of Reynolds' claims should not apply. The only difference between an "assignment" and a "sale," however, is the payment of consideration. *Compare Assignment*, *Black's Law Dictionary* (11th ed. 2019) (defining an "assignment" as "[t]he transfer of rights or property"), *with Sale*, *id.* (defining a "sale" as "[t]he transfer of property or title *for a price*" (emphasis added)). Our jurisprudence has not drawn a distinction between property acquired by judicial sale and property acquired by assignment, and we decline to do so now. *See, e.g.*, *Gallegos*, 127 Nev. at 582, 255 P.3d at 1289 (holding that a judicially assigned right of action was personal property subject to execution to satisfy a judgment); *Sportsco Enters.*, 112 Nev. at 627-28, 917 P.2d at 935 (considering competing interests in property assigned by both a voluntary sale and an execution sale).

unasserted legal malpractice claims on public policy grounds); *Gruber v. Baker*, 20 Nev. 453, 469, 23 P. 858, 862 (1890) (voiding the assignment of a right to bring a claim in action for fraud as being contrary to public policy because a fraud claim is personal to the one defrauded); *accord Miller v. Jackson Hosp. & Clinic*, 776 So. 2d 122, 125 (Ala. 2000) (acknowledging the general rule that "purely personal" tort claims are not assignable); *Webb v. Gittlen*, 174 P.3d 275, 278 (Ariz. 2008) (holding that most claims are generally assignable "except those involving personal injury"). For example, in *Prosky v. Clark*, this court held that fraud claims are not assignable because they "are personal to the one defrauded." 32 Nev. 441, 445, 109 P. 793, 794 (1910). And in *Maxwell v. Allstate Insurance Co.*, we held that subrogation clauses allowing the assignment of claims in insurance contracts violated public policy due to the potential that only the insurer would receive payments from a personal injury action. 102 Nev. 502, 506-07, 728 P.2d 812, 815 (1986) (holding that such a result would deprive the injured party of "his actual damages [and] the benefit of the premiums he has paid"). Such public policy concerns do not arise, however, when an injured party assigns away the right to proceeds from a personal injury action, rather than the claim itself. *See Achrem v. Expressway Plaza Ltd.*, 112 Nev. 737, 739-41, 917 P.2d 447, 448-49 (1996) (observing that there is a distinction "between assigning the rights to a tort action and assigning the proceeds from such an action"). This is because the assignment of the proceeds from a tort action still permits the injured party to retain control of his lawsuit "without any interference" from a third-party assignee. *Id.* Other claims, such as contract claims, are generally assignable unless they are personal in nature. *See, e.g.*, *Ruiz v. City of N. Las Vegas*, 127 Nev. 254, 261-62, 255 P.3d 216, 221 (2011) (recognizing that contracts are freely assignable, subject to certain limitations); 6 Am. Jur. 2d *Assignments* § 46 (2018) (explaining that claims based on "contracts of a purely personal nature" are an exception to the rule that "choses in action are generally assignable").

Nevada's statutory scheme governing the enforcement of judgments requires the sheriff's office to carry out a writ of execution by "collecting [and] selling the [debtor's] things in action and selling the other property." NRS 21.110. But, because "a judgment creditor can acquire no greater right in the property levied upon than that which the judgment debtor possesses," a judgment debtor's property is not subject to execution "unless the debtor has power to pass title to such property or interest in property by his . . . own act." 30 Am. Jur. 2d *Executions and Enforcement of Judgments* § 118 (2017). In other words, "not *every* interest in property a debtor may have a right to . . . may be subjected to sale under execution." *Shaw v. Frank*, 334 S.W.2d 476, 480-81 (Tex. Civ. App. 1959) (emphasis added). Thus, while there can be no doubt that Reynolds' claims are

"things in action" in his hands, such that they allow him to bring an action for recovery, *see Gallegos*, 127 Nev. at 582, 255 P.3d at 1289, if the claims are not assignable, the sheriff cannot force sale of those claims to satisfy a judgment any more than Reynolds could assign them of his own volition. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Estep*, 873 N.E.2d 1021, 1025-26 (Ind. 2007) (invalidating the forced assignment of legal malpractice claims to satisfy a judgment because those claims were not assignable); *see also Scarlett v. Barnes*, 121 B.R. 578, 580 (W.D. Mo. 1990) (holding that, under Missouri law, whether a cause of action is exempt from attachment and execution depends on whether it is assignable); *Carbo Indus., Inc. v. Alcus Fuel Oil, Inc.*, 998 N.Y.S.2d 571, 572 (Sup. Ct. 2014) (applying New York law that requires property to be assignable in order for it to be reached to satisfy a judgment); *cf. Craft v. Craft*, 757 So. 2d 571, 572 (Fla. Dist. Ct. App. 2000) (observing that personal injury claims are not assignable and thus not reachable in execution sales). Having concluded that only assignable claims are subject to execution, our resolution of respondents' motion depends on whether each of appellants' claims was assignable and therefore properly executed on.

Tort claims for personal injury are generally not assignable

As stated above, Nevada generally prohibits the assignment of tort claims on public policy grounds, as many tort claims are personal in nature and meant to recompense the injured party. *See, e.g.*, *Maxwell*, 102 Nev. at 506, 728 P.2d at 815 (rejecting the subrogation of tort claims via an insurance contract on public policy grounds); *Prosky*, 32 Nev. at 445, 109 P. at 794 (recognizing that fraud claims are not assignable due to their personal nature). *But see Achrem*, 112 Nev. at 740-41, 917 P.2d at 449 (allowing the assignment of proceeds from a tort action). Two of appellants' claims fall into this category. The first, fraud/intentional misrepresentation, has already been held to be personal in nature and unassignable. *See Prosky*, 32 Nev. at 445, 109 P. at 794. The second, elder exploitation, presents a question of first impression as to whether it is assignable.

The elder exploitation statute's plain language clearly provides that only the older person can bring the claim. *See Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004) (explaining that this court "will not go beyond the language of [a] statute" where "the plain meaning of [the] statute is clear on its face"). Indeed, NRS 41.1395(1) provides that "if an older person . . . suffers a loss of money or property caused by exploitation, the person who caused the . . . loss is liable *to the older person*." (Emphasis added.) And while NRCP 17(a) permits a party to "sue in their own names without joining the person for whose benefit the action is brought" under certain circumstances, none of those circumstances exist here. Respondents neither claim to be any

of the parties entitled to bring claims without naming appellants as the real parties in interest, *see* NRCP 17(a)(1)(A)-(F) (listing parties, such as guardians and trustees, that can bring claims in their own name without joining the real party in interest), nor does the elder exploitation statute allow a party other than the affected older person to bring a claim for damages, *see* NRCP 17(a)(1)(G) (permitting a party authorized by statute to maintain a cause of action without joining the injured party); NRS 41.1395(1) (providing that the liability for an elder exploitation claim lies to the older person with no language permitting another party to maintain such a claim on the elder person's behalf).[2]

Here, permitting respondents to purchase appellants' fraud and elder exploitation claims implicates the same policy concerns addressed in *Maxwell* and *Achrem*: it strips appellants of their right to pursue their personal injury claims by essentially "plac[ing] the right to appeal on an auction block." *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1077 (10th Cir. 2009) (Lucero, J., concurring).[3] *See also Villanueva v. First Am. Title Ins. Co.*, 740 S.E.2d 108, 110 (Ga. 2013) (noting that Georgia has codified the common-law principle that personal injury claims cannot be assigned); *N. Chi. St. Ry. Co. v. Ackley*, 49 N.E. 222, 225 (Ill. 1897) (voiding the sale or assignment of personal injury claims on public policy grounds so that personal injury claims would not become a "commodity of sale"); *MP Med. Inc. v. Wegman*, 213 P.3d 931, 936 (Wash. Ct. App. 2009) (disapproving of the purchase of appealed claims at an execution sale because "allowing one party to destroy the opposing party's appeal by becoming its owner through enforcement of the very judgment under review is fundamentally unjust"). Having concluded that appellants' claims for fraud and elder exploitation are personal to Reynolds, those claims are not assignable and thus were not subject to execution. Respondents therefore did not acquire those claims at the sheriff's sale, and as a result, we deny respondents' motion to substitute in as appellants and dismiss these claims.

Tort claims for injury to property are generally assignable

This court also has not yet considered whether a claim for negligent misrepresentation is assignable. "A determination of whether

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[2]In comparison, NRS 41.085(2) explicitly permits an heir to maintain a personal cause of action for wrongful death without bringing it in the name of the decedent or joining the decedent to the action.

[3]*RMA Ventures* also involved a defendant purchasing a plaintiff's claims and then moving to dismiss the appeal regarding those claims. 576 F.3d at 1075. The court ultimately ruled in the defendant's favor based on Utah law that expressly allows a party to purchase its opponent's claims and dismiss them, but noted its "degree of discomfort" with the result. *Id.* (citing *Applied Med. Techs., Inc. v. Eames*, 44 P.3d 699 (Utah 2002)).

a cause of action is assignable should be based upon an analysis of the nature of the claim to be assigned and on an examination of the public policy considerations that would be implicated if assignment were permitted." 6A C.J.S. *Assignments* § 42 (2016) (recognizing that, aside from claims to recover personal damages or claims involving personal or confidential relationships, claims are generally, but not always, assignable); *see also Christison v. Jones*, 405 N.E.2d 8, 10 (Ill. App. Ct. 1980) (examining "the nature of the cause of action . . . and . . . public policy considerations" as part of its analysis to determine whether certain claims are assignable), *superseded by statute on different grounds as stated in Hoth v. Stogsdill*, 569 N.E.2d 34, 38 (Ill. App. Ct. 1991); *Webb*, 174 P.3d at 278 (providing that, "absent legislative direction, public policy considerations should" be weighed when considering whether a claim is assignable).

In *Bill Stremmel Motors, Inc. v. First National Bank of Nevada*, 94 Nev. 131, 134, 575 P.2d 938, 940 (1978), this court adopted section 552 of the Second Restatement of Torts and limited claims for negligent misrepresentation to only those claims resulting in pecuniary loss. *See* Restatement (Second) of Torts § 552 (Am. Law Inst. 1977); *see also Goodrich & Pennington Mortg. Fund, Inc. v. J.R. Woolard, Inc.*, 120 Nev. 777, 782, 101 P.3d 792, 795-96 (2004) (limiting damages for negligent misrepresentation to the "out-of-pocket damages" suffered). In so doing, Nevada rejected the "somewhat broader liability" that other jurisdictions recognize that allows negligent misrepresentation claims to proceed when the alleged damage is the risk of physical harm rather than pecuniary loss. *See id.*; Restatement (Second) of Torts § 311 cmt. a (Am. Law Inst. 1965) (recognizing the contrast between jurisdictions that allow negligent misrepresentation claims for risk of physical harm and those that only allow such claims for pecuniary loss). Under this more limited approach, Nevada law only recognizes negligent misrepresentation claims in the context of business transactions. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1998) (stating that negligent misrepresentation "only applies to business transactions"). Given that negligent misrepresentation claims in Nevada only arise out of pecuniary loss, it is clear that the nature of such a claim is not to recover for a personal injury, but instead is more akin to a claim seeking recovery for a loss of property. *Cf. Stalk v. Mushkin*, 125 Nev. 21, 26-27, 199 P.3d 838, 841-42 (2009) (acknowledging a difference between torts that cause injury to property and torts that cause injury to a person). Claims alleging damages to property, rather than personal damages, are generally assignable. *See, e.g.*, *TMJ Haw., Inc. v. Nippon Tr. Bank*, 153 P.3d 444, 452 (Haw. 2007) (recognizing that property tort claims, "*i.e.*, those that arise out of an injury to the claimant's property or estate," are generally assignable); *Gremminger v. Mo. Labor & Indus. Relations Comm'n*, 129 S.W.3d 399, 403 (Mo. Ct. App. 2004) (stating that Missouri allows

the assignment of tort claims, including misrepresentation claims, when an estate "has been injured, diminished or damaged" (quoting *State ex rel. Park Nat'l Bank v. Globe Indem. Co.*, 61 S.W.2d 733, 736 (Mo. 1933))); 6A C.J.S. *Assignments* § 50 (2016) (explaining that rights of action in tort involving damage to property are generally assignable).

Additionally, because a claim for negligent misrepresentation in Nevada can only be based on pecuniary loss, assigning such claims does not implicate the same public policy concerns this court observed in *Prosky*, 32 Nev. at 445, 109 P. at 794, and *Maxwell*, 102 Nev. at 506-07, 728 P.2d at 815, because they do not include "non-economic losses such as physical pain and mental anguish." *Maxwell*, 102 Nev. at 507, 728 P.2d at 815. As the losses for a negligent misrepresentation claim are limited to purely monetary losses, assigning appellants' rights to their negligent misrepresentation claim is more akin to the assignment of proceeds from a personal injury tort than to the assignment of the claim itself. *See Achrem*, 112 Nev. at 739-41, 917 P.2d at 448-49 (noting with approval that some jurisdictions allow assignment of the proceeds of a tort action where the assignor retains control of the action).

Based on the foregoing, we hold that while claims for personal injury torts are not assignable, when a tort claim alleges purely pecuniary loss, as is the case with appellants' negligent misrepresentation claim, the claim may be assigned. And, because the claim may be assigned, it is subject to execution in satisfaction of a judgment. *Compare Gallegos*, 127 Nev. at 582, 255 P.3d at 1289 (allowing assignment and execution of contract-based rights of action), *with Chaffee*, 98 Nev. at 223-24, 645 P.2d at 966 (disallowing execution on a claim for legal malpractice because it was not assignable). Other jurisdictions have come to similar conclusions and allowed the assignment of tort claims affecting property while prohibiting the assignment of personal injury tort claims. *See, e.g.*, *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 293 P.3d 661, 665 (Idaho 2013) (explaining that personal injury torts are generally not assignable, but distinguishing tort claims that result in property damage); *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 829 (Mo. 2014) (explaining that causes of action for torts that cause injury to property are assignable, but personal injury torts are not). Because appellants' claim for negligent misrepresentation is a property tort, we conclude that this claim was properly assigned to respondents at the sheriff's execution sale. Respondents' motion to substitute in place of appellants and to dismiss this appeal as to the negligent misrepresentation claim is therefore granted.

Contract-based claims are generally assignable

Appellants' final claim is for breach of contract. Under Nevada law, contract-based claims in action are generally assignable and

thus "subject to execution in satisfaction of a judgment," unless personal in nature. *Gallegos*, 127 Nev. at 582, 255 P.3d at 1289; *see also* 6 Am. Jur. 2d *Assignments* § 15 (2018) (explaining the general rule that "unless an assignment would add to or materially alter the obligor's duty of risk," the contract itself restricts assignability, or the assignment would violate a statute, "most rights under contracts are freely assignable"). *But see HD Supply Facilities Maint., Ltd. v. Bymoen*, 125 Nev. 200, 204-05, 210 P.3d 183, 185-86 (2009) (providing an exception to the general rule that breach of contract claims are generally assignable for personal service contracts); *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 120 Nev. 168, 176, 87 P.3d 1054, 1060 (2004) (observing that noncompete agreements are "personal in nature and therefore are not assignable absent the employee's express consent"). Appellants present no argument to depart from this general rule, and we find no reason to do so as the contract at issue is not a personal service contract. Therefore, respondents' motion to substitute themselves for appellants and to dismiss this appeal as to appellants' breach-of-contract claim is granted.

CONCLUSION

Because appellants' claims for fraud and elder exploitation are personal in nature, they are not assignable and thus were not subject to execution at the sheriff's sale. Therefore, respondents did not acquire these claims at the execution sale, and we deny their motion to substitute themselves for appellants and to dismiss this appeal as to the fraud and elder exploitation claims. Having further concluded that appellants' claims for negligent misrepresentation and breach of contract are assignable and subject to execution, we grant respondents' motion to substitute themselves for appellants as to those claims and to voluntarily dismiss this appeal as to those claims. Accordingly, we reinstate briefing solely as to the summary judgment on appellants' claims for fraud and elder exploitation. Respondents shall have 30 days from the date of this opinion to file and serve the answering brief.[4] Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1).

Hardesty and Stiglich, JJ., concur.

[4]To the extent appellants' opening brief addresses their claims for negligent misrepresentation and breach of contract, respondents need not respond to those arguments, as we will not address them in resolving this appeal.

JOSE VALDEZ-JIMENEZ, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE MARK B. BAILUS, District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

No. 76417

AARON WILLARD FRYE, Petitioner, *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 THE STATE OF NEVADA, Real Party in Interest.

No. 76845

April 9, 2020 460 P.3d 976

Original petitions for writs of mandamus challenging district court orders denying pretrial motions to reduce or vacate bail.

Petitions denied.

Pickering, C.J., dissented in part.

Darin F. Imlay, Public Defender, and *Nancy M. Lemcke* and *Christy L. Craig*, Deputy Public Defenders, Clark County; *Civil Rights Corps* and *Charles Lewis Gerstein, Alec George Karakatsanis*, and *Olevia Boykin*, Washington, D.C., for Petitioners.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Alexander G. Chen* and *Krista D. Barrie*, Chief Deputy District Attorneys, Clark County, for Real Parties in Interest.

Armstrong Teasdale LLP and *Tracy A. DiFillippo*, Las Vegas, for Amicus Curiae American Bail Coalition.

Law Office of Franny Forsman and *Franny Forsman*, Las Vegas, for Amicus Curiae National Law Professors of Criminal, Procedural, and Constitutional Law.

Law Office of Lisa Rasmussen and *Lisa Rasmussen*, Las Vegas, for Amicus Curiae Social Scientists.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, J.:

We are asked to consider what process is constitutionally required when a district court sets bail in an amount that the defendant cannot

afford, resulting in pretrial detention. Though the bail issue is moot because petitioners have been convicted and are no longer subject to pretrial detention, we nevertheless elect to reach the issue because it is a matter of public importance and is capable of repetition but evading review.

The right to reasonable bail is guaranteed by the Nevada Constitution for individuals who commit offenses other than capital offenses or first-degree murder. Bail serves the important function of allowing a defendant to be released pending trial while at the same time ensuring that he or she will appear at future proceedings and will not pose a danger to the community. When bail is set in an amount the defendant cannot afford, however, it deprives the defendant of his or her liberty and all its attendant benefits, despite the fact that he or she has not been convicted and is presumed innocent. To safeguard against pretrial detainees sitting in jail simply because they cannot afford to post bail, we conclude that the following due process protections are constitutionally required.

A defendant who remains in custody following arrest is constitutionally entitled to a prompt individualized determination on his or her pretrial custody status. The individualized determination must be preceded by an adversarial hearing at which the defendant is entitled to present evidence and argument concerning the relevant bail factors. The judge must consider the factors set forth in NRS 178.4853 and may impose bail only if the State proves by clear and convincing evidence that it is necessary to ensure the defendant's presence at future court proceedings or to protect the safety of the community, including the victim and the victim's family. If the district court determines that bail, rather than nonmonetary conditions, is necessary, the judge must consider the defendant's financial resources as well as the other factors set forth in NRS 178.498 in setting the amount of bail, and the judge must state his or her reasons for the bail amount on the record. Accordingly, we elect to entertain the writ petitions, but we deny the petitions because there is no relief we can provide to petitioners.

FACTS AND PROCEDURAL HISTORY

Petitioners Aaron Frye and Jose Valdez-Jimenez were arrested and charged with felony offenses. Bail was set for each petitioner in the justice court. Rather than proceed by criminal complaint in the justice court, the State obtained an indictment from a grand jury. Upon the indictment returns, the district court set bail in the amount requested by the State. For Frye, bail was set in the amount of $250,000 based on the State's representation that he was already in custody on that amount, and for Valdez-Jimenez, bail was set in the amount of $40,000, the amount on which he was in custody in another case. Neither petitioner was present at the indictment return. Each petitioner was later arraigned in district court and subsequently

filed a motion to vacate or reduce the bail amount. In their motions, petitioners contended that the bail amounts were excessive and that the bail process violated their right to due process and equal protection. Relying on *United States v. Salerno*, 481 U.S. 739 (1987), they argued that setting bail in an amount they could not afford was tantamount to a detention order, and therefore, before the district court could set such bail, it was required to hold an adversarial hearing at which it considered their financial ability to pay and the State proved that bail was the least restrictive means of ameliorating any risk of flight or danger to the community.

The district court held hearings on the motions and denied them. In denying Frye's motion, the district judge, who was not the judge who set bail on the indictment warrant, indicated that its role was limited to determining whether the bail amount was an abuse of discretion:

> Bond was previously set by a competent judge. I don't find there was any abuse of discretion. In order to assure the defendant is present in court and to protect the community, and the other things that are considered under the various statutes dealing with the amount of bond, I don't find that an amount of $250,000 is unreasonable.

The district court added, "The only thing that's before me today is whether or not the $250,000 bail that was set by a different judge was wrong; okay. I can't find that it was wrong. Would I have imposed the same amount of bail? I don't know."

The district judge who considered and denied Valdez-Jimenez's motion found that Nevada's statutory scheme, and not *Salerno*, controlled and required that good cause be shown before an accused could be released without bail. The judge stated that, in denying the motion, he had considered the statutory factors for release with bail and without bail, but the judge did not discuss those factors or otherwise explain the basis for the bail amount.

Both defendants filed a petition for a writ of mandamus[1] in this court challenging the bail process and decisions. We elect to consolidate these petitions for disposition. *Cf.* NRAP 3(b)(2).

DISCUSSION

We elect to entertain the petitions for a writ of mandamus

A writ of mandamus is appropriate "to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*,

[1]We note that Frye's petition is entitled alternatively as a petition for a writ of habeas corpus, but in light of this opinion, the request for habeas relief is denied.

124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (footnote omitted). Because a writ of mandamus is an extraordinary remedy, it is within our complete discretion whether to consider it. *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008). Writ relief is generally available only in "cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170.

Since filing their petitions, both Frye and Valdez-Jimenez have pleaded guilty and are no longer subject to pretrial detention. The State therefore contends that the petitions should be denied because the issues have been rendered moot. However, petitioners contend that the constitutional issues raised by their bail proceedings are important and will likely arise again but evade review. We agree with petitioners.

As a general rule, this court will decline to hear a moot case. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). That general rule comports with our duty "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." *NCAA v. Univ. of Nev.*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981). Therefore, "a controversy must be present through all stages of the proceeding, and even though a case may present a live controversy at its beginning, subsequent events may render the case moot." *Personhood Nev.*, 126 Nev. at 602, 245 P.3d at 574 (citations omitted).

Even where a case is moot, however, this court "may consider it if it involves a matter of widespread importance that is capable of repetition, yet evading review." *Id.* The party seeking to overcome mootness must prove "that (1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important." *Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 334-35, 302 P.3d 1108, 1113 (2013).

The issues presented here are within the exception to the mootness doctrine. First, given the time restraints inherent in criminal cases, most bail orders are short in duration and the issues concerning bail and pretrial detention become moot once the case is resolved by dismissal, guilty plea, or trial.[2] *See Gerstein v. Pugh*, 420 U.S. 103,

[2]The dissent disagrees and cites several decisions by this court to argue that challenges to bail proceedings do not evade review. But the dissent ignores that two of the cases were resolved on mootness grounds because the defendant had already been released, *see Black v. Eighth Judicial Dist. Court*, Docket No. 76472 (Order Denying Petition, Sept. 14, 2018); *Sherard v. Eighth Judicial Dist. Court*, Docket No. 76398 (Order Denying Petition, Sept. 14, 2018), and the other case involved the district court's application of bail statutes and not the more complicated constitutional questions raised here, *see Cameron v. Eighth Judicial Dist. Court*, 135 Nev. 214, 445 P.3d 843 (2019).

110 n.11 (1975) ("Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted.").

As to the second requirement—"a likelihood that a similar issue will arise in the future"—we take this opportunity to clarify that this does not necessitate the similar issue to recur with respect to petitioners personally. As the dissent highlights, federal law requires "a reasonable expectation that *the same complaining party* will be subjected to the same action again" in order to satisfy the capable-of-repetition-yet-evading-review exception to the mootness doctrine. *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018) (emphasis added). But Nevada courts are not bound by the federal standard for determining mootness. *See State v. Glusman*, 98 Nev. 412, 418, 651 P.2d 639, 643 (1982) (recognizing that it is within this court's inherent discretion "to consider issues of substantial public importance which are likely to recur," despite any intervening events that have rendered the matters moot). And our jurisprudence has implicitly rejected "the same complaining party" requirement, instead focusing on whether the issues raised by the party are likely to recur under similar circumstances. *See, e.g.*, *Solid v. Eighth Judicial Dist. Court*, 133 Nev. 118, 120, 393 P.3d 666, 670 (2017) (reviewing petitioner's challenge to his criminal trial where, although his conviction rendered the issue moot, the same issue was likely to recur in other criminal trials); *Haney v. State*, 124 Nev. 408, 410-11, 185 P.3d 350, 352 (2008) ("Although our ruling in this case will not benefit Haney directly because his sentence has expired, we nonetheless address the legal questions presented because they are capable of repetition, yet evading review."); *Miller v. State*, 113 Nev. 722, 724 n.1, 941 P.2d 456, 458 n.1 (1997) (noting that defendants' sentencing claims warranted review even if "moot because they challenge an activity that is capable of repetition yet evades review"); *Binegar v. Eighth Judicial Dist. Court*, 112 Nev. 544, 548, 915 P.2d 889, 892 (1996) (concluding that though petitioner's claim was moot, review was appropriate because the issue of the constitutionality of the statute was capable of repetition).

The dissent's strict reliance on federal law ignores our precedent defining the contours of our mootness exception.[3] Though

[3]We are not unique in allowing this "capable of repetition" factor to be met even where the issue is not likely to recur with respect to the same complaining party. *See, e.g.*, *In re Webb*, 440 P.3d 1129, 1131 (Cal. 2019) (addressing bail issue, which was moot as to the defendant, because it was an important issue likely to recur); *Dutkiewicz v. Dutkiewicz*, 957 A.2d 821, 828 (Conn. 2008) (recognizing mootness exception where there is "a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate" (internal quotation marks omitted)); *State v. Mercedes*, 183 A.3d 914, 924 (N.J. 2018) (reviewing moot pretrial detention issue that was "'capable of repetition' in countless detention

the dissent suggests that our three-factor test in *Bisch* presents an inexplicable departure from the federal mootness exception, our jurisprudence reveals that *Bisch* did not alter our capable-of-repetition-yet-evading-review exception to the mootness doctrine but rather delineated the three factors that must be met. *See, e.g.*, *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 120 Nev. 168, 171-72, 87 P.3d 1054, 1057 (2004) (recognizing the exception applies when the duration of the challenged action is "relatively short" and there is a "likelihood that a similar issue will arise in the future"); *State v. Washoe Cty. Pub. Def.*, 105 Nev. 299, 301, 775 P.2d 217, 218 (1989) (explicitly recognizing the "capable of repetition, yet evading review" exception to address an important question of law). And while the dissent urges us not to apply our capable-of-repetition exception as set forth in *Bisch*, the dissent fails to provide any compelling reason for departing from our long-standing precedent. *See Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) ("[U]nder the doctrine of stare decisis, we will not overturn [precedent] absent compelling reasons for so doing. Mere disagreement does not suffice." (footnotes omitted)).

To reiterate, the second factor of the mootness exception requires that the question presented is likely to arise in the future with respect to the complaining party or individuals who are similarly situated to the complainant. We conclude that petitioners have satisfied this requirement. Petitioners have provided documents from other criminal cases in which defendants have raised similar arguments before the justice court or district court about the process of setting bail. Because the constitutional issues concerning the inquiries and findings required for setting bail are relevant in many criminal cases, they will arise in the future.[4]

Finally, petitioners have demonstrated that these are issues of widespread importance, as they affect many arrestees and involve the constitutionality of Nevada's bail system. Deciding these issues

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hearings yet may evade review if other defendants plead guilty before similar challenges can be resolved"); *Saunders v. Hornecker*, 344 P.3d 771, 775 (Wyo. 2015) (addressing challenge to bail where defendant had already been convicted because the issue was capable of repetition with respect to other defendants).

[4]The dissent also contends that the questions raised in the petitions are unlikely to recur because Clark County has recently established an "Initial Appearance Court" and has also modified its bail and pretrial release procedures in response to the COVID-19 pandemic. While Clark County's Initial Appearance Court is laudable and a significant step toward addressing an arrestee's custody status in a timely manner, it applies solely to the Eighth Judicial District and is not available to all arrestees. And, any court order that was entered to address the pandemic is temporary in nature and would not permanently alter the process for pretrial release. The dissent further points out that the Legislature recently formed an interim committee to study and report on pretrial detention. Though legislative amendments warrant consideration, the issue here is whether the legislation as it exists today comports with constitutional requirements.

would provide guidance to judges who are responsible for assessing an arrestee's custody status. Because the petitions raise legal questions of first impression and statewide importance that are likely to recur in other cases, we choose to consider the issues on the merits. *See Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 822-23, 407 P.3d 702, 708 (2017) (permitting advisory mandamus "to address the rare question that is 'likely of significant repetition prior to effective review,' so that our opinion would assist other jurists, parties, or lawyers" (internal quotation marks omitted)). Furthermore, we conclude that a writ of mandamus is the appropriate vehicle for raising these issues, as petitioners have no other adequate remedy. *See* NRS 34.160; NRS 34.170.

The constitutionality of the bail process

Petitioners challenge the process by which bail is set following an indictment. Petitioners argue that Nevada's statutory bail scheme and the district court's imposition of money bail in an amount they could not pay denied them substantive and procedural due process and equal protection under the Nevada and United States Constitutions. Petitioners argue that because unaffordable bail is equivalent to a pretrial detention order, and the liberty interest of an arrestee is a fundamental right, they were entitled to an adversarial hearing at which the State demonstrated that the amount of bail was necessary to further the State's interests—i.e., to ensure the defendant's appearance in court and to protect the safety of the community. They contend that because Nevada's current statutory scheme for pretrial release makes money bail the presumption, requires the defendant to show good cause for release on nonmonetary conditions, and lacks procedural safeguards, it is unconstitutional. We review each of these contentions in turn.

Bail in an amount greater than necessary to ensure the defendant's appearance and the safety of the community is unconstitutional

Typically, a pretrial release decision is a matter within the sound discretion of the trial court. *See In re Wheeler*, 81 Nev. 495, 500, 406 P.2d 713, 716 (1965). However, the issues raised by the petitioners involve the meaning or applicability of constitutional provisions, which present questions of law we review de novo. *Manning v. State*, 131 Nev. 206, 209-10, 348 P.3d 1015, 1017-18 (2015).

Article 1, section 7 of the Nevada Constitution creates a right to bail before conviction: "All persons shall be bailable by sufficient sureties; unless for Capital Offenses or murders punishable by life imprisonment without possibility of parole when the proof is evident or the presumption great." Article 1, section 6 of the Nevada Constitution proscribes excessive bail, which we have explained

means that "[b]ail must not be in a prohibitory amount, more than the accused can reasonably be expected under the circumstances to give, for if so it is substantially a denial of bail." *Ex parte Malley*, 50 Nev. 248, 253, 256 P. 512, 514 (1927) (quoting 6 C.J. *Bail* § 222 (1916)), *rejected on other grounds by Wheeler*, 81 Nev. 495, 406 P.2d 713. Thus, under our constitution, individuals such as petitioners, who are accused of committing noncapital, non-first-degree-murder offenses, have a right to bail in a reasonable amount. *See id.*; *Wheeler*, 81 Nev. at 498-99, 406 P.2d at 715.

The amount of bail that is reasonable will depend on the circumstances of the individual. However, because the right of an individual to reasonable bail before trial is a fundamental one, *see Salerno*, 481 U.S. at 750 (describing "the individual's strong interest in liberty" as "fundamental"), bail must not be in an amount greater than necessary to serve the State's interests. As the United States Supreme Court said, "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citation omitted); *see also Salerno*, 481 U.S. at 755 ("In our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception.").

The purpose of bail in Nevada is twofold: to ensure "the presence of one charged at all times when demanded," *Malley*, 50 Nev. at 253-55, 256 P. at 514, and to protect the community, including the victim and the victim's family, *see* Nev. Const. art. 1, § 8A(1)(c) (requiring consideration of the safety of the victim and the victim's family in setting bail). Thus, the right to release before trial is conditioned on adequate assurance that the defendant will appear at all court proceedings and that he or she will not be a danger to other persons. Accordingly, for bail to be reasonable, it must relate to one of these two purposes—to ensure the appearance of the accused at all stages of the proceedings or to protect the safety of the victim and the community. Otherwise, it will necessarily be excessive in violation of the Nevada Constitution's bail provisions.

Our conclusion that bail may be imposed only where necessary to ensure the defendant's appearance or to protect the community is also mandated by substantive due process principles. Because bail may be set in an amount that an individual is unable to pay, resulting in continued detention pending trial, it infringes on the individual's liberty interest. And given the fundamental nature of this interest, substantive due process requires that any infringement be necessary to further a legitimate and compelling governmental interest. *Cf. Salerno*, 481 U.S. at 746, 750 (stating that a government action violates substantive due process when it "interferes with rights implicit in the concept of ordered liberty" (internal quotation

marks omitted)); *Bearden v. Georgia*, 461 U.S. 660, 668-69 (1983) (holding that due process and equal protection principles preclude a court from ordering a person incarcerated for failing to pay a fine or restitution "through no fault of his own" without first "considering whether adequate alternative methods of punishing the defendant are available"). Thus, to comport with substantive due process, bail must be necessary to further the State's compelling interests in bail—that is, to prevent the defendant from being a flight risk or a danger to the community.

Having established the substantive inquiries the district court must make in assessing a defendant's custody status before trial, we now turn to the procedural requirements attendant to that decision.

An individualized bail hearing must be held within a reasonable time after arrest for defendants who remain in custody

Petitioners challenge the procedure for setting bail following the return of an indictment. Nevada's statutes provide that upon return of an indictment, the district court may fix the amount of bail in the arrest warrant, NRS 173.155, and the arrested person shall be brought promptly before a magistrate for the purpose of admission to bail, NRS 173.195. Though petitioners contend that they should have been present and a hearing should have been held before bail was set in the arrest warrant, none of the cases they cite require such a conclusion. Rather, the United States Supreme Court decisions on which petitioners rely do not suggest that a hearing must be held before any detention can occur. *See, e.g.*, *Salerno*, 481 U.S. at 747 (stating that an arrestee is entitled to "a prompt" hearing under the federal Bail Reform Act). Furthermore, courts generally have recognized that an initial bail amount may be set pursuant to a standardized bail schedule, as long as the accused is given the opportunity soon after arrest to have an individualized determination where the accused's financial ability to pay is considered. *See, e.g.*, *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1446 (2019); *ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018); *see also In re Humphrey*, 228 Cal. Rptr. 3d 513, 540-41 (Ct. App. 2018), *appeal pending*, 417 P.3d 769 (Cal. 2018). Petitioners provide no authority requiring an adversarial hearing to be held before bail can be set in an arrest warrant. Thus, we conclude that the district court's initial bail setting in the post-indictment arrest warrant did not run afoul of the Nevada or United States Constitutions.

We recognize, however, that an accused is entitled to a prompt individualized hearing on his or her custody status after arrest. Generally, such a hearing occurs at the initial appearance, or arraignment. Though "[t]here is no statutory designation of a specific time within which an arraignment shall be held after the arrest of an accused under an indictment," this court presumes that an arraignment will

be conducted within "a reasonable time." *Tellis v. Sheriff of Clark Cty.*, 85 Nev. 557, 559-60, 459 P.2d 364, 365 (1969). We have explained that one of the primary reasons for a speedy arraignment is to protect the defendant's "right to due process of law and to assure that he is not left to languish in jail." *Id.* at 559, 459 P.2d at 365. Accordingly, we stress that where a defendant remains in custody following indictment, he or she must be brought promptly before the district court for an individualized custody status determination.[5] We next address what procedures are constitutionally required in making such a determination.

Heightened procedural due process requirements apply when bail is set in an amount the defendant cannot afford

Petitioners contend that the current statutory bail scheme lacks sufficient procedural protections to ensure that bail is necessary and not excessive. In determining what procedural due process requires, it is helpful to review the process for setting bail in Nevada. In doing so, we stress that for many individuals who are arrested, bail will not be necessary. Where the defendant presents little to no flight risk or danger to the community, release on personal recognizance or nonmonetary conditions will likely be appropriate, in which case bail in any amount would be excessive. On the other hand, where the defendant has an extensive history of failing to appear for court proceedings and few ties to the community, bail will likely be necessary.

In order to determine whether bail is necessary, the district court should consider first whether, given the individual circumstances of the defendant, including his or her character and ties to the community, his or her criminal history, and the nature of and potential sentence for the alleged offenses, release on personal recognizance or subject to nonmonetary conditions would be sufficient to reasonably ensure the purposes of bail are met. *See* NRS 178.4853 (setting forth factors for the district court to consider in determining what pretrial release conditions should be imposed). If so, then no bail should be set, as any amount of bail would be excessive. But if, after a consideration of all of the relevant factors, the court finds that no combination of nonmonetary conditions would be sufficient to reasonably ensure the defendant's appearance or the safety of the community, then the court must determine the amount of bail that is

[5]The State asserts that petitioners already received an individualized hearing in justice court, implying that they were not entitled to an individualized hearing in the district court. However, the bail proceedings and amount set in the justice court do not alleviate the need for an individualized determination in the district court following indictment. *See Cameron*, 135 Nev. at 216, 445 P.3d at 844 (noting that the district court is "not constrained by the justice court's bail determination" when a case is transferred to the district court as a result of a grand jury indictment and is not bound over from the justice court).

necessary. For this determination, the court must take into consideration the defendant's financial resources as well as the other factors relevant to the purposes of bail. *See* NRS 178.498 (setting forth factors to consider in setting the amount of bail). Though there is no constitutional requirement that bail be in an amount the defendant can afford to pay, *see Malley*, 50 Nev. at 253-55, 256 P. at 514 (stating "a mere inability to procure bail in a certain amount does not of itself make such amount excessive"), consideration of how much the defendant can afford is essential to determining the amount of bail that will reasonably ensure his or her appearance and the safety of the community.

Petitioners' challenge to this bail process focuses on the situation where the court imposes bail in an amount that is beyond the defendant's ability to pay, resulting in the defendant remaining in jail before trial. Relying heavily on *Salerno*, 481 U.S. 739, they argue that because bail in an amount a person cannot afford has the same result as a detention order, it necessitates heightened procedural due process protections.

In *Salerno*, the United States Supreme Court upheld the constitutionality of pretrial detention provisions in the Bail Reform Act of 1984, which allowed a federal court to detain an individual if no release conditions would reasonably ensure the safety of the community. Under those provisions, a judicial officer could order an arrestee detained only after holding "a full-blown adversary hearing," at which the defendant had the right to be represented by counsel and present evidence and the government proved by clear and convincing evidence "that no conditions of pretrial release can reasonably assure the safety of other persons and the community," and the judicial officer stated his or her findings of fact in writing. *Id.* at 742, 750. The Supreme Court found that the Bail Reform Act was constitutional because it was "narrowly focuse[d]" on the government's overwhelming interest in crime prevention and provided extensive procedural safeguards, particularly the State's burden of proof by clear and convincing evidence. *Id.* at 750-51.

We agree with petitioners that when bail is set in an amount that results in continued detention, it functions as a detention order, and accordingly is subject to the same due process requirements applicable to a deprivation of liberty. Procedural due process requires that any government action depriving a person of liberty must "be implemented in a fair manner." *See id.* at 746. We conclude that to ensure the accuracy of the court's bail assessment and to comport with procedural due process, additional procedural safeguards are necessary before bail may be set in an amount that results in continued detention. We find several protections identified by *Salerno* in the federal Bail Reform Act to be of particular importance in safeguarding against erroneous de facto detention orders. *See United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991)

(holding that a court may impose a financial condition the defendant cannot meet but, in such a situation, the court "must satisfy the procedural requirements for a valid *detention* order"); *Hernandez v. Bennett-Haron*, 128 Nev. 580, 587, 287 P.3d 305, 310 (2012) (stating that this court looks to federal precedent for guidance in determining what procedures satisfy due process).

First, as we stated earlier, when the State requests bail to be set following an indictment, the defendant is entitled to a prompt individualized hearing on his or her custody status. At the hearing, the defendant shall have the right to be represented by counsel and shall be afforded the right to testify and present evidence. *See McCarty v. State*, 132 Nev. 218, 222-24, 371 P.3d 1002, 1005-06 (2016) (discussing defendant's right to counsel at an initial appearance and during critical stages). Second, given the important nature of the liberty interest at stake, the State has the burden of proving by clear and convincing evidence that no less restrictive alternative will satisfy its interests in ensuring the defendant's presence and the community's safety. *See Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (holding that a state's confinement scheme for individuals found to be not guilty by reason of insanity violated due process because it did not provide for an adversarial hearing at which the State proved by clear and convincing evidence that the individual presented a danger to the community); *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) ("This Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" (quoting *Addington v. Texas*, 441 U.S. 418, 424-25 (1979))). And third, the district court must make findings of fact and state its reasons for the bail decision on the record. Transcribed oral findings will satisfy this requirement as long as those findings provide a sufficient basis for the decision. *Cf. United States v. Sesma-Hernandez*, 253 F.3d 403, 405-06 (9th Cir. 2001).

Lastly, we consider petitioners' constitutional challenge to NRS 178.4851(1), which requires a showing of "good cause" before a person may be released without bail.[6] We agree that this "good cause" requirement to release a person on nonmonetary conditions undermines the constitutional right to nonexcessive bail, as it excuses the court from considering less restrictive conditions before determining that bail is necessary. Furthermore, it effectively relieves the State of its burden of proving that bail is necessary to ensure the

[6]NRS 178.4851(1) states:

> Upon a showing of good cause, a court may release without bail any person entitled to bail if it appears to the court that it can impose conditions on the person that will adequately protect the health, safety and welfare of the community and ensure that the person will appear at all times and places ordered by the court.

defendant's appearance or protect the community. Accordingly, we conclude that the "good cause" requirement in NRS 178.4851(1) is unconstitutional. Because the remaining portion of the statute may be given legal effect and accords with the legislative intent that an individual may be released without bail if other nonmonetary conditions are sufficient, the "good cause" language may be severed from NRS 178.4851(1). *See Cty. of Clark v. City of Las Vegas*, 92 Nev. 323, 336-37, 550 P.2d 779, 788 (1976) (setting forth the severability test).

CONCLUSION

When bail is set at an amount greater than necessary to serve the purposes of bail, it effectively denies the defendant his or her rights under the Nevada Constitution to be "bailable by sufficient sureties" and for bail not to be excessive. Thus, bail may be imposed only where it is necessary to reasonably ensure the defendant's appearance at court proceedings or to protect the community, including the victim and the victim's family. Because of the important liberty interest at stake when bail has the effect of detaining an individual pending trial, we hold that a defendant who remains in custody after arrest is entitled to an individualized hearing at which the State must prove by clear and convincing evidence that bail, rather than less restrictive conditions, is necessary to ensure the defendant's appearance at future court proceedings or to protect the safety of the community, and the district court must state its findings and reasons for the bail decision on the record. Because petitioners in these cases are no longer subject to pretrial detention, we deny these petitions for writs of mandamus.

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

Pickering, C.J., concurring in part and dissenting in part:

This court should deny these writ petitions as moot, without venturing an unconstitutionally advisory opinion on legal issues that cannot affect the parties to this case. The Nevada Constitution separates the powers of Nevada government into three departments, "the Legislative,—the Executive and the Judicial," and provides that "no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others." Nev. Const. art. 3, § 1(1). "Judicial Power is the authority to hear and determine justiciable controversies." *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967) (emphasis and internal quotation omitted). Once a controversy becomes moot, it is no longer justiciable. *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). Without a justiciable controversy, the power of the court to pronounce on the law ends:

"[T]he duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." *Nat'l Collegiate Athletic Ass'n v. Univ. of Nev.*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981).

Both Valdez-Jimenez and Frye pleaded guilty in 2019. They are in prison, serving the sentences of imprisonment their judgments of conviction imposed. Petitioners' confinement pursuant to their judgments of conviction renders their challenge to the bail proceedings by which they had been confined—pretrial—moot and nonjusticiable. *Compare United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540-41 (2018) (holding defendants' challenge to their pretrial custody restraints moot and nonjusticiable because their guilty pleas ended their pretrial custody), *with United States v. Salerno*, 481 U.S. 739, 744 n.2 (1987) (holding that case remained justiciable where the defendant remained confined pursuant to the pretrial detention order he challenged); *but see id*. at 758 (questioning majority's justiciability determination given the defendant's conviction on another charge) (Marshall, J., dissenting).

Because this court cannot grant relief to Valdez-Jimenez or Frye with respect to their now-terminated pretrial confinement, it should deny their petitions as moot. *See, e.g.*, *Black v. Eighth Judicial Dist. Court*, Docket No. 76472, at 1* (Order Denying Petition, Sept. 14, 2018) (denying writ petition challenging bail proceeding as moot since "petitioner is no longer in custody and fails to demonstrate that this issue is capable of repetition yet evading review"); *Sherard v. Eighth Judicial Dist. Court*, Docket No. 76398 (Order Denying Petition, Sept. 14, 2018) (same); *accord Valdez-Jimenez v. Lombardo*, Case No. 2:19-cv-00581-RFB-VCF (Order Granting Motion to Dismiss (ECF Nos. 25, 27) and Dismissing Action, D. Nev., June 26, 2019) (dismissing as moot Valdez-Jimenez's parallel federal writ proceeding challenging his pretrial bail proceedings after he pleaded guilty and was incarcerated on his judgment of conviction).

The law makes an exception to mootness for disputes that are capable of repetition yet evading review. But, to guard against the judicial exercise of generally applicable executive and legislative power, the capable-of-repetition mootness exception has strict limits. It applies "*only* if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, *and* (2) there is a reasonable expectation that *the same complaining party* will be subjected to *the same action* again." *Sanchez-Gomez*, 138 S. Ct. at 1540 (emphasis added) (internal quotation omitted). The test is conjunctive—both standards must be met—and these petitions do not satisfy either.

In-custody defendants in Nevada have, as recently as last year, litigated pretrial-bail-proceeding challenges to appellate conclusion

before release or incarceration mooted the bail dispute. *See Cameron v. Eighth Judicial Dist. Court*, 135 Nev. 214, 445 P.3d 843 (2019) (mandating that the district court reconsider and explain its decision, following an indictment return, to increase bail beyond the amount the justice court had set on the original criminal complaint); *In re Application of Wheeler*, 81 Nev. 495, 500, 406 P.2d 713, 716 (1965) (holding that the district court did not abuse its discretion in denying the defendant's release on bail in a murder case). The challenged action thus is not "in its duration too short to be fully litigated prior to its cessation or expiration." *Sanchez-Gomez*, 138 S. Ct. at 1540. And, for Valdez-Jimenez and Frye to face the same action again, they would have to serve their prison sentences, be released, reoffend, and again be arrested, jailed, and subjected to the same bail procedures they challenge. For policy reasons, courts do not presume future criminal conduct in applying the capable-of-repetition mootness exception. *Compare Lane v. Williams*, 455 U.S. 624, 632-33 n.13 (1982) (concluding that case was moot where the challenged parole revocation could not "affect a subsequent parole determination unless respondents again violate state law, are returned to prison, and become eligible for parole"), *with Sanchez-Gomez*, 138 S. Ct. at 1541 (in analyzing mootness, courts "assume[ ] that [litigants] will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct") (second alteration in original) (internal quotation omitted). *See Spencer v. Kemna*, 523 U.S. 1, 17-18 (1998) (holding that "[t]he capable-of-repetition doctrine applies only in exceptional situations" such that petitioner's challenge to his parole revocation was moot and nonjusticiable) (internal quotation omitted).

Quoting *Bisch v. Las Vegas Metropolitan Police Department*, 129 Nev. 328, 334-35, 302 P.3d 1108, 1113 (2013), the majority offers a stripped-down statement of the capable-of-repetition mootness exception. It suggests that, to overcome mootness, it is enough "that (1) the duration of the challenged action is *relatively short*, (2) there is a *likelihood* that a *similar issue* will arise in the future, and (3) the matter is *important*." Majority op., *supra*, at 158 (emphasis added) (internal quotation omitted). As precedent, *Bisch* is questionable for two reasons. First, *Bisch* does not acknowledge much less explain its departure from the federal caselaw on the capable-of-repetition exception, which this court has endorsed and followed for years. *See, e.g.*, *Stephens Media, LLC v. Eighth Judicial Dist. Court*, 125 Nev. 849, 858, 221 P.3d 1240, 1247 (2009) (applying the United States Supreme Court's capable-of-repetition mootness exception to resolve a Nevada case) (citing *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976)); *Langston v. State, Dep't of Motor Vehicles*, 110 Nev. 342, 344, 871 P.2d 362, 363 (1994) (same) (citing *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498

(1911), and *DeFunis v. Odegaard*, 416 U.S. 312 (1974)). Second, *Bisch*'s reformulation of the capable-of-repetition mootness exception is dictum—although Bisch's employer had removed her disciplinary write-up from her file by the time she appealed, the discipline carried collateral consequences so "an actual controversy still exist[ed]" for us to decide. *Bisch*, 129 Nev. at 335, 302 P.3d at 1113.

More fundamentally, the *Bisch* version of the capable-of-repetition exception does not provide adequate separation-of-powers guardrails—especially since the judiciary is applying the standard to itself, with no other checks or balances. Relying on the interests of nonparties to save a case from mootness exponentially expands what is meant to be a very narrow exception. Nonparties with similar interests exist outside almost every case this court decides. Yet, the "judicial power exists *only* to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (emphasis added). Replacing the requirement that "the same [complained of] action" be likely to repeat, *Sanchez-Gomez*, 138 S. Ct. at 1540 (emphasis added), with a mere "*likelihood* that a *similar issue* will arise in the future," *Bisch*, 129 Nev. at 334-35, 302 P.3d at 1113, invites judicial review of questions that did not and cannot affect the parties to the original dispute, which the separation of powers doctrine forbids. *Compare Degraw v. Eighth Judicial Dist. Court*, 134 Nev. 330, 334, 419 P.3d 136, 140 (2018) (denying as moot an extraordinary writ petition where "interpreting the statute in the requested manner when it is unclear whether this issue is likely to reoccur in the future would render any opinion advisory at best"), *with Personhood*, 126 Nev. at 602, 245 P.3d at 574 ("This court's duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment.").

To be clear: I agree with my colleagues as to the importance of prompt and constitutionally conducted pretrial detention and release decisions. But Valdez-Jimenez's and Frye's bail proceedings took place in Clark County's justice and district courts in 2018. In January of 2019, Clark County established its Initial Appearance Court, which revamped the County's pretrial custody and bail determination procedures, reportedly resulting in defendants appearing and having their custody and bail status reviewed in a matter of hours. *See* Clark County, Nevada, News Releases, *In the Face of Increased Bookings, Inmates Move through Streamlined Judicial System Faster* (Feb. 24, 2020). And effective July 1, 2019, the Nevada Legislature created an interim committee to examine and recommend legislation relating to the pretrial release of defendants in criminal cases to the 2021 Nevada Legislature. Senate Concurrent Resolu-

tion No. 11, 80th Leg. (Nev. 2019).[1] These measures, combined with the changes wrought by the judicial and executive branches in the face of the COVID-19 pandemic, mean that, to the extent the record in this case frames the issues the court addresses,[2] those issues do not exist in the same form today.

Cases seeking extraordinary writ relief are fully subject to mootness and justiciability constraints. *Sanchez-Gomez*, 138 S. Ct. at 1540; *Mesagate Homeowners' Ass'n v. City of Fernley*, 124 Nev. 1092, 1097, 194 P.3d 1248, 1251 (2008). With an incomplete record, parties whom our judgment cannot affect, and the changes that have occurred and are occurring in Nevada's bail procedures since the petitioners' 2018 bail proceedings, I would deny their petitions as moot. To do otherwise raises serious "concern about the proper—and properly limited—role of the courts in a democratic society." *Warth*, 422 U.S. at 498.

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[1]Senate Concurrent Resolution No. 11 directs the interim committee to examine and recommend changes to existing statutes concerning, among other matters, "[t]he timeliness and conduct of hearings to consider the pretrial release of defendants," "[t]he circumstances under which defendants should be released on their own recognizance," and "[t]he imposition of monetary bail as a condition of pretrial release and the considerations relating to the setting of the amount of any monetary bail."

[2]Valdez-Jimenez and Frye did not include the record of their bail proceedings in justice court in the appendices to their writ petitions, so we cannot say precisely how Clark County's establishment of its Initial Appearance Court in 2019 would affect what they experienced in 2018. While the indictment returns in district court started new criminal cases, that did not render irrelevant the bail proceedings had in justice court on Valdez-Jimenez's and Frye's initial charges. *Cf. Cameron*, 135 Nev. at 215, 445 P.3d at 844 (holding that the district court properly considered justice court bail proceedings in setting bail post-indictment-return and abused its discretion in later increasing the bail amount without explaining its departure from the amount the justice court originally set).