LaMONT'S WILD WEST BUFFALO, LLC, Appellant, *v.*
NATHANIAL TERRY, Respondent.

No. 85056

March 7, 2024 544 P.3d 248

Appeal from a district court order denying a motion for attorney fees as sanctions. Eighth Judicial District Court, Clark County; Nadia Krall, Judge.

Affirmed in part, reversed in part, and remanded with instructions.

McDonald Carano LLP and *Ryan J. Works*, *John A. Fortin*, and *Karyna M. Armstrong*, Las Vegas, for Appellant.

Hutchings Law Group and *Mark H. Hutchings*, Las Vegas, for Respondent.

Before the Supreme Court, Herndon, Lee, and Parraguirre, JJ.

OPINION

By the Court, Herndon, J.:

LaMont's Wild West Buffalo, LLC, appeals from a district court order denying its motion for attorney fees as sanctions under NRCP 11, NRS 18.010(2)(b), and NRS 7.085. The district court found that Nathanial Terry filed frivolous counterclaims against LaMont's for breach of contract, breach of the covenant of good faith, intentional interference with prospective economic advantage, trespass to chattels, and negligence. However, the district court denied LaMont's motion for its failure to comply with NRCP 11's safe harbor provision.

We conclude that the district court properly denied LaMont's motion for sanctions under NRCP 11 for failure to comply with that rule's procedural requirements. However, the district court erred by denying attorney fees under NRS 18.010(2)(b) and NRS 7.085 for the same perceived procedural flaw, as the NRCP 11 procedural requirements do not apply to awards under those statutes.

FACTS AND PROCEDURAL HISTORY

Appellant LaMont's Wild West Buffalo and respondent Nathanial Terry entered into an oral agreement under which LaMont's acted as an order-buyer to procure 517 bison for Terry's Montana ranch. After the last of the bison were delivered to Terry's ranch, Terry ceased communication with LaMont's. LaMont's sent Terry an invoice for its finder's fee but received no response.

LaMont's made several attempts to collect payment but ultimately filed suit for breach of contract and related claims. Terry filed an answer and counterclaimed, alleging breach of contract, breach of the covenant of good faith, intentional interference with prospective economic advantage, trespass to chattels, and negligence. LaMont's moved for summary judgment on all of Terry's counterclaims, and the district court granted the motion. The parties proceeded to trial on LaMont's claims, resulting in an $88,083.28 judgment for LaMont's.

The district court found that Terry's counterclaims were frivolous and brought only to dissuade LaMont's legitimate claims or to confuse the issues. After trial, LaMont's moved for attorney fees as sanctions under NRCP 11 and NRS 18.010(2)(b). The court issued its findings of fact and conclusions of law denying LaMont's motion for fees based on its finding that LaMont's did not comply with the procedural requirements set forth in NRCP 11(c)(2). LaMont's moved for reconsideration, citing NRS 7.085 as another statute permitting it to collect attorney fees. The district court, for "good cause," denied LaMont's motion for reconsideration.

DISCUSSION

We generally review the district court's decision regarding attorney fees for an abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 74, 319 P.3d 606, 615 (2014); *Berkson v. LePome*, 126 Nev. 492, 504, 245 P.3d 560, 568 (2010) ("This court reviews a district court's award of attorney fees and costs, as a sanction, for an abuse of discretion."). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006). A court may also abuse its discretion if its decision is "in clear disregard of the guiding legal principles." *Gunderson*, 130 Nev. at 80, 319 P.3d at 615 (internal quotation marks omitted).

LaMont's contends that the district court abused its discretion when it denied LaMont's motions for fees under NRCP 11, NRS 18.010, and NRS 7.085 because the district court rigidly applied the safe harbor procedural requirements of NRCP 11 and improperly applied NRCP 11's safe harbor procedural requirements to NRS 18.010 and NRS 7.085.

We first address whether the district court abused its discretion in denying LaMont's motion for fees under NRCP 11 for failing to comply with Rule 11's safe harbor provision. Next, we address whether Rule 11's procedural requirements apply to NRS 18.010 and NRS 7.085.

The district court did not abuse its discretion in denying LaMont's request for sanctions under NRCP 11

Under the Nevada Rules of Civil Procedure, parties certify through their signature that papers presented to the court are, to the best of the party's belief and knowledge, not presented for an improper purpose and not unwarranted or frivolous, and that factual assertions and denials are supported and warranted by evidence. NRCP 11(a)-(b). If a party files papers for an improper purpose or frivolously engages in litigation, that party may be sanctioned under NRCP 11(c).

The movant seeking sanctions under NRCP 11(c) must comply with the rule's procedural requirements, commonly referred to as the safe harbor provision. NRCP 11(c)(2); *see Watson Rounds, P.C. v. Eighth Jud. Dist. Ct.*, 131 Nev. 783, 787, 358 P.3d 228, 231 (2015) ("NRCP 11's safe harbor provisions prevent attorneys from being sanctioned until they have the opportunity to cure the sanctionable conduct or appear at an order to show cause hearing."). The safe harbor provision requires the movant to file its motion for sanctions "separate from any other motion" and that the motion "must not be filed . . . if the challenged paper . . . is withdrawn or appropriately corrected within 21 days after service." NRCP 11(c)(2). The prevailing party may then, at the court's discretion, be awarded "reasonable expenses, including attorney fees, incurred for presenting or opposing the motion." *Id.*

In this case, the district court denied LaMont's motion for attorney fees as sanctions for failure to comply with NRCP 11(c)(2). LaMont's motion was not "separate from any other motion," as it combined the Rule 11 motion with a motion for attorney fees under NRS 18.010, and the motion was not served upon Terry 21 days prior to its filing.

We conclude that the district court's order denying the motion for failure to procedurally comply with NRCP 11(c)(2) was not an abuse of discretion, at least as to LaMont's request for Rule 11 sanctions. Rule 11 is clear: a request for sanctions must be made separate from any other motion and must be served 21 days prior to filing. The district court enforced compliance with the procedure explicitly mandated by the Nevada Rules of Civil Procedure.[1]

The district court improperly denied LaMont's request for attorney fees under NRS 18.010 and NRS 7.085

Terry contends that LaMont's waived any argument based on NRS 7.085 on appeal because it was not raised in LaMont's original

[1]We decline to adopt LaMont's position that substantial compliance is sufficient to satisfy the procedural requirements under NRCP 11(c)(2).

motion for attorney fees; however, the statutory grounds for recovery were raised in LaMont's motion for reconsideration, which the district court denied for "good cause." We may consider an argument newly raised in a motion for reconsideration so long as (1) the reconsideration motion and order are part of the record on appeal and (2) the district court entertained the motion on its merits. *R.J. Reynolds Tobacco Co. v. Eighth Jud. Dist. Ct.*, 138 Nev. 585, 594, 514 P.3d 425, 432 (2022). As both of these prerequisites have been satisfied, we address LaMont's arguments related to both NRS 18.010 and NRS 7.085.

The district court denied LaMont's motion for attorney fees as sanctions entirely for failing to follow the procedures outlined under NRCP 11. The order specified that because LaMont's failed to comply with the procedural requirements under NRCP 11(c)(2), it was not entitled to an award of attorney fees under either NRCP 11 or NRS 18.010. LaMont's moved for reconsideration, citing NRS 7.085 as another statutory basis for recovery, and the district court denied the motion for "good cause." Therefore, we must determine whether the procedural requirements of NRCP 11(c)(2) apply to NRS 18.010 and NRS 7.085.

"Although a district court's decision regarding an award of attorney fees is generally reviewed for an abuse of discretion, where . . . the decision implicates a question of law, the appropriate standard of review is de novo." *Gunderson*, 130 Nev. at 82, 319 P.3d at 616. NRS 18.010(2)(b) provides for the recovery of attorney fees "when the court finds that the claim, counterclaim, or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." NRS 7.085 provides for the recovery of attorney fees, from the offending attorney personally, when "an attorney has filed, maintained, or defended a civil action . . . not well-grounded in fact . . . or unreasonably and vexatiously extended a civil action." Both statutes state that "[i]t is the intent of the legislature that the court award costs, expenses, and attorney's fees pursuant to this [statute] *and* impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations." NRS 18.010(2)(b); NRS 7.085 (emphasis added).

We have previously determined that NRCP 11 does not supersede NRS 7.085. *Watson Rounds*, 131 Nev. at 784-85, 358 P.3d at 230. In *Watson Rounds*, we determined that NRCP 11 and NRS 7.085 were "distinct, independent mechanism[s] for sanctioning attorney misconduct" because they apply to different types of misconduct. 131 Nev. at 784, 788-89, 358 P.3d at 230, 232. LaMont's argument regarding NRS 18.010 relies heavily on this premise. We agree that the same proposition is true of NRCP 11 and NRS 18.010(2)(b); each provision is a distinct mechanism for sanctions. The plain language

of NRS 18.010(2)(b)—"*and* impose sanctions pursuant to Rule 11" (emphasis added)—indicates that the statute may be applied in addition to NRCP 11, further supporting the notion that it is an independent mechanism for sanctioning misconduct. The Legislature also chose not to incorporate a safe harbor provision similar to the one in NRCP 11 in the statutory text of NRS 18.010(2)(b) or NRS 7.085. Further, no section in NRS 18.010 provides a procedural constraint to the movant seeking attorney fees. Rather, NRS 18.010 instructs the court to "liberally construe the provisions" of paragraph (2)(b), and paragraph (3) indicates the court may impose such attorney fees even without a written motion.

Given that NRCP 11 and NRS 18.010(2)(b) are independent bases for sanctions and NRS 18.010(2)(b) does not contain a safe harbor provision, the district court's order denying attorney fees on the basis that LaMont's did not comply with the procedural requirements of NRCP 11 is inconsistent with the statute. Further, NRS 7.085 is an additional independent sanctioning mechanism under which LaMont's may potentially recover. Thus, the district court erred in applying the procedural bar set forth in NRCP 11(c)(2) to NRS 18.010 and, in turn, NRS 7.085.

CONCLUSION

While a movant must comply with the procedural requirements of NRCP 11(c)(2) for the district court to impose sanctions under Rule 11, those procedural requirements do not apply to independent sanctioning mechanisms such as NRS 18.010(2)(b) and NRS 7.085. Thus, the district court's order denying LaMont's request for fees was proper in part and erroneous in part. The district court properly applied NRCP 11(c)(2)'s procedural bar to LaMont's request for sanctions under Rule 11 but erred by applying the same procedural requirements to NRS 18.010(2)(b) and NRS 7.085. Accordingly, we affirm the district court's order in part as to NRCP 11, and we reverse in part and remand for the district court to determine whether LaMont's is entitled to attorney fees under NRS 18.010 and NRS 7.085.

Lee and Parraguirre, JJ., concur.

SUNRISE HOSPITAL AND MEDICAL CENTER, LLC; AND CORD OLSEN, RN, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARIA A. GALL, DISTRICT JUDGE, RESPONDENTS, AND TIFFINY GRACE, INDIVIDUALLY AND AS LEGAL GUARDIAN AND MOTHER OF E.G., REAL PARTY IN INTEREST.

No. 85844

March 7, 2024 544 P.3d 241

Original petition for a writ of prohibition challenging a district court order compelling discovery.

Petition granted.

Hall Prangle & Schoonveld, LLC, and *Nathan R. Reinmiller* and *Michael E. Prangle*, Las Vegas, for Petitioners.

Prince Law Group and *Dennis M. Prince*, *Kevin T. Strong*, and *Andrew R. Brown*, Las Vegas, for Real Party in Interest.

Before the Supreme Court, HERNDON, LEE, and PARRAGUIRRE, JJ.

OPINION

By the Court, HERNDON, J.:

In this opinion, we address the contours of the privilege created by the federal Patient Safety and Quality Improvement Act of 2005 (PSQIA), 42 U.S.C. §§ 299b-21–299b-26, that applies to information that qualifies as patient safety work product. We determine that under the PSQIA, identifiable patient safety work product is privileged from discovery in civil proceedings and the privilege cannot be waived.

FACTS AND PROCEDURAL HISTORY

E.G. was born prematurely at Sunrise Hospital on January 8, 2018. Sunrise's medical team placed him in the Neonatal Intensive Care Unit due to complications from the premature birth. On February 27, 2018, his assigned nurse, Cord Olsen, changed his fluid lines. Shortly thereafter, E.G. decompensated, his oxygen levels and heart rate plummeted, and his skin splotched with discolorations. He entered into cardiac arrest, and medical staff rushed to save him. E.G. ultimately suffered a hypoxic event, leading to permanent developmental damage.

Sunrise has a Patient Safety Committee, which investigated E.G.'s cardiac arrest with the goal of improving future healthcare

outcomes. Dr. Jeffrey Murawsky, the Chief Medical Officer of Sunrise, chaired the committee. His deposition testimony revealed that Sunrise used a patient safety evaluation system as its internal process for collecting, managing, and analyzing the information that it reported to the patient safety organization. The Patient Safety Committee reviewed that information, collected additional data, and maintained that data within its internal evaluation system.

Real party in interest Tiffiny Grace, E.G.'s legal guardian, sued Sunrise Hospital and Nurse Olsen for professional negligence. During discovery, she attempted to depose Dr. Murawsky. She sought to discover what information the Patient Safety Committee examined in its investigation. Sunrise objected to some of the questions Grace posed on the basis of privileges under both Nevada law and the PSQIA. Grace halted the deposition, citing the need for answers to those questions. She then moved to compel further deposition testimony from Dr. Murawsky.

On October 24, 2022, the district court issued an order rejecting Sunrise's PSQIA arguments after concluding that any privilege was waived by disclosure and directed the parties to further brief whether Sunrise waived its privilege under Nevada law. Following that briefing, on December 6, 2022, the district court issued its second order, granting Grace's motion to compel. The district court determined that Sunrise had permitted Dr. Murawsky to testify about certain privileged topics, Sunrise had permitted other personnel to testify about those topics, and Sunrise had waived any privileges by permitting such testimony. The district court again rejected Sunrise's PSQIA arguments as unpersuasive. Sunrise filed the instant writ petition challenging both orders.

In November 2023, after this matter was fully briefed and set for oral argument, the district court sua sponte filed a third order relating to the motion to compel. Neither party was alerted to the court's intentions, and, as a result, they were not invited to further brief any issues or otherwise participate. However, the district court addressed only the proportionality of the requested discovery and refused a protective order; it again rejected Sunrise's PSQIA arguments in conclusory fashion.

DISCUSSION

This original proceeding asks us to determine whether the district court exceeded its jurisdiction by compelling testimony concerning allegedly privileged information. Because harm from disclosure of that information cannot be remedied in the normal course of an appeal and this petition concerns a novel issue of law, we consider the petition. In doing so, we first consider whether the PSQIA patient safety work product privilege can be waived. We then consider the district court's decision in the context of whether

the information that Grace seeks to discover constitutes privileged patient safety work product.

Writ relief

Writ relief is appropriate to prevent the disclosure of privileged information. "When the district court acts without or in excess of its jurisdiction, a writ of prohibition may issue to curb the extrajudicial act." *Toll v. Wilson*, 135 Nev. 430, 432, 453 P.3d 1215, 1217 (2019) (internal quotation marks omitted). "Therefore, even though discovery issues are traditionally subject to the district court's discretion and unreviewable by a writ petition, this court will intervene when the district court issues an order requiring disclosure of privileged information." *Id.*

Furthermore, writ relief is appropriate when "an important issue of law needs clarification and this court's invocation of its original jurisdiction serves public policy." *Canarelli v. Eighth Jud. Dist. Ct.*, 136 Nev. 247, 250-51, 464 P.3d 114, 119 (2020) (internal quotation marks omitted). "One such instance is when a writ petition offers this court a unique opportunity to define the precise parameters of a privilege conferred by a statute that this court has never interpreted." *Diaz v. Eighth Jud. Dist. Ct.*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000) (cleaned up).

The district court order below compels the disclosure of allegedly privileged information, so we elect to entertain this petition for a writ of prohibition. Our intervention will clarify the extent of the privilege afforded by the PSQIA, a federal act we have yet to address. It will also serve public policy by helping medical providers and attorneys understand the extent to which patient safety work product is privileged.

Standard of review

We review discovery matters for an abuse of discretion. *Club Vista Fin. Servs., LLC v. Eighth Jud. Dist. Ct.*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). But we review conclusions of law, including the meaning and scope of statutes, de novo. *Dewey v. Redev. Agency of Reno*, 119 Nev. 87, 93-94, 64 P.3d 1070, 1075 (2003).

Under the PSQIA, patient safety work product is privileged, and that privilege cannot be waived

The PSQIA provides that "patient safety work product shall be privileged and shall not be . . . subject to discovery . . . [or] admitted as evidence in any Federal, State, or local governmental civil proceeding." 42 U.S.C. §§ 299b-22(a)(2), (4). Patient safety work product comes in two categories: identifiable and nonidentifiable. Identifiable patient safety work product includes the identities of the

providers, patients, or reporters involved. 42 U.S.C. § 299b-21(2). Nonidentifiable patient safety work product includes all other patient safety work product (i.e., that without identifying information). 42 U.S.C. § 299b-21(3). Nonidentifiable patient safety work product may be voluntarily disclosed, and when it is, it is exempted from privilege. 42 U.S.C. § 299b-22(c)(3). Our opinion concerns the privilege as it pertains to identifiable patient safety work product.

There are only a few exceptions to PSQIA privilege for identifiable patient safety work product: in certain criminal proceedings, in civil actions brought by a good-faith reporter, or when every medical provider identified in the work product authorizes disclosure. 42 U.S.C. § 299b-22(c)(1)(A)–(C). None of those exceptions apply here.

Nonetheless, the district court found that Sunrise could waive the PSQIA's grant of privilege over patient safety work product. It erred in doing so by abusing the negative-implication canon to create a necessary condition for privilege where none exists in the PSQIA's implementing regulation.[1]

The regulation, 42 C.F.R. § 3.208, states that patient safety work product disclosed in accordance with 42 C.F.R. § 3.204(b)(1) or disclosed impermissibly shall remain privileged. But the district court interpreted this regulation to mean that patient safety work product disclosed *permissibly* shall *not* remain privileged. This maneuver was both logically invalid and incorrect as a matter of law.

The plain language of the regulation describes when patient safety work product shall continue to remain privileged. 42 C.F.R. § 3.208. It does not purport to describe when patient safety work product shall be excepted from privilege, as the implementing regulations cover those exceptions in a different section. *See* 42 C.F.R. § 3.204(b) (titled "[e]xceptions to privilege" and describing when privilege shall not apply to the enumerated disclosures). The negative-implication canon should not be applied to 42 C.F.R. § 3.208 because it creates an exception to privilege far broader than the exceptions to privilege explicitly carved out elsewhere in the PSQIA and its implementing regulations.

The district court's interpretation also fails to consider that the PSQIA's implementing regulations already contemplate when voluntary disclosure could defeat privilege, specifically, for nonidentifiable patient safety work product. 42 C.F.R. § 3.204(b)(4).

[1]Better known in its Latin form as "*expressio unius est exclusio alterius*," the negative-implication canon holds that the expression of one thing implies the exclusion of others. Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012). "Virtually all the authorities who discuss the negative-implication canon emphasize that it must be applied with great caution, since its application depends so much on context." *Id.* The applicability of the canon is limited to when the subjects specified in the rule can reasonably be thought to be an expression of all that share in the quality described. *Id.*

Reading further exceptions to privilege into 42 C.F.R. § 3.208 would render the explicitly enumerated exceptions in 42 C.F.R. § 3.204(b) superfluous. That violates one of our long-held tenets of interpretation, which is to consider a statute's "provisions as a whole so as to read them in a way that [will] not render words or phrases superfluous or make a provision nugatory." *S. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (internal quotation marks omitted).[2]

We reject the district court's interpretation and determine that PSQIA privilege is absolute. Federal courts tasked with determining whether PSQIA privilege extends over alleged patient safety work product ask two questions: (1) whether those materials were "created for the purpose of reporting to a patient safety organization"[3] and (2) whether they were "so reported." *Nelms v. Wellpath, LLC*, 667 F. Supp. 3d 560, 563 (E.D. Mich. 2023) (quoting *Penman v. Correct Care Sols., LLC*, No. 5:18-CV-00058-TBR-LLK, 2020 WL 4253214, at *3 (W.D. Ky. July 24, 2020), and citing *Tinal v. Norton Healthcare, Inc.*, No. 3:11-CV-596-S, 2014 WL 12581760, at *11 (W.D. Ky. July 15, 2014)). We adopt the same test here in Nevada. The only factors bearing on whether identifiable patient safety work product may be privileged under the PSQIA are (1) whether the materials were created for the purpose of reporting to a patient safety organization and (2) whether they were so reported. If they are so privileged, then courts must consider whether one of the exceptions made explicit by 42 C.F.R. § 3.204(b) applies.

Because the PSQIA does not contemplate waiver of the privilege over identifiable patient safety work product, we conclude that such a privilege cannot be waived. Our interpretation accords with the PSQIA's stated goals. Congress enacted the PSQIA to "strike[ ] the appropriate balance between plaintiff rights and creat[e] a new culture in the health care industry that provides incentives to identify and learn from errors." S. Rep. No. 108-196, at 4 (2003). The PSQIA grants privileges to information produced in pursuit of that goal, like patient safety work product. 42 U.S.C. § 299b-22. The

[2]Because the plain language of the regulation suffices to support our conclusion, we need not reach other means of deciphering the drafters' intent. However, we caution district courts to be wary of finding exceptions to a rule via the negative-implication canon when such exceptions are explicit elsewhere in the regulatory scheme. It would be quite strange to make some exceptions explicit under the section titled "Exceptions to privilege" (42 C.F.R. § 3.204(b)) but others implicit under a section titled "Continued protection of patient safety work product" (42 C.F.R. § 3.208(b)).

[3]The PSQIA defines "patient safety organization[s]" and states that they must obtain certification from the Secretary of Health and Human Services. 42 U.S.C. §§ 299b-21(4), 299b-24. It is undisputed that Sunrise, at all times relevant to this suit, maintained an active agreement with a certified patient safety organization, the HCA Patient Safety Organization, LLC.

statutory scheme does not permit a finding that a party has voluntarily relinquished PSQIA privilege pertaining to identifiable patient safety work product; that party might inadvertently disclose patient safety work product or disclose it in accordance with specific exceptions, but the privilege continues to exist. 42 U.S.C. § 299b-22(a), (c); 42 C.F.R. § 3.208.

Finally, we note that the privilege flows in both directions. Nothing in the PSQIA precludes a plaintiff from asserting the same privilege when it suits them. If a medical provider were to attempt to introduce evidence including identifiable patient safety work product, then the plaintiff could object on the same grounds.

We grant the petition for a writ of prohibition

The district court further erred by failing to determine whether the testimony that Grace sought to compel constituted identifiable or nonidentifiable patient safety work product. The two are treated differently under the PSQIA. 42 U.S.C. §§ 299b-21, 299b-22. This court is not particularly suited to fact-finding in the first instance. *Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012). We thus decline to decide whether the information constitutes identifiable or nonidentifiable patient safety work product. We grant the petition for a writ of prohibition to vitiate the district court's orders to the extent they found PSQIA protections waived and compelled the testimony of potentially privileged information. We further instruct the district court to, upon reconsideration of the issue, first determine whether the testimony that Grace seeks to compel constitutes identifiable or nonidentifiable patient safety work product.[4]

CONCLUSION

The district court erred by concluding that Sunrise waived any privilege over identifiable patient safety work product under the PSQIA. Because that privilege cannot be waived, the district court must first determine whether the testimony that Grace seeks to compel concerns identifiable or nonidentifiable patient safety work product, and then rule on the motion to compel accordingly. Thus,

[4]We have considered the parties' remaining arguments about preemption and state law privilege. Because we find no conflict between the PSQIA and Nevada's state law privilege provided by NRS 49.265, we need not apply any preemption doctrine. Nonetheless, to the extent that PSQIA privilege is broader than the privilege afforded under Nevada law, the PSQIA applies. *See* 42 U.S.C. § 299b-22(a) ("Notwithstanding any other provision of Federal, State, or local law . . . patient safety work product shall be privileged . . . ."); *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007) ("[W]hen a conflict exists between state and federal law, valid federal law overrides, *i.e.*, preempts, an otherwise valid state law.").

we grant the petition for a writ of prohibition. The clerk of this court shall issue a writ of prohibition directing the district court to vacate its orders compelling the testimony of Dr. Murawsky and to reconsider Grace's motion to compel in light of this opinion.

Lee and Parraguirre, JJ., concur.

JAMEL JACQKEY GIBBS, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 83672

March 7, 2024 543 P.3d 1185

Appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Tierra D. Jones, Judge.

Reversed and remanded.

[Rehearing denied May 16, 2024]

[En banc reconsideration denied June 12, 2024]

Law Office of Jeannie N. Hua, Inc., and *Jeannie N. Hua*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Taleen R. Pandukht*, Chief Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, Stiglich, Lee, and Bell, JJ.

OPINION

By the Court, Bell, J.:

While in pretrial detention, Appellant Jamel Jacqkey Gibbs spoke with a defense investigator on a recorded phone line. At trial, the State admitted the recording into evidence over Gibbs's objection that the conversation was privileged. The trial court found that the conversation was not protected by attorney-client privilege because Gibbs violated jail policy by using another detainee's telephone access code and made a three-way call to connect to his investigator. In this opinion, we examine whether the district court erred in finding Gibbs waived the attorney-client privilege. We conclude that a defendant's call to a defense investigator that is routed through a three-way call is, alone, insufficient to establish waiver of the attorney-client privilege absent a showing that the third party remained present during the conversation. Further, we cannot conclude that violation of jail telephone policies operates as a waiver of attorney-client privilege. Accordingly, the district court erred in admitting the recorded phone call. Because the error was not harmless, we reverse the judgment of conviction and remand for further proceedings.[1]

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal. Further, because we are reversing on the ground stated, we need not decide the remaining issues raised in this appeal.

BACKGROUND

The State charged Jamel Gibbs with fatally shooting Jaylon Tiffith in the driveway of an apartment complex. Gibbs pleaded not guilty to the charges, and the case was set for trial. The record unambiguously reflects that defense counsel planned to focus the defense at trial on mistaken identity and undermine the single witness who identified Gibbs as the shooter.

While in pretrial detention, Gibbs placed several phone calls using another inmate's access code. Gibbs called a third party, who then employed three-way calling to connect Gibbs to the intended receiver. During one of these calls, Gibbs spoke with a defense investigator and discussed details of the case that indicated Gibbs was present at the time of the shooting. The State moved to admit this recording at trial. Gibbs objected on the basis that the recorded conversation was protected by attorney-client privilege. The district court admitted the recording, concluding that Gibbs waived attorney-client privilege because he violated jail phone policies by using another detainee's access code and using three-way calling.

In addition to this evidence, Tiffith's cousin, Brionta Terrell, identified Gibbs as the shooter after viewing a photograph on social media. Another witness saw the shooting while driving by the apartment complex but was unable to positively identify the shooter.

At the conclusion of the trial, the jury convicted Gibbs of second-degree murder with the use of a deadly weapon. This appeal follows.

DISCUSSION

The district court abused its discretion in admitting the recorded phone call between Gibbs and a defense investigator

Gibbs argues that the district court erred in admitting the recording of the phone call between Gibbs and the defense investigator because the conversation was protected by the attorney-client privilege. Decisions regarding the admission of evidence lie within the district court's discretion and will not be disturbed absent a showing that the district court abused that discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Such an abuse "occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (internal quotation marks omitted). When the district court's exercise of discretion relies upon findings of fact, those findings "are given deference and will not be set aside unless they are clearly erroneous or not supported by substantial evidence." *Canarelli v. Eighth Jud. Dist. Ct.*, 136 Nev. 247, 251, 464 P.3d 114, 119 (2020).

The attorney-client privilege protects against disclosure of confidential communications between a defendant and the defendant's attorney or a representative of the attorney. *See* NRS 49.095(1).

Confidential communications are "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services." NRS 49.055. Attorney-client privilege, like all evidentiary privileges, is "not designed or intended to assist the fact-finding process." *Diaz v. Eighth Jud. Dist. Ct.*, 116 Nev. 88, 98, 993 P.2d 50, 57 (2000). Rather, the purpose of this privilege is to "encourage clients to make full disclosures to their attorneys in order to promote the broader public interests of recognizing the importance of fully informed advocacy in the administration of justice." *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. 369, 374, 399 P.3d 334, 341 (2017); *see Diaz*, 116 Nev. at 98, 993 P.2d at 57 (recognizing that evidentiary "privileges are justified by the public's interest in encouraging socially useful communications and by certain notions of legitimate privacy expectations").

For the attorney-client privilege to apply, "the communications must be between an attorney and client, for the purpose of facilitating the rendition of professional legal services, and be confidential." *Wynn Resorts*, 133 Nev. at 374, 399 P.3d at 341. The attorney-client privilege encompasses communications with a representative of the attorney, which, here, would include a defense investigator. *See* NRS 49.055 (recognizing that confidential communications include disclosures to parties necessary to render legal services); NRS 49.085 ("'Representative of the lawyer' means a person employed by the lawyer to assist in the rendition of professional legal services."); *United States v. Christensen*, 828 F.3d 763, 802 (9th Cir. 2015) (protecting communications with third party acting as counsel's agent when communications were necessary for advising and defending client), *abrogated on other grounds by Honeycutt v. United States*, 581 U.S. 443 (2017). A defendant who asserts a privilege bears the burden of showing that the evidence is privileged and that the defendant has not waived that privilege. *Canarelli*, 136 Nev. at 252, 464 P.3d at 120; *see also United States v. Martin*, 278 F.3d 988, 999-1000 (9th Cir. 2002) (recognizing that a party asserting privilege must "establish all the elements of the privilege," including that it has not been waived); *Louen v. Twedt*, 236 F.R.D. 502, 506 (E.D. Cal. 2006) ("A person asserting attorney-client privilege has the burden of persuasion as to all elements of the privilege, including an affirmative showing of non-waiver . . . ."). The privilege "should be interpreted and applied narrowly." *Canarelli*, 136 Nev. at 252, 464 P.3d at 120 (internal quotation marks omitted).

The district court was persuaded that Gibbs's communications were not privileged, or that he had waived any privilege, because he connected his call to the investigator using three-way calling and violated the detention center's rules by using another inmate's access code. We do not agree.

First, we cannot say that Gibbs's violation of the detention center's rules prohibiting using another inmate's telephone access code resulted in a waiver of the attorney-client privilege. Attorney-client privilege belongs to the client and may only be waived by the client. NRS 49.105(1). The analysis focuses entirely on whether the client intended—either explicitly or implicitly—to waive the attorney-client privilege. Violation of a jail policy alone does not inform the analysis of whether a defendant intended for an attorney-client conversation to be confidential or whether the privilege is waived.

Second, we cannot conclude, based on the record before us, that use of three-way calling alone resulted in waiver of the attorney-client privilege. Absent a waiver, the communication between Gibbs and the defense investigator was a confidential communication protected by attorney-client privilege. The investigator's role was to assist counsel in preparing a legal defense for Gibbs, and Gibbs's communications with him concerned Gibbs's whereabouts at the time of the shooting, a matter that was material to his defense.

The record does not indicate that the three-way calling method used by Gibbs to communicate with the investigator rendered the conversation nonconfidential. Generally, communications between a client and counsel in the presence of a third party lack confidentiality. *Nev. Tax Comm'n v. Hicks*, 73 Nev. 115, 134, 310 P.2d 852, 862 (1957), *superseded on other grounds by statute as stated in M & R Inv. Co. v. Nev. Gaming Comm'n*, 93 Nev. 35, 35, 559 P.2d 829, 830 (1977). The presence of a third party implies that the client did not intend the communication to be confidential. *See* NRS 49.055 ("A communication is 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."); *Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 345, 353, 891 P.2d 1180, 1185 (1995) (recognizing that the presence of people who were not represented clients indicates an intent that a meeting with counsel is not confidential). Here, though, nothing in the record shows a third party listened to or participated in the call. Gibbs called a third party who then made a three-way call to connect Gibbs to the investigator. Although a third party was used to connect the call, the transcript of the call does not indicate that the third party listened to or participated in the conversation with the investigator.

No other evidence in the record indicates that the third party remained on the call, either actively listening to the conversation or passively remaining in earshot of the conversation, *see Rogers v. State*, 717 S.E.2d 629, 632 (Ga. 2011) (considering whether evidence showed that third party to attorney-client conference call ceased to listen to call to determine that party's presence); *see also Manley v. State*, 115 Nev. 114, 120, 979 P.2d 703, 707 (1999) (holding that

disclosure of some contents of communication between client and counsel operates as waiver of privilege regarding entire communication), as opposed to merely connecting the call and either placing down the handset or disconnecting from the other parties, *see Lisle v. State*, 113 Nev. 679, 701, 941 P.2d 459, 474 (1997) (holding that merely informing third party that communication between client and counsel occurred does not waive privilege regarding conversation), *overruled on other grounds by Middleton v. State*, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998). Because some telecommunication carriers permit the host of a three-way call to disconnect and leave the remaining parties connected, *see, e.g.*, AT&T, *Use Three-Way Calling*, http://att.com/support/article/u-verse-voice/KM1064301 (last visited Feb. 21, 2024); Xfinity, *Use the Three-Way Calling Feature with Xfinity Voice*, http://xfinity.com/support/articles/3-way-calling (last visited Feb. 21, 2024), the host may have even completely disconnected after the investigator joined the call.

The district court failed to hold an evidentiary hearing to gather any additional evidence regarding the waiver issue. Given the absence of information in the record, we cannot conclude that substantial evidence supports the district court's finding that Gibbs waived the attorney-client privilege. *See Canarelli*, 136 Nev. at 251, 464 P.3d at 119. Thus, we conclude that the district court abused its discretion in concluding that Gibbs's conversation with the investigator was not protected by the attorney-client privilege.

The error was not harmless beyond a reasonable doubt

The State contends that even if the district court abused its discretion in admitting the recorded phone call, that error is harmless. "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." NRS 178.598. The error here involves the admission of evidence protected by attorney-client privilege. Because the error intrudes upon the right to counsel, we can conclude that the error was harmless only if the error was harmless beyond a reasonable doubt. *Manley*, 115 Nev. at 121-23, 979 P.2d at 707-09 (evaluating the improper admission of evidence in violation of attorney-client privilege for harmless error under *Chapman v. California*, 386 U.S. 18, 24 (1967)). We cannot conclude the error was harmless beyond a reasonable doubt.

Here, defense counsel planned a mistaken identity defense and planned to undermine the single witness who identified Gibbs as the shooter. No evidence suggested that the witness had met Gibbs before. After the shooting, the witness used social media to help identify Gibbs at the scene, demonstrating a lack of familiarity with Gibbs. While the remaining evidence tying Gibbs to the offense may have been sufficient to support a conviction, the evidence was not overwhelming. The evidence at trial showed no weapon was

recovered that could be matched to the casing left at the scene, the projectile recovered during the autopsy, or the ammunition recovered from Gibbs's girlfriend's apartment. Although the ammunition recovered from the girlfriend's apartment was the same brand and caliber as the casing found at the scene, no forensic evidence was introduced to suggest a more compelling connection. Gibbs's statements to the investigator conceded that Gibbs was present during the shooting. This evidence directly undermined the theory of defense and necessitated a change in strategy at the start of trial; therefore, we cannot conclude beyond a reasonable doubt that its admission was harmless. *See Carr v. State*, 96 Nev. 238, 239-40, 607 P.2d 114, 116 (1980) (concluding that erroneous admission of hearsay that "directly undermined the defense's theory of the case" was not harmless).

CONCLUSION

The district court abused its discretion in admitting a recording of a phone call between Gibbs and his defense investigator. In reaching this determination, we conclude that a jail rule violation in and of itself does not support a finding that the attorney-client privilege was waived. Further, while we agree that the presence of a third party during a conversation may waive the privilege, the limited record here does not support such a finding. Because the conversation was privileged and the admission of the phone call was not harmless beyond a reasonable doubt, we reverse the judgment of conviction and remand for a new trial.

Stiglich and Lee, JJ., concur.

VALLEY HEALTH SYSTEM, LLC, a Nevada Limited Liability Corporation, dba CENTENNIAL HILLS HOSPITAL MEDICAL CENTER, Appellant, *v.* DWAYNE ANTHONY MURRAY, Individually, as an Heir, as Guardian and Natural Parent of BROOKLYN LYSANDRA MURRAY, and as Special Administrator of the ESTATE OF LaQUINTA ROSETTE WHITLEY-MURRAY, Deceased, Respondent.

No. 79658

VALLEY HEALTH SYSTEM, LLC, a Nevada Limited Liability Corporation, dba CENTENNIAL HILLS HOSPITAL MEDICAL CENTER, Appellant, *v.* DWAYNE ANTHONY MURRAY, Individually, as an Heir, as Guardian and Natural Parent of BROOKLYN LYSANDRA MURRAY, and as Special Administrator of the ESTATE OF LaQUINTA ROSETTE WHITLEY-MURRAY, Deceased, Respondent.

No. 80113

VALLEY HEALTH SYSTEM, LLC, a Nevada Limited Liability Corporation, dba CENTENNIAL HILLS HOSPITAL MEDICAL CENTER, Appellant, *v.* DWAYNE ANTHONY MURRAY, Individually, as an Heir, as Guardian and Natural Parent of BROOKLYN LYSANDRA MURRAY, and as Special Administrator of the ESTATE OF LaQUINTA ROSETTE WHITLEY-MURRAY, Deceased, Respondent.

No. 80968

March 14, 2024 544 P.3d 904

Consolidated appeals from a district court judgment pursuant to a jury verdict and orders awarding attorney fees and costs in a medical malpractice action. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Sr. Judge, and Jacqueline Bluth, Judge.

Affirmed in part, reversed in part, vacated in part, and remanded.

[Rehearing denied May 14, 2024]

Pisanelli Bice PLLC and *Jordan T. Smith*, Las Vegas; *Greenberg Traurig, LLP*, and *Tami D. Cowden* and *Kara B. Hendricks*, Las Vegas, and *Kendyl T. Hanks*, Austin, Texas; *Hall Prangle & Schoonveld, LLC*, and *Michael E. Prangle* and *Jonquil L. Whitehead*, Las Vegas, for Appellant.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg* and *Abraham G. Smith*, Las Vegas; *The Gage Law Firm, PLLC*, and *David O. Creasy*, Las Vegas, for Respondents.

Hutchison & Steffen, PLLC, and *Michael K. Wall*, Las Vegas, for Amicus Curiae Your Nevada Doctors.

Shook, Hardy & Bacon, LLP, and *Jennifer Odell Hatcher*, Kansas City, Missouri, for Amici Curiae American Medical Association and Nevada State Medical Association.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Stiglich, J.:

LaQuinta Whitley-Murray passed away at Centennial Hills Hospital Medical Center during a sickle cell crisis. Respondent, on behalf of LaQuinta's estate and heirs, filed a negligence action against appellant Valley Health Systems, which operates Centennial Hills. A jury awarded respondent over $48 million in compensatory and punitive damages combined. Concluding respondent had prevailed under a theory of breach of fiduciary duty, the district court upheld the awards and declined to apply NRS Chapter 41A's statutory caps on damages in professional negligence actions.

We clarify that hospitals do not owe a fiduciary duty to their patients in connection with medical treatment. Accordingly, we vacate the compensatory damages awards and remand to the district court to apply the damages cap to the award of noneconomic damages and to reduce both economic and noneconomic damages to the hospital's 65-percent pro rata share. And because respondent's breach of fiduciary duty claim against Centennial fails, we also reverse the award of punitive damages. We further vacate the award of prejudgment interest and remand for recalculation so that prejudgment interest is awarded solely on past damages. But we conclude that the district court did not abuse its discretion in awarding attorney fees and costs, and we accordingly affirm in that relevant part.

PROCEDURAL HISTORY

Appellant Valley Health Systems operates Centennial Hills Hospital Medical Center. On April 20, 2013, LaQuinta Whitley-Murray

[1]The Honorable Elissa F. Cadish, Chief Justice, and the Honorable Patricia Lee, Justice, voluntarily recused themselves from participation in the decision of this matter. The Honorable Michael Cherry and the Honorable Abbi Silver, Senior Justices, have been assigned to participate in the determination of this matter in their places.

was admitted to Centennial for a sickle cell crisis, complaining of extreme pain. The hospital pharmacy recommended ketorolac, a non-opioid pain medication better known as Toradol, in part because sickle cell disease increases the risk associated with opiate drugs. Toradol's "black box" insert warns that a daily dose should not exceed 120 mg to alleviate the risk of adverse reactions, including renal failure.

The attending physician ordered 30 mg of Toradol to be administered every six hours. Because Centennial's policy for administering non-time-sensitive medications, as Toradol was designated, allows nurses to administer the drug within one hour of the scheduled time, LaQuinta's dosage sometimes exceeded 120 mg per 24 hours. On April 24, LaQuinta went into cardiac arrest and passed away. She had suffered multiorgan failure, including renal failure.

Respondent Dwayne Anthony Murray, on behalf of LaQuinta's estate and heirs, filed a negligence action against Centennial, its staff, and the treating physicians. Notably, Murray alleged that hospital staff's treatment of LaQuinta fell below the standard of care and, before trial, amended the complaint to allege that Centennial breached a fiduciary duty to LaQuinta by intentionally understaffing the hospital. At trial, Centennial's primary defense was that it had not breached the standard of care and that the Toradol had not caused LaQuinta's death, and both sides presented substantial expert testimony on those points.[2] Regarding breach of fiduciary duty, no witness testified that Centennial intentionally understaffed the hospital; to the contrary, testimony established that the hospital was not understaffed on the day LaQuinta died. During trial and particularly closing arguments, Murray argued for the first time that Centennial's medication administration policy was meant to increase the hospital's profitability to the patients' detriment. No discovery was conducted on the medication administration policy or on whether Centennial prioritized profits over patients, as Murray contended. The district court—over Centennial's objection—nevertheless allowed Murray's experts to criticize the policy.

The jury was presented a verdict form that first asked whether Centennial had breached the standard of care, proximately causing LaQuinta's death. The jury answered in the affirmative, awarding $16,210,000 in compensatory damages and apportioning 65-percent of the fault to Centennial. The verdict form then asked whether Centennial had intentionally breached its fiduciary duty to LaQuinta and instructed the jury to stop and sign the last page if it answered "NO." The jury also answered this question in the affirmative, as well as the next question regarding whether that breach was a proximate cause of LaQuinta's death, leading it to the final question: whether Centennial engaged in fraud, oppression, or malice toward

[2]Senior Judge Bonaventure presided over the trial.

LaQuinta. The jury also answered that question in the affirmative and thereafter awarded $32,420,000 in punitive damages.

The district court did not apply NRS 41A.035's cap on noneconomic compensatory damages, concluding the awards fell under the claim for breach of fiduciary duty, which did not sound in professional negligence and was not subject to that cap. Relying on Centennial's rejection of a pretrial offer of judgment from Murray, the district court awarded Murray $511,200 for attorney fees, $169,895.61 for expert witness fees, and $37,374.21 for other court costs.

Centennial separately appealed the judgment upon the jury verdict (Docket No. 79658), order awarding attorney fees (Docket No. 80113), and order awarding costs (Docket No. 80968). This court consolidated the appeals.

DISCUSSION

Centennial does not contest the jury's negligence findings, instead primarily arguing that the district court erred by entering judgment for intentional breach of fiduciary duty because Nevada law does not support imposing a heightened fiduciary duty on hospitals in this context.[3] We agree and address that issue before addressing the application of NRS Chapter 41A and considering whether the punitive damages award was proper, the district court erred by awarding prejudgment interest on future damages, and the district court abused its discretion in awarding attorney fees and costs.[4]

Nevada does not recognize a fiduciary duty owed by a hospital to a patient in the provision of medical services

Centennial argues that Nevada law does not recognize a heightened fiduciary duty owed by a hospital to a patient in the administration of medicine and thus the district court erred in entering judgment against Centennial on Murray's claim for intentional breach of fiduciary duty. Murray responds that this court should recognize hospitals as fiduciaries that owe their patients a duty to establish and follow policies for the health and safety of patients.

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[3]The American Medical Association and Nevada State Medical Association jointly filed an amicus brief supporting Centennial, arguing that caps on noneconomic damages rationally respond to rapidly rising noneconomic damages, Nevada enacted such caps to address a healthcare crisis caused by increasing liability costs, these caps have been effective in safeguarding available and affordable health care, and this court should not allow Murray to plead around Nevada medical liability laws and undermine their benefits. Your Nevada Doctors also filed an amicus brief supporting Centennial, arguing that Centennial does not owe a fiduciary duty to LaQuinta and that Nevada's policy of limiting liability for noneconomic damages, medical malpractice liability, and punitive damages must not be defeated by creative lawyering.

[4]In view of our decision, we need not reach Centennial's alternate argument that NRS Chapter 41A should apply because the breach of fiduciary duty claim sounded in malpractice.

Because the existence of a duty of care presents a question of law, we review the district court's decision de novo. *See Peck v. Zipf*, 133 Nev. 890, 892, 407 P.3d 775, 778 (2017); *Scialabba v. Brandise Constr. Co.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996). A fiduciary relationship exists when one places heightened confidence in another such that the latter must then act in good faith and for the other's benefit. *See Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 529-30 (1982) (discussing the elements for a claim of constructive fraud). Although physicians may owe a duty of fiduciary care to their patients in certain circumstances,[5] *cf. Hoopes v. Hammargren*, 102 Nev. 425, 431, 725 P.2d 238, 242 (1986), a majority of courts to consider the present issue have rejected the argument that hospitals likewise owe a fiduciary duty to patients. For example, a Mississippi federal district court recognized the fiduciary duty a doctor owed to a patient but distinguished that from the duties owed by a hospital, as the plaintiff emergency room patient failed to plead facts supporting "that she placed any special trust or confidence in" the hospital "beyond what is reasonably anticipated in an arms-length transaction." *Henley v. Biloxi H.M.A., LLC*, 489 F. Supp. 3d 580, 590-91 (S.D. Miss. 2020), *rev'd on other grounds*, 48 F.4th 350 (5th Cir. 2022). Without the patient demonstrating more in that particular instance, the relationship between an emergency room provider and a patient does not exhibit the degree of trust or confidence exceeding that of a routine business relationship in which parties must exercise simply reasonable care for each other. *Id.* at 590. Along these lines, the Arizona Court of Appeals rejected the reasoning that, because a "hospital is subject to the same standard of care in a malpractice action as a doctor," and "because a doctor owes a patient a fiduciary duty," a hospital likewise "owes a patient a fiduciary duty." *Gonzales v. Palo Verde Mental Health Servs.*, 783 P.2d 833, 835 (Ariz. Ct. App. 1989).

Similarly, the California Supreme Court rejected the claim that a hospital owner, medical researcher, and two interested corporations owed a fiduciary duty to a patient and thus were obligated to obtain

[5]We have previously recognized that the physician-patient relationship is based on an elevated level of trust and that a physician must accordingly exercise an elevated degree of good faith in acting in the patient's best interest. *Hoopes v. Hammargren*, 102 Nev. 425, 431, 725 P.2d 238, 242 (1986). This duty may be violated where a physician abuses the trust inherent in the physician-patient relationship to exploit the patient in a context distinct from providing medical services. *Id.* at 432, 725 P.2d at 243. In other circumstances, we have recognized a fiduciary duty in situations involving particular care and trust, such as a partnership or an agency relationship, *Bynum v. Frisby*, 73 Nev. 145, 149, 311 P.2d 972, 974 (1957), an attorney-client relationship, *see Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009) (recognizing that an attorney has a fiduciary relationship with a client in connection with the duties of loyalty and confidentiality owed the client), or a marriage, *Williams v. Waldman*, 108 Nev. 466, 472, 836 P.2d 614, 618 (1992).

a patient's informed consent regarding a procedure, in contrast to the fiduciary duty owed by the patient's physician. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 486 (Cal. 1990) (recognizing, however, that a hospital may be vicariously liable for a supervised physician's violation of that physician's own fiduciary duty to the patient). The Connecticut Supreme Court noted that professional negligence involved breaching a duty of care, while breaching a fiduciary duty involved violating a duty of loyalty and honesty, before concluding that "[t]he plaintiff has provided scant reason to conclude that a hospital owes a patient the duty of a fiduciary." *Sherwood v. Danbury Hosp.*, 896 A.2d 777, 797 (Conn. 2006). And a Louisiana federal district court rejected that any authority existed to support the proposition that such a fiduciary duty might arise from a healthcare-provider-and-patient contract between those parties.[6] *Harrison v. Christus St. Patrick Hosp.*, 430 F. Supp. 2d 591, 595 (W.D. La. 2006).

We agree with these courts. No authority supports a broad finding that hospitals owe patients a fiduciary duty. Further, recognizing a claim for breach of fiduciary duty against a hospital in relation to a patient's medical care would be duplicative, and therefore improper, where the allegation boils down to one of medical malpractice by the hospital. For example, the United States Supreme Court explained that a decision by an HMO physician that mixed the HMO's financial incentive with medical considerations and resulted in a negative patient outcome would not support a claim for breach of fiduciary duty, as "for all practical purposes, every claim of fiduciary breach by an HMO physician making a mixed decision would boil down to a malpractice claim, and the fiduciary standard would be nothing but the malpractice standard traditionally applied in actions against physicians." *Pegram v. Herdrich*, 530 U.S. 211, 234-35 (2000). The Colorado Court of Appeals likewise rejected as duplicative a fiduciary duty claim against a physician "because the same issue was before the jury in the context of plaintiffs' negligence claims." *Spoor v. Serota*, 852 P.2d 1292, 1294-95 (Colo. App. 1992); *see also Neade v. Portes*, 739 N.E.2d 496, 505 (Ill. 2000) (declining to recognize a fiduciary duty claim against a physician for failing to disclose

[6]Murray nevertheless relies on *DiCarlo v. St. Mary Hosp.*, 530 F.3d 255 (3d Cir. 2008), to impliedly support the proposition that a hospital owes a patient a fiduciary duty. But Murray misconstrues *DiCarlo*. *DiCarlo* observed "that nonprofit hospitals owe a fiduciary duty to the public *with regard to staffing decisions*" to ensure that hospitals had adequate capacity to provide medical services before concluding that no fiduciary duty was owed to an individual patient in a billing context. *Id.* at 268-69 (emphasis added). *DiCarlo* thus pertains to a hospital's obligation to ensure access to care to the public. It does not support the existence of a fiduciary duty owed by a hospital to an individual patient in connection with medical treatment. We have considered the other foreign authorities Murray proffers and observe that none directly supports the proposition that a hospital owes a fiduciary duty under these facts.

financial incentives in a medical malpractice action and holding that "a breach of fiduciary duty claim is duplicative of a medical negligence claim" in such circumstances).

Here, Murray initially based the breach-of-fiduciary-duty claim on allegations of intentional understaffing, but at trial, Murray reversed course and argued what he failed to allege in his complaint: Centennial's medication administration policy prioritized profits over patient safety and constituted an intentional breach of fiduciary duty because the policy allowed staff to administer medication in violation of Toradol's black box warning. Upon concluding Centennial owed a heightened duty of care to LaQuinta by virtue of her status as a patient who came to the hospital with an expectation of being cared for, the district court upheld the full damages award on grounds that NRS Chapter 41A did not apply to a claim of breach of fiduciary duty. This was error in light of the majority view and the absence of any compelling authority to the contrary. Centennial owed LaQuinta the same duties that hospitals owe patients in providing medical services, that is, "to employ that degree of skill and care expected of a reasonably competent hospital in the same or similar circumstances." *Wickliffe v. Sunrise Hosp., Inc.*, 101 Nev. 542, 548, 706 P.2d 1383, 1388 (1985). It did not owe a heightened duty beyond that.[7]

The compensatory damages award must be reduced

As only the negligence claim remains, NRS Chapter 41A applies. Where relief is warranted for a claim sounding in professional negligence such as medical malpractice, the noneconomic compensatory damages that may be recovered are limited to $350,000.[8] NRS 41A.035 (2015); 2015 Nev. Stat., ch. 439, § 3, at 2526. Noneconomic damages in this context refer to "damages to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damages." NRS 41A.011. These are distinguishable from economic damages, which "include[ ] damages for medical treatment, care or custody, loss of earnings and loss of earning capacity." NRS 41A.007. And when a defendant is liable for professional negligence, it will be severally, not jointly, liable for both economic and noneconomic damages for the percentage of negligence attributable to it. NRS 41A.045(1).

The jury here found Centennial and its staff to be 65-percent liable. It awarded $5,000,000 for loss of companionship, comfort, and consortium; $7,000,000 for grief and sorrow; $1,700,000 for loss

[7]Because we conclude that Centennial owed no such duty as a matter of law, we need not address Centennial's related evidentiary claim.

[8]Pursuant to recently enacted legislation, the amount of this cap will increase over time, beginning January 1, 2024. A.B. 404, 82d Leg., § 2 (Nev. 2023); 2023 Nev. Stat., ch. 493, § 2, at 3023.

of probable support; $10,000 for funeral expenses; and $2,500,000 for LaQuinta's pain and suffering. Of these, loss of companionship, comfort, and consortium; grief and sorrow; and pain and suffering are noneconomic damages and are accordingly capped at an aggregate amount of $350,000. Centennial's liability is further limited severally to its share according to its 65-percent contribution to the negligence. Accordingly, we vacate the judgment's damages award for loss of companionship, comfort, and consortium; grief and sorrow; and pain and suffering and remand for the district court to issue a judgment awarding $227,500 in aggregate for these damages and to determine what portion of the $227,500 is attributable to each of those loss categories.[9] The damages for loss of support and funeral expenses are likewise subject to the pro rata cap, and we vacate that portion of the damages judgment and remand for the district court to issue a judgment against Centennial awarding $1,105,000 for loss of probable support and $6,500 for funeral expenses.

Punitive damages were improper

Centennial argues the record does not support an award of punitive damages. We agree that the punitive damages award was improper. Critically, the verdict form allowed the jury to reach punitive damages only if the jury first determined Centennial breached a fiduciary duty. The district court later upheld that award on the ground that the medication administration policy supported the breach of fiduciary duty claim. But Murray did not plead facts regarding the medication administration policy in the amended complaint, instead alleging understaffing and raising the medication administration policy only during trial. Regardless, our determination that Centennial did not owe a fiduciary duty here precludes the punitive damages award, as under the verdict form the jury could not reach punitive damages if Centennial did not owe, and therefore could not breach, a fiduciary duty to LaQuinta. Accordingly, we reverse the punitive damages award without reaching the parties' arguments on this point.

The district court erred in awarding prejudgment interest on the entire award, rather than the portion attributable to past damages

Centennial argues that the district court erred in awarding prejudgment interest on future damages. Murray argues that this claim was waived because it was not timely raised and the district court accordingly did not consider it. If the claim is entertained, Murray asserts that the only future damages are those for grief and sorrow.

[9]Given the reduction of damages to those allowable, we need not reach Centennial's contention that the award of $2,500,000 for pain and suffering was excessive.

Centennial replies that relief is nevertheless warranted for plain error. Again, we agree with Centennial.

Nevada law is clear: prejudgment interest cannot be awarded on future damages. *See* NRS 17.130(2) (stating that "the judgment draws interest from the time of service of the summons and complaint until satisfied, except for any amount representing future damages"). It is error to award prejudgment interest for the entire verdict when it cannot be determined what part of the verdict represents past damages. *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 428, 132 P.3d 1022, 1035 (2006). A defendant's challenge to the award of prejudgment interest, when raised for the first time on appeal, is reviewable under the plain error rule. *Id.* at 429, 132 P.3d at 1035 (reviewing sua sponte an award of prejudgment interest for plain error).

The jury here awarded a combination of past and future damages. It awarded past damages for LaQuinta's pain and suffering and funeral expenses. Damages for loss of companionship, comfort, and consortium and loss of support reflected future damages. *See* NRS 41.100(3). The grief and sorrow damages explicitly commingle "[p]ast and future grief and sorrow." The district court ordered prejudgment interest on the aggregate amount of compensatory damages and plainly erred in doing so. Accordingly, we vacate the award of prejudgment interest. Given that the award of noneconomic damages has been vacated and must be recalculated consistent with NRS 41A.035, on remand the district court must determine what portion of the noneconomic damages was attributable to pain and suffering and recalculate prejudgment interest as to LaQuinta's pain and suffering and funeral expenses. Also, we direct the district court to consider whether the damages for grief and sorrow may be separated into past and future damages in that regard and to recalculate and award prejudgment interest only as to the portion constituting past grief and sorrow. Should the district court be unable to separate past and future grief and sorrow, it may not order prejudgment interest as to that portion of the damages.[10]

The district court did not abuse its discretion in awarding attorney fees and costs

Centennial argues that the district court should not have awarded more than $700,000 in attorney fees and costs. It argues that its refusal of LaQuinta's offer of judgment was not grossly unreasonable or in bad faith. It argues that the court should have credited its

[10]Centennial alternatively argues that a new trial is warranted because the verdict was improperly the product of "passion and prejudice," highlighting the large awards for punitive damages and compensatory damages for pain and suffering. Given that our disposition reverses the punitive damages award and reduces considerably the compensatory damages for pain and suffering, we decline to reach this alternative argument.

theories of defense in determining whether it rejected Murray's offer of judgment in good faith and that Murray's attorneys' hourly rates were not reasonable. Centennial also argues that Murray's experts' fees were unreasonable, considering that two experts opined on similar topics. We disagree.

Where a party rejects an offer of judgment and fails to obtain a more favorable outcome, the offering party may recover attorney fees and costs incurred after the offer was made. NRCP 68(f)(1)(B). In deciding whether to award attorney fees under NRCP 68, the district court must consider the factors set forth in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983):

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Where a plaintiff rather than a defendant makes an offer, the first factor looks to whether the defendant raises its defenses in good faith. *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998). To determine whether the fees sought are reasonable with respect to the fourth *Beattie* factor, the court looks to the *Brunzell* factors:

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). Until the statutory limit in NRS 18.005(5) was raised in 2023, A.B. 76, 82d Leg., § 1 (Nev. 2023); 2023 Nev. Stat., ch. 70, § 1, at 342, recoverable costs to retain expert witnesses were limited to $1,500 per expert for up to five experts unless the court determined that the circumstances required allowing a larger fee, *Logan v. Abe*, 131 Nev. 260, 267, 350 P.3d 1139, 1144 (2015); *see* 2007 Nev. Stat., ch. 440, § 7(5), at 2191. We review the district court's award of attorney fees and costs for an abuse of discretion and will uphold an award supported by substantial evidence. *Logan*, 131 Nev. at 266-67, 350 P.3d at 1143-44.

The district court found that Centennial rejected an offer of judgment for $300,000 and did not obtain a more favorable outcome. The court specifically found that the *Beattie* and *Brunzell* factors warranted attorney fees. It found that the offer was in good faith and reasonable in light of the trial preparation that had already been undertaken at that time and that the rejection of the offer was unreasonable because Centennial knew the evidence supporting the claims and the substantial damages alleged. The court found that the attorney fees were justified and reasonable considering that counsel were experienced trial attorneys and that one of Murray's attorneys was also a board-certified medical doctor, who accordingly brought medical expertise to the representation. Further, the court found that the case was complex and heavily contested with extensive pretrial litigation and trial preparation and that counsel's work led to a substantial jury verdict. As to expert costs, the district court found that both doctors were highly qualified and needed to address different areas of medicine pertinent to the cause of death. The court found that their testimony was not duplicative, that their preparation required reviewing thousands of pages of medical records, that each expert spent a significant amount of time preparing and testifying, and that exceeding the $1,500 statutory amount was justified because the expert testimony was important to Murray's theory of the case. The district court awarded attorney fees in the amount of $511,200 and costs totaling $207,269.82, including expert fees of $169,895.61.

The record demonstrates that the district court considered the relevant standards and that substantial evidence supports the award of attorney fees and costs. *See id.* at 266, 350 P.3d at 1143 ("[T]he district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence."). Centennial has not shown to the contrary. Further, this matter required a nine-day jury trial in 2019 and ongoing appellate litigation to resolve. Had Centennial accepted Murray's good-faith offer of judgment in 2016, each party would have forgone considerable time and expense. *Cf. Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 888 (1999) (remarking that "[t]he purpose of . . . NRCP 68 is to save time and money for the court system, the parties and the taxpayers" and to "reward a party who makes a reasonable offer and punish the party who refuses to accept such an offer"). We conclude that Centennial has not shown the district court abused its discretion in awarding attorney fees and costs in the amounts ordered.

CONCLUSION

A hospital does not owe a fiduciary duty to its patients in relation to medical care. Under NRS Chapter 41A, Centennial was liable for

no more than $350,000 in noneconomic compensatory damages. The district court erred in awarding a larger sum. Further, both economic and noneconomic compensatory damages are limited to the hospital's 65-percent pro rata contribution to the negligence, given that the hospital is severally, not jointly, liable. We vacate the compensatory damages awards and remand to the district court to apply the damages cap to the award of noneconomic damages and to reduce both economic and noneconomic damages to the hospital's 65-percent pro rata share, that is, noneconomic compensatory damages totaling $227,500 and economic compensatory damages of $1,105,000 for loss of probable support and $6,500 for funeral expenses. Because we do not recognize a breach of a fiduciary duty claim between a hospital and a patient, we reverse the award of punitive damages that the jury awarded for that cause of action. We also conclude that the district court erred in awarding prejudgment interest on both past and future compensatory damages and vacate on that ground, remanding for recalculation so that prejudgment interest is awarded solely on past damages. Lastly, considering the offer of judgment below, we conclude that the district court did not abuse its discretion in awarding attorney fees and costs and accordingly affirm the orders awarding fees and costs.

Pickering, Herndon, Parraguirre, and Bell, JJ., and Cherry and Silver, Sr. JJ., concur.

CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, APPELLANT, *v.* 6635 W OQUENDO LLC, A NEVADA LIMITED LIABILITY COMPANY, RESPONDENT.

No. 85185

March 14, 2024 544 P.3d 900

Appeal from a district court order denying an anti-SLAPP special motion to dismiss. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Affirmed.

Steven B. Wolfson, District Attorney, and *Timothy J. Allen*, Deputy District Attorney, Clark County, for Appellant.

Steven L. Yarmy, Las Vegas, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

NRS 41.660 is colloquially referred to as Nevada's "anti-SLAPP" statute.[1] It permits a "person" to file a special motion to dismiss a complaint when the complaint is based on the person's "good faith communication in furtherance of . . . the right to free speech in direct connection with an issue of public concern." At issue in this appeal is whether a governmental entity is a "person" entitled to bring an anti-SLAPP motion. We conclude that a governmental entity is not a "person" for purposes of the anti-SLAPP statute and affirm the district court's order denying appellant's special motion to dismiss.

FACTS

In early 2019, appellant Clark County received a complaint that a residential property was being operated as a short-term rental and party house. The property at issue is owned by the eponymous respondent 6635 W Oquendo LLC (Oquendo). The Clark County Code Enforcement Department opened an investigation, during which the Department spoke with several short-term renters at the Oquendo property. Finding violations of the Clark County Code, the Department issued Oquendo seven civil penalties totaling $38,350. After the civil penalties went unpaid, Clark County recorded a lien against the Oquendo property for each penalty. Oquendo did not

[1]NRS 41.660 is codified within a subset of statutes, NRS 41.635-.670, which are referred to plurally as Nevada's anti-SLAPP statutes.

contest the penalties or liens, and in early 2021, Oquendo sent Clark County a check for the entire $38,350. Thereafter, Clark County released the liens.

Then, in 2022, Oquendo filed the underlying action against Clark County. Generally speaking, Oquendo's complaint alleged that Clark County lacked the authority to impose the civil penalties and to record liens against the property. Clark County filed an anti-SLAPP motion, arguing that the conduct forming the basis for Oquendo's claims—recording liens against the Oquendo property—was protected speech covered by the anti-SLAPP statutes.[2] At a hearing on the motion, Oquendo's counsel argued that "I just don't believe that these Anti-SLAPP statutes were meant for the government to just dismiss complaints." The district court agreed and entered an order denying Clark County's motion, finding that "Clark County is not a person for purposes of anti-SLAPP." Clark County now appeals.

DISCUSSION

Determining whether Clark County and other governmental entities are a "person" for purposes of the anti-SLAPP statute is a matter of statutory construction, which we review de novo. *See Young v. Nev. Gaming Control Bd.*, 136 Nev. 584, 586, 473 P.3d 1034, 1036 (2020).

As indicated, NRS 41.660 refers to a "person" bringing an anti-SLAPP motion. Oquendo argues that Clark County is not a "person" for anti-SLAPP purposes based on NRS 0.039, which, in its entirety, provides,

> *Except as otherwise expressly provided in a particular statute or required by the context*, "person" means a natural person, any form of business or social organization and any other nongovernmental legal entity including, but not limited to, a corporation, partnership, association, trust or unincorporated organization. *The term does not include a government, governmental agency or political subdivision of a government.*

(Emphases added.) *See also* NRS 0.010 (providing that NRS Chapter 0 "provides definitions and declarations of legislative intent which apply to Nevada Revised Statutes as a whole"). Thus, according to Oquendo, NRS 0.039 plainly precludes Clark County from being a person for purposes of the anti-SLAPP statute.

We agree and are not persuaded by either of Clark County's two counterarguments. First, Clark County relies upon the Legislature's

[2]In light of our resolution of this appeal, we need not address whether recording a lien can constitute protected speech under the anti-SLAPP statutes.

language in NRS 41.031(1) providing for the waiver of sovereign immunity on behalf of the State and its political subdivisions. This statute provides that "[t]he State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations." NRS 41.031(1). According to Clark County, because the anti-SLAPP statute is a "rule[ ] of law [that applies to] natural persons," it is entitled to bring an anti-SLAPP motion.

While Clark County's reasoning is plausible, we are nevertheless confined by NRS 0.039's plain-language definition of "person." *See Young*, 136 Nev. at 586, 473 P.3d at 1036 (recognizing that this court interprets statutes by their plain meaning unless there is ambiguity, the plain meaning would provide an absurd result, or the plain meaning clearly was not intended). As indicated, when read as a whole, NRS 0.039 states that "[e]xcept as otherwise expressly provided in a particular statute or required by the context," "[person] does not include a government, governmental agency or political subdivision of a government." It is undisputed that NRS 41.660 does not "expressly provide[ ]" that "person" includes governmental entities. Nor does NRS 41.660's context *require* "person" to be construed as including governmental entities, as it is wholly reasonable that the Legislature would wish to exclude governmental entities from anti-SLAPP protection. *Cf. Simonian v. Univ. & Cmty. Coll. Sys. of Nev.*, 122 Nev. 187, 191, 128 P.3d 1057, 1059-60 (2006) ("[A] long-standing principle of statutory construction instructs that person does not include the sovereign" and that, "unless a statute expressly indicates otherwise, we will presume that the statute does not confer person status on a state entity." (internal quotation marks omitted)). Namely, when the Legislature amended the anti-SLAPP statutes in 1997, it expressly declared that the anti-SLAPP statutes' purpose was to protect "participation by *citizens* in government" and "giv[e] the *people* the right to petition the government for redress of grievances [consistent with] the First Amendment to the United States Constitution and in section 10 of article 1 of the constitution of the State of Nevada." 1997 Nev. Stat., ch. 387, at 1363-64 (emphases added) (preamble to bill amending anti-SLAPP statutes). In other words, affording the *government* anti-SLAPP protection would appear to be contrary to the Legislature's purpose in enacting the anti-SLAPP statutes. *Cf. Crosby v. Town of Indian River Shores*, 358 So. 3d 444, 447 (Fla. Dist. Ct. App. 2023) (concluding that Florida's anti-SLAPP statute does not apply to governmental entities because the statute "protects the right guaranteed to each of us by the First Amendment[, which] protects citizens' speech only from government regulation; government speech itself is not

protected by the First Amendment" (internal quotation marks omitted)). Accordingly, we reject Clark County's first counterargument.[3]

Clark County's second counterargument is that we already held in *John v. Douglas County School District*, 125 Nev. 746, 760, 219 P.3d 1276, 1286 (2009), that governmental entities are entitled to bring an anti-SLAPP motion. Again, we disagree. *John* involved a teacher (John) who was disciplined for misconduct and then sued the school district that disciplined him, asserting an array of federal claims. 125 Nev. at 750-51, 219 P.3d at 1279-80. The school district filed an anti-SLAPP motion, which identified communications between school officials and the school district in furtherance of investigations into John's misconduct as protected under the anti-SLAPP statute. The district court granted the anti-SLAPP motion. On appeal, this court identified two primary issues: (1) "whether Nevada's anti-SLAPP statute applies to John's federal causes of action raised in Nevada district court," and (2) "whether the district court erred in dismissing John's lawsuit under the statute." *Id.* at 749-50, 219 P.3d at 1279. After resolving the first issue in the school district's favor, we then turned to the second issue. *Id.* at 760, 219 P.3d at 1286. John had argued that the at-issue communications between the various school district employees did not constitute protected speech under NRS 41.637 because, in part, the school district was not a governmental entity, meaning that the communications did not petition or seek redress from a government agency pursuant to NRS 41.637(1)-(3). *Id.* at 760-61, 219 P.3d at 1286. In rejecting his argument, we reasoned that the school district was a "political subdivision" as defined in NRS 41.0305, such that the internal communications were aimed at procuring governmental action, i.e., disciplining John at his job with the school district. *Id.* at 749-50, 761-62, 219 P.3d at 1279-80, 1286-87. We then proceeded to explain why John failed to rebut the school district's showing that its communications were covered by the anti-SLAPP statute. *Id.* at 761-62, 219 P.3d at 1286-87.

Thus, *John* addressed whether internal disciplinary measures taken by a school district were communications to a government agency pursuant to NRS 41.637(1)-(3). *Cf. id.* At no point in the

[3]We recognize that California courts have interpreted California's anti-SLAPP statute to afford protection to governmental entities, *see, e.g.*, *San Ramon Valley Fire Prot. Dist. v. Contra Costa Cnty. Emps. Ret. Ass'n*, 22 Cal. Rptr. 3d 724, 731 (Ct. App. 2004); *Bradbury v. Superior Ct.*, 57 Cal. Rptr. 2d 207, 211 (Ct. App. 1996), and that we typically construe our anti-SLAPP statute consistently with California's statute, *see Coker v. Sassone*, 135 Nev. 8, 11, 432 P.3d 746, 749 (2019). However, we decline to do so here because California has no apparent analog to NRS 0.039, which, again, applies "to Nevada Revised Statutes as a whole." NRS 0.010. If the Legislature believes that governmental entities should be entitled to anti-SLAPP protection, it is free to make the necessary statutory amendments.

John decision did the parties present the issue of whether a governmental entity was a "person" for purposes of bringing a motion to dismiss under the anti-SLAPP statute in the first place, nor did we make such a holding.[4] *See Senjab v. Alhulaibi*, 137 Nev. 632, 633-34, 497 P.3d 618, 619 (2021) (recognizing that this court "review[s] only the issues the parties present"); *Liu v. Christopher Homes, LLC*, 130 Nev. 147, 151, 321 P.3d 875, 877 (2014) (reviewing de novo the interpretation of this court's caselaw). Accordingly, we reject Clark County's second counterargument.

CONCLUSION

We hold that a governmental entity is not a "person" entitled to bring an anti-SLAPP motion. NRS 0.039 unambiguously defines "person" to exclude governmental entities, and the context of NRS 41.660 does not require that "person" as used in that statute be construed to include governmental entities. The district court therefore correctly denied Clark County's anti-SLAPP motion because it was not entitled to bring it. Accordingly, we affirm the district court's order denying Clark County's special motion to dismiss.

Cadish, C.J., and Stiglich, Pickering, Herndon, Lee, and Bell, JJ., concur.

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[4]We take this opportunity to clarify that while portions of the *John* decision could be read to infer as much, the court did not address whether a governmental entity is considered a person for the purpose of anti-SLAPP protections, and that was not the ultimate holding. *See* 125 Nev. at 760-61, 219 P.3d at 1286-87.