CHRISTOPHER DEANGELO PALMER, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 86560-COA

June 27, 2024 553 P.3d 447

Appeal from a judgment of conviction, pursuant to a jury verdict, of battery constituting domestic violence—strangulation, false imprisonment, pandering, misdemeanor assault constituting domestic violence, and misdemeanor battery constituting domestic violence. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Reversed and remanded.

F. Virginia Eichacker, Special Public Defender, and *Melinda E. Simpkins* and *Julian Gregory*, Chief Deputy Special Public Defenders, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Karen L. Mishler*, Chief Deputy District Attorney, Clark County, for Respondent.

Before the Court of Appeals, Gibbons, C.J., and Bulla and Westbrook, JJ.

OPINION

By the Court, Westbrook, J.:

The Sixth Amendment guarantees every criminal defendant the right to a public trial. This public trial right helps ensure that the defendant will be tried fairly, that the trial court and the prosecutor "carry out their duties responsibly," and further "encourages witnesses to come forward and discourages perjury." *Waller v. Georgia*, 467 U.S. 39, 46 (1984). The public trial right is considered so fundamental that a violation constitutes structural error when preserved for appellate review. *See Weaver v. Massachusetts*, 582 U.S. 286, 299 (2017); *Jeremias v. State*, 134 Nev. 46, 47, 412 P.3d 43, 46 (2018).

Before a court may exclude members of the public from a criminal trial, it must satisfy the four-factor test articulated by the United States Supreme Court in *Waller* and adopted by the Nevada Supreme Court in *Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995). In *Feazell*, the supreme court concluded that a partial courtroom closure was justified by a witness's fear for her personal safety after applying the four-part *Waller* test. Since *Feazell* was decided nearly 30 years ago, Nevada's appellate courts have never addressed in a published decision the circumstances under which a partial closure would *not* be justified. We take the opportunity to do so here and conclude that the trial court violated Christopher Deangelo Palmer's right to a public trial by excluding Palmer's family from the courtroom during the complaining witness's testimony based on her nonspecific "concern" about their presence. Because the district court did not comply with *Waller*, we reverse Palmer's judgment of conviction and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

This case arises from allegations that Palmer encouraged his then-girlfriend, Wilkeshia Hunter, to engage in prostitution to make money while they were both unemployed. Allegedly, after her first prostitution "date," Palmer told Hunter that she had taken too long and then physically attacked her over the course of several hours. In connection with these allegations, the State charged Palmer with multiple crimes, including: (1) battery constituting domestic violence—strangulation, (2) sex trafficking, (3) first degree kidnapping with the use of a deadly weapon, (4) assault with a deadly weapon constituting domestic violence, (5) coercion constituting domestic violence with the use of a deadly weapon, and (6) misdemeanor battery constituting domestic violence.[1]

Pending his trial, Palmer remained in custody at the Clark County Detention Center for approximately ten months. During this period, Palmer called and spoke with Hunter approximately 400 times, and he also called and spoke with members of his family. These phone calls were recorded. During one call, Hunter told Palmer that she no longer wanted to be in a relationship with him, and on another call, Hunter stated that she was "done" and was "just gonna leave [Palmer] alone." On a third call, Palmer's mother told him that she was going to reach out to Hunter and "guarantee" to her that "when [Palmer] comes home he won't bother you, he won't call you, he won't act like you exist."

Palmer's six-day jury trial began in February 2023. During jury selection, the district court excluded Palmer's brother from the courtroom after he stood up in the gallery and "mumbled something out loud" that some prospective jurors "probably" could hear. Palmer did not object to his brother's removal.

Later that day, the State requested that Palmer's entire family be excluded from the courtroom during Hunter's upcoming testimony. The prosecutor stated that the request was not only based on Palmer's family's actions during the court proceedings, but also

[1]Palmer was also charged with ownership or possession of a firearm by a prohibited person, but that charge was bifurcated before the jury trial and is not at issue in this appeal.

because Hunter expressed a general "concern" about the family's presence. Additionally, the State noted a concern of its own:

> The big reason is because [Palmer], through jail calls, had given [Hunter's] number to his mother. To reach out to her. Things of that nature. I'm not trying to say that anybody's threatened her with death or anything like that. I'm not trying to overblow this, Your Honor. But still, it's the course of it and gives the State a lot of concern.

Palmer objected and offered alternatives to courtroom closure, including having his family sit in the back of the courtroom during Hunter's testimony or moving a monitor to block Hunter's view of the family. The district court did not directly address the parties' arguments but stated it would take the matter under advisement, and the State subsequently provided the district court with a recording of the jail call between Palmer and his mother.

Jury selection continued, and at the end of the following day the State renewed its request to exclude Palmer's family from the courtroom during Hunter's testimony, which was scheduled to begin the next day. The State conceded that Palmer's family had not threatened Hunter but argued Palmer's prior phone calls to his mother and to Hunter demonstrated coerciveness:

> But when we talk about coercive behavior, as we know, there's a—there's a continuum along a long kind of array of what that can mean. And that's why the State sent over the jail call so Your Honor could listen to it and hear this is the kind of conversation that's going on. Hey, reach out to [Hunter] or hey, let her know. And [Palmer's mother's] like yeah, no, I'm going to let her know that, you know, he's not going to bother you anymore. I mean, all those things it all goes to the coercive behavior. It all goes to what's going on behind the scenes, and not so much behind the scenes because of his 450-400 and some odd calls to the victim. And over and over, this is—it's a full-court press, Your Honor. The full-court press is going, and we could get it from—from the jail call.
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> So, the State has provided proof on this, and we have shown good cause. This is not something—the State did not go to the victim and say hey, are you scared, do you want us to do this. This is something she asked us about. She's aware of the situation. She's very aware of it, and she has concerns. And I think those are very well-founded concerns. I—if somebody just said hey, I'm—I'm scared of the family, I would tell them, unfortunately, it's an open courtroom and we can't do anything about that. And listen, I've had that happen plenty in my career.
>
> But in this case, that's not what happened here. We're having somebody express a concern because this is a family that

> has been reached out to by the Defendant as we can hear on the jail calls to reach out to the victim. They—they dated for eight months, the Defendant and the victim, so everybody knows each other. And that's what we hear on that jail call. . . . [I]f you're going to work on dissuading witnesses, I think you forfeit your right to sit—get the right to sit down and hear that witness testify and stare at them from the back of the courtroom.

In response, Palmer argued that there was no evidence of witness dissuasion and that the number of jail calls was not coercive because Hunter accepted all of them. Palmer further argued there was no evidence that his family had threatened Hunter or that his mother ever did, in fact, reach out to Hunter. Ultimately, the district court decided to exclude Palmer's family during Hunter's testimony, citing the "totality of the circumstances," including its need to maintain "control in the courtroom," the misbehavior of Palmer's brother during jury selection, the jail calls between Palmer and Hunter, and Palmer's alleged request for his mother to reach out to Hunter.[2]

During Hunter's testimony, she acknowledged she had extensive contact with Palmer while he was at the Clark County Detention Center. Hunter stated that she accepted Palmer's numerous phone calls after his arrest, went to the detention center to conduct video visits with him, and put money on his books.

At the conclusion of trial, the jury found Palmer guilty of (1) battery constituting domestic violence—strangulation, (2) pandering, (3) gross misdemeanor false imprisonment, (4) misdemeanor assault constituting domestic violence, and (5) misdemeanor battery constituting domestic violence. The court sentenced Palmer to an aggregate prison term of four to ten years with credit for time served on all misdemeanor and gross misdemeanor offenses. On appeal, Palmer argues that the district court violated his Sixth Amendment right to a public trial by excluding his family during Hunter's testimony. We agree, and therefore reverse and remand for a new trial.

ANALYSIS

The Sixth Amendment provides that a criminal defendant shall enjoy "the right to a . . . public trial." In *Waller v. Georgia*, the United States Supreme Court recognized that this right "may give way in certain cases to other rights or interests" and set forth a four-factor test that must be met before a court can completely exclude the public from criminal trial proceedings. 467 U.S. at 45. First, the trial court must find that "the party seeking to close the hearing [has advanced] an overriding interest that is likely to be prejudiced";

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[2]It does not appear that Hunter provided a statement or otherwise participated in the State's request to exclude Palmer's family.

second, "the closure must be no broader than necessary to protect [the overriding] interest"; third, "the trial court must consider reasonable alternatives to closing the proceeding"; and fourth, the trial court "must make findings adequate to support the closure." *Feazell*, 111 Nev. at 1448, 906 P.2d at 728-29 (second alteration in original) (quoting *Waller*, 467 U.S. at 48). However, when a court only partially closes the proceedings, the court must find a "substantial reason" to justify the closure, instead of an "overriding interest." *Id.* at 1448, 906 P.2d at 729 (internal quotation marks omitted).

When properly preserved, a violation of a defendant's Sixth Amendment right to a public trial, whether due to a full or partial courtroom closure, is structural error. *Jeremias*, 134 Nev. at 47, 412 P.3d at 46. Thus, the error "entitles an appellant to automatic reversal of his judgment of conviction without an inquiry into whether the error affected the verdict." *Id.*

In this case, because the district court temporarily excluded Palmer's family during Hunter's testimony without closing the courtroom completely, "it is appropriate to apply the less stringent 'substantial reason' test to determine whether a defendant's right to a public trial was violated." *Feazell*, 111 Nev. at 1448, 906 P.2d at 728 (quoting *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992)). Therefore, when addressing the first *Waller* factor, this court must determine if there was a "substantial reason" to justify excluding Palmer's family. Palmer argues that Hunter's "amorphous concern" did not justify closure and was insufficient to override his Sixth Amendment right to a public trial.

What constitutes a "substantial reason" is not subject to a bright-line rule and varies based on the facts and circumstances of each case. However, the presence of a defendant's family and supporters is of particular importance. "[W]ithout exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." *In re Oliver*, 333 U.S. 257, 271-72 (1948); *see also Presley v. Georgia*, 558 U.S. 209, 216 (2010) (reversing an appellant's conviction for drug trafficking because his uncle was wrongly excluded during voir dire); *Carson v. Fischer*, 421 F.3d 83, 91 (2d Cir. 2005) (recognizing a "heightened interest in the exclusion of family members and friends"). With this in mind, we turn to the reasons offered by the district court to exclude Palmer's family: maintaining courtroom control, the misbehavior of Palmer's brother, and Palmer's jail calls to Hunter and to his mother. We conclude that none of these reasons justified the partial courtroom closure in this case.

The first reason given—courtroom control—did not justify excluding Palmer's family because nothing in the record indicated that closure was necessary due to Palmer's family being disorderly or failing to maintain courtroom decorum during the trial.

Further, the district court did not explain why excluding Palmer's entire family was necessary to maintain courtroom control. *See, e.g.*, *People v. Richardson*, 744 N.Y.S.2d 407, 407 (App. Div. 2002) ("The trial court's exclusion of defendant's children, ages eight and nine, from the courtroom violated defendant's right to a public trial, there being no support in the record for the contention that the children were being disruptive."); *cf. Clemons v. State*, 720 So. 2d 961, 971 (Ala. Crim. App. 1996) (concluding the defendant's Sixth Amendment right was not violated by closing the courtroom after several individuals in the audience began causing disruptions during trial and "the record show[ed] clearly that the judge closed the courtroom doors to preserve order and decorum"). Because the district court did not address why the exclusion was necessary to exercise courtroom control, nor was it apparent in the record, this was not a substantial reason to justify closure.

The second, and related, reason given was the prior exclusion of Palmer's brother during jury selection. However, Palmer's brother had *already* been excluded from the courtroom, and the district court did not explain why the brother's previous removal warranted excluding Palmer's entire family, particularly when no other family members caused similar interruptions during the trial and the closure was only during Hunter's testimony. *Cf. Woods*, 977 F.2d at 77 (upholding the exclusion of the defendant's entire family because the trial court expressly "considered, but dismissed as ineffective, the possibility of removing only the family members who threatened" the witness). Thus, this was also not a substantial reason to justify closure.

The next reason provided was the high number of calls between Palmer and Hunter. While the State argued that the sheer volume of calls between Palmer and Hunter was "coercive," Palmer responded that Hunter voluntarily accepted all of these calls and visited Palmer at the detention center. Hunter's subsequent testimony confirmed that she did in fact voluntarily accept Palmer's calls and visit him, and she did not testify that she felt coerced or threatened at any time following Palmer's arrest. We disagree with the State's position, which it reasserts on appeal, that a large number of calls between two willing participants alone, without any reference to the calls' substance, is inherently coercive. Further, it is unclear from the record why the high number of calls between Palmer and Hunter would justify excluding Palmer's *entire family*, and the district court did not provide an explanation on this point.[3] Therefore, the number

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[3]We recognize that the charges in this case involved domestic violence and sex trafficking and that the court could properly consider the relationship between Palmer and Hunter when evaluating the existence of coercion by Palmer. *Cf. Bigpond v. State*, 128 Nev. 108, 118, 270 P.3d 1244, 1250 (2012) (recognizing that a "victim's prior accusations of domestic violence were relevant because they provide insight into the relationship and the victim's possible

of calls between Palmer and Hunter did not constitute a substantial reason to justify the partial closure.[4]

The final reason offered by the district court was the jail call between Palmer and his mother. During this call, Palmer purportedly gave Hunter's phone number to his mother, and his mother stated that she would reach out to Hunter and tell her that Palmer would not bother her anymore. The State argued to the district court that Hunter had a general "concern" with Palmer's family being present in the courtroom because of this call.[5] On appeal, however, the State specified that Hunter was concerned for her "personal safety" and that her concern about personal safety was a substantial reason to justify the courtroom closure.

A witness's fear for her personal safety may be a substantial reason to warrant a courtroom closure. *See, e.g.*, *Feazell*, 111 Nev. at 1447-49, 906 P.2d at 729. However, whether a closure is justified due to a witness's fear frequently turns on whether objective evidence exists in the record to establish that witness's fear, which may include evidence of direct or indirect threats. *See United States v. Farmer*, 32 F.3d 369, 372 (8th Cir. 1994) (finding a partial closure was justified when there was evidence in the record showing that the defendant had threatened the complaining witness and the witness feared retaliation by the defendant and his family); *Nieto v. Sullivan*, 879 F.2d 743, 753 (10th Cir. 1989) (concluding that a partial closure was justified because the record showed "clear references

reason for recanting her prior accusations"). But the State presented no argument or evidence below to suggest that Palmer's *family* was part of a team trying to prevent her from testifying.

[4]Shortly before Hunter testified, the State made a record that Hunter had received a text message that morning from an unknown number that said, "twenty to life, don't go to Court." The district court excluded the text message from evidence because the sender was unknown, and the court reasoned that introducing the text message to the jury created a risk the jury would improperly speculate that Palmer or someone connected to him sent the message. On appeal, the State contends that this text message justified the courtroom closure, but the message was sent a day *after* the district court announced its decision to exclude Palmer's family. In addition, to rely on the text message to retroactively justify the courtroom closure would require this court to speculate that the message originated from Palmer's family when the district court expressly rejected that conclusion.

[5]The recording of the jail call was transmitted to this court as an original trial exhibit. The call was largely unintelligible, and, upon our review, we were unable to discern that Palmer gave his mother Hunter's phone number. While Palmer's mother did offer to reach out to Hunter, it was unclear if Palmer requested that contact, but in any event, there was no indication in the record that Palmer's mother actually contacted Hunter. Further, the call neither contained any facially threatening or coercive remarks directed at Hunter, nor was there anything apparent in the call that would support a finding of witness dissuasion, as argued by the State. *See* NRS 199.230 (defining witness dissuasion, in pertinent part, as attempting to or preventing another person from testifying "by persuasion, force, threat, intimidation, deception or otherwise").

to [the witness's] fear or concern" about other assailants who had not been apprehended, the defendant and defendant's family knew where the witness lived, and the police advised the witness to buy a gun); *cf. Garcia v. Bertsch*, 470 F.3d 748, 753 (8th Cir. 2006) (declining to grant postconviction relief but noting that, had the issue come before the panel on direct appeal, it may not have found the closure justified where the witness "did not say why he was reluctant to testify. The trial court did not hold an evidentiary hearing to clarify the reasons for [his] silence. As such, there is no evidence in the record of any specific threats against him personally, or against his family members.").

In *Feazell*, an eyewitness refused to testify unless the district court excluded four African-American men from the courtroom "whom she felt posed a threat to her personal safety." 111 Nev. at 1447, 906 P.2d at 728. The witness informed the court that she felt threatened specifically "because she had received two telephone calls telling her not to testify and because somebody had left a dead bird in a plastic bag on her patio." *Id.* at 1447-48, 906 P.2d at 728. After the witness identified the individuals she did not want in the courtroom during her testimony, the district court made findings regarding the threats and the witness's concern for her safety and excluded the four men. *Id.* at 1448-49, 906 P.2d at 728-29. The Nevada Supreme Court concluded that the exclusion did not violate Feazell's Sixth Amendment rights because the witness's interest in her personal safety "qualifie[d] as both a 'substantial reason' and an 'overriding interest' sufficient to justify partially closing the trial." *Id.* at 1448-49, 906 P.2d at 729.

In *Woods v. Kuhlmann*, the United States Court of Appeals for the Second Circuit similarly determined that the appellant's Sixth Amendment rights were not violated when his family was excluded during a witness's testimony. 977 F.2d at 78. The court first observed that, based on the prosecutor's representations, the witness was "'scared to death' because she had been threatened by at least one member of the defendant's family," who had gone to the witness's house "telling her she had better not testify, she had better not go to court." *Id.* at 75-76. Further, immediately before the witness testified, she confirmed to the presiding judge that "she was reluctant to testify because of 'certain fears' that she had for the safety of herself and her family." *Id.* at 75. The Second Circuit found that, while the court's questioning "may not have been exhaustive, we do not doubt that by hearing her answer and observing her demeanor during this exchange, the judge was able to adequately determine for herself the scope of [the witness's] fear of the [defendant's] family." *Id.* at 77.

Unlike in *Feazell* and *Woods*, where the court was advised of the specific, objective reasons why the witnesses feared for their personal safety, the prosecutor in this case did not articulate to the district court *why* Hunter was concerned about the family's presence, nor did the prosecutor offer to have Hunter express her concerns directly to the court. The district court did not have an "exchange" with Hunter to clarify the reasons for her concern, and so the district court was not able to hear her answer or observe her demeanor and could not adequately determine the scope of Hunter's concern. More importantly, the State acknowledged that there were no threats against Hunter.

While the State argues on appeal that Hunter's "concern" was actually a fear for her personal safety, this was not reflected in the district court record.[6] The State neither proffered, nor did Hunter herself claim, that she was afraid. *Cf. Feazell*, 111 Nev. at 1447-49, 906 P.2d at 728-29; *Woods*, 977 F.2d at 77. To the extent that the State implied that Hunter was concerned because Palmer had given his mother Hunter's phone number during a jail call, the record does not establish that Palmer's mother ever contacted Hunter. This creates further uncertainty and emphasizes the lack of a clear record as to the source of Hunter's "concern" with Palmer's family being present during her testimony. In the absence of a supporting record or factual findings, Hunter's general "concern" was not a substantial reason to justify the partial courtroom closure. Because none of the reasons given by the district court were a "substantial reason" to justify the partial courtroom closure, the first *Waller* factor was not met. *Feazell*, 111 Nev. at 1448, 906 P.2d at 729.

The second *Waller* factor, that the exclusion be "no broader than necessary" to protect the identified substantial reason, was also not satisfied in this case. 467 U.S. at 48. The record is unclear why excluding Palmer's entire family was necessary. *See Guzman v. Scully*, 80 F.3d 772, 776 (2d Cir. 1996) ("The exclusion of courtroom observers, especially a defendant's family members and friends, even from part of a criminal trial, is not a step to be taken lightly."). The State's proffered reasons for the exclusion, on their face, applied only to Palmer's mother and brother, but otherwise did not implicate Palmer's other family members. Therefore, even if a substantial reason existed to exclude Palmer's mother and brother from the proceedings, that reason would not automatically apply to Palmer's other family members absent findings to explain the necessity for

[6]The district court did not find that Hunter's concern was for her personal safety or that Hunter's personal safety justified closure. Rather, the State argued repeatedly that Hunter was "concerned" without ever specifying the nature of that concern, and the district court agreed with the State's argument as it was framed at trial. Though the State asks this court to infer that Hunter's concern was tied to a fear for her personal safety, we decline to speculate about the district court's reasoning for the closure. *See State v. Rincon*, 122 Nev. 1170, 1176-77, 147 P.3d 233, 237-38 (2006) (concluding that when the district court "does not include express findings of fact," the appellate court will not "speculate about the factual inferences" that the district court may have drawn).

their exclusion. *Cf. Woods*, 977 F.2d at 77. Without such findings, this court cannot hold that the closure was no broader than necessary to satisfy the second *Waller* factor.

We are also concerned with the lack of consideration given to "reasonable alternatives" to the partial closure under the third *Waller* factor. *Presley*, 558 U.S. at 210 ("[E]ven assuming, *arguendo*, that the trial court had an overriding interest in closing *voir dire*, it was still incumbent upon it to consider reasonable alternatives to closure. It did not, and that is all this Court needs to decide."). Palmer offered two alternatives to exclusion—having his family sit in the back of the room during Hunter's testimony and moving a courtroom monitor to block Hunter's view of his family—and the record does not reflect that the district court considered these, or any other, alternatives to closure. *See id.* at 214 (noting that "trial courts are required to consider alternatives to closure even when they are not offered by the parties"). Because the record does not reflect that the district court considered or addressed the proposed reasonable alternatives to closure, the third *Waller* factor was also not satisfied. *See Feazell*, 111 Nev. at 1448, 906 P.2d at 729.

Finally, the fourth *Waller* factor required the district court to make adequate findings on the record to support its decision. 467 U.S. at 48. In this case, although the district court did make limited findings, it found that excluding Palmer's family was justified "under the totality of the circumstances," rather than under the four-factor test provided in *Waller*. While the district court identified reasons for the partial closure, as noted above, the record does not support the court's conclusory findings that closure was warranted to maintain courtroom control, to address misbehavior by Palmer's brother, or in light of Palmer's numerous jail calls. Further, the court did not find that excluding Palmer's entire family was no broader than necessary and did not address the proposed reasonable alternatives to closure. Because the record contains no findings that relate to the second and third factors of the *Waller* test, this court cannot make reasonable inferences from the record to support the district court's decision without resorting to speculation. *State v. Rincon*, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006).

Because the record does not support that the partial courtroom closure was justified pursuant to *Waller*, the closure violated Palmer's Sixth Amendment right to a public trial, which constitutes structural error necessitating reversal.[7] *Jeremias*, 134 Nev. at 47, 412 P.3d at 46.

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[7]Palmer also alleges that his Sixth Amendment rights were violated when his brother was removed during jury selection and when the marshal excluded his family at the start of jury selection, even though the district court subsequently corrected the marshal and instructed him to let Palmer's family inside the courtroom. We need not reach these issues given that we reverse on other grounds. *See Miller v. Burk*, 124 Nev. 579, 588-89 & n.26, 188 P.3d 1112,

CONCLUSION

The district court violated Palmer's Sixth Amendment right to a public trial when it excluded his entire family from the courtroom during the complaining witness's testimony in contravention of the four-part *Waller* test. First, none of the reasons advanced by the State and credited by the court constituted a "substantial reason" to justify the partial courtroom closure. Second, even if a substantial reason existed to justify excluding Palmer's mother and brother, this court cannot find that the closure was "no broader than necessary," as applied to Palmer's entire family. Third, the record does not reflect that the court considered reasonable alternatives to the closure. Finally, the court did not make adequate findings to support the closure. Because the violation of Palmer's Sixth Amendment right to a public trial was a structural error, we reverse Palmer's judgment of conviction and remand for a new trial.[8]

Gibbons, C.J., and Bulla, J., concur.

1118-19 & n.26 (2008) (explaining that this court need not address issues that are unnecessary to resolve the case at bar).

[8]Insofar as Palmer raised other arguments that are not specifically addressed in this opinion, we conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

MANUEL MARISCAL-OCHOA, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 84670

June 27, 2024 550 P.3d 813

Appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault against a child under the age of 14 years and lewdness with a child under the age of 14 years. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.[1]

Affirmed.

Karla K. Butko and *Richard A. Molezzo*, Verdi, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, *Marilee Cate*, Appellate Deputy District Attorney, and *Erin Morgan*, Deputy District Attorney, Washoe County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

In this opinion, we clarify the nature and standard of review for motions pertaining to prejudicial statements by a prospective juror during voir dire. We conclude that a district court does not abuse its discretion in denying a motion for a mistrial, construed as a motion to strike a venire for cause, based on a prospective juror's comments during voir dire unless the comments are so prejudicial that they could not be cured by an admonition.

During voir dire, a prospective juror stated that she might recognize the defendant because he may have abused her niece or nephew. The defense moved for a mistrial. Because the district court found that the prospective juror's statement was equivocal and vague, we conclude that any prejudice could be neutralized by a curative admonition, which the district court administered. Further, the record here does not indicate the statement prejudiced the rest of the venire. Accordingly, the district court did not abuse its discretion in denying the motion for a mistrial. Because the other issues raised on appeal also lack merit, we affirm the judgment of conviction.

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[1]We previously issued an order in this matter on August 17, 2023. We later granted en banc reconsideration. *Mariscal-Ochoa v. State*, Docket No. 84670 (Nov. 22, 2023) (Order Granting En Banc Reconsideration). We now withdraw the prior order and issue this opinion in its place.

FACTS AND PROCEDURAL HISTORY

The 9-year-old victim, L.N.C., was home alone when she heard her stepfather, appellant Manuel Mariscal-Ochoa, returning to the house. She ran to her room, jumped out the window, hid in the yard, and called 911 because she feared her stepfather would make her do "stuff" she did not want to do. An investigation ensued, and L.N.C. alleged four instances of abuse in detail, claiming that Mariscal-Ochoa had penetrated her with his fingers or penis on each instance. The State charged Mariscal-Ochoa with four counts of sexual assault against a child under the age of 14 years and one count of lewdness with a child under the age of 14 years.

Mariscal-Ochoa pleaded not guilty, and the case went to trial. During voir dire, after general questioning of the entire venire, the district court asked each prospective juror if there was any reason that the prospective juror could not be fair and impartial. The court asked prospective juror J.M. if she knew anyone participating in the case, and J.M. responded, "I'm not sure because my sister—I know somebody [sic] else about Manuel, they abused one of my nephews." J.M. continued:

> PROSPECTIVE JUROR: Okay. This morning, when I come here and I saw him, I do remember I saw him somewhere but I'm not sure.
>
> THE COURT: The man accused of the crime?
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> PROSPECTIVE JUROR: Manuel—
>
> THE COURT: You think you might—
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> PROSPECTIVE JUROR: I don't know if he was married or live with my nephew, Blanca, because I know one case similar where—what he's doing. This is why I'm not sure I know him.
>
> THE COURT: So you may know him, you may not know him?
>
> Well, if you know him, would it be from work, from church, from the neighborhood, from—
>
> PROSPECTIVE JUROR: About my sister—my sister and my nephews—

At this point the attorneys interjected, asked to approach, and then met in chambers to discuss J.M.'s comments. During that discussion, the judge, attorneys, and court reporter all observed that it was difficult to understand J.M.'s statements due to a "language issue," and it was noted that J.M. had indicated in her juror questionnaire that she struggled with English. Beyond the language issue, however, the parties disagreed on the impact that J.M.'s statements might have had on the other prospective jurors. The State argued that the court should strike J.M. for cause but should not strike the rest of the venire. Mariscal-Ochoa moved for a mistrial, which the

State suggested was more accurately characterized as a request to strike the venire for cause given that jeopardy had not yet attached. Mariscal-Ochoa argued J.M.'s statements had tainted the venire such that the resulting prejudice could not be repaired by a curative admonition.

The district court agreed to dismiss J.M. for cause but denied Mariscal-Ochoa's motion for a mistrial, reasoning that J.M.'s statements were not so prejudicial as to require disqualification of the venire. The district court recalled that J.M.'s "answers were a little bit confusing, a little bit hazy" and that "[t]he court didn't see anyone that looked like they were offended, concerned, impacted, no noticeable response from any of the ones seated near her as she stood there answering the court's questions." The court stated that it would provide a curative instruction to the rest of the venire that Mariscal-Ochoa was not on trial for any other offense, but Mariscal-Ochoa requested that the instruction be limited merely to a reiteration of the presumption of innocence to avoid calling attention to J.M.'s statements. Immediately before returning to the courtroom, Mariscal-Ochoa requested that the court say only that J.M. had been dismissed and nothing else.

The district court told the venire that several prospective jurors, including J.M., had been excused, but it did not elaborate. The district court resumed questioning the venire and, after further inquiry, another prospective juror made an oblique reference to J.M.'s comment. At that point, Mariscal-Ochoa requested that the court provide the curative admonition discussed earlier, reiterating the presumption of innocence. The court promptly administered a curative admonition emphasizing the presumption of innocence, but added language instructing jurors not to discuss uncharged conduct:

> I want to remind everyone that we're here to talk about whether the qualifications of you as potential jurors are such that you can fairly serve in this case, be fair to both sides, follow the law that the court instructs you, listen critically to the evidence, make your own decision. Discuss, if you're chosen as a juror, with the other jurors what the evidence was and what the law is as applied to that. We're not here to talk about uncharged matters against other people, other times, other circumstances. We're not here to talk about whether somebody said something that may impact whatever. No. No.
>
> We're here to determine if you can be fair and impartial to both sides, if you can apply the law, if you'll promise to be true to the cornerstone of our democracy that those charged with criminal justice matters are presumed innocent at all phases of the trial until and unless the State meets its burden to prove beyond a reasonable doubt all charges against the person for whom the crime has been alleged.

After this admonition, the court concluded its questioning of the remaining prospective jurors.

Once the district court concluded questioning, the State questioned the venire and passed the panel for cause. When Mariscal-Ochoa questioned the jurors, he discussed bias and the presumption of innocence at length. Mariscal-Ochoa concluded his questioning by asking each potential juror, through his attorney, "Can you be a fair and impartial juror to my client?" Each answered affirmatively, and Mariscal-Ochoa passed the panel for cause. Neither party asked the venire specifically about J.M.'s comments.

During trial, L.N.C. testified regarding the four distinct incidents she had reported to police. The State also presented corroborating evidence. After the State rested, Mariscal-Ochoa testified and denied all wrongdoing. The jury found Mariscal-Ochoa guilty of one count of sexual assault and the single charged count of lewdness. The jury acquitted Mariscal-Ochoa on the three remaining sexual assault counts.

The district court sentenced Mariscal-Ochoa to an aggregate sentence of life in prison with parole eligibility after 45 years. The district court acknowledged Mariscal-Ochoa's sentencing memorandum that challenged the constitutionality of NRS 200.366(3)(c) but did not rule on the issue, saying it could not deem NRS 200.366 "unconstitutional at this stage." Mariscal-Ochoa now appeals.

DISCUSSION

Mariscal-Ochoa raises a number of issues. Principally, he challenges the district court's denial of his motion for a mistrial after J.M.'s statements, arguing that the statements so prejudiced the venire that he could not have received a fair trial. Mariscal-Ochoa also argues that the district court improperly instructed the jury regarding the sufficiency of the evidence, that the State committed prosecutorial misconduct, and that he is entitled to the reversal of his conviction based on cumulative error. In addition, he claims that he received ineffective assistance of counsel. Finally, he challenges the constitutionality of NRS 200.366(3)(c). We address each of these claims below.

The district court did not abuse its discretion when it denied Mariscal-Ochoa's motion for a mistrial

Mariscal-Ochoa argues that J.M.'s comments during voir dire accused him of uncharged bad acts. He asserts that these accusations so tainted the venire that proceeding with any jurors who heard J.M.'s statements violated his Confrontation Clause and Sixth Amendment rights, depriving him of a fair trial. Mariscal-Ochoa therefore argues that the district court erred by failing to grant his mistrial motion. As the State correctly pointed out, a mistrial was an incorrect request because a jury was not yet empaneled and therefore jeopardy had not attached. *See Burns v. State*, 137 Nev. 494, 498, 495 P.3d 1091, 1098-99 (2021) (concluding that jeopardy attaches once the jury is empaneled). Nevertheless, the parties proceeded as though the proper motion had been made, and the district court construed Mariscal-Ochoa's motion as a motion to strike the venire for cause. We conclude that the district court did not abuse its discretion by issuing a curative admonition rather than dismissing the venire.

We review the district court's decision for abuse of discretion

This court has not previously addressed the correct standard for reviewing a district court decision regarding a potentially prejudicial statement from a prospective juror during voir dire. "Decisions concerning the scope of voir dire and the manner in which it is conducted are reviewable only for abuse of discretion and draw considerable deference on appeal." *Lamb v. State*, 127 Nev. 26, 37, 251 P.3d 700, 707 (2011) (citation and internal quotation marks omitted). As we have recognized when reviewing district court decisions on challenges to individual prospective jurors for cause and peremptory strikes, "[t]he trial court is better able to view a prospective juror's demeanor than a subsequent reviewing court." *Leonard v. State*, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001). Therefore, we conclude abuse of discretion is the appropriate standard here. "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." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

The district court was within its discretion to provide a curative admonition rather than disqualify the venire

The United States and Nevada Constitutions guarantee the right to a trial by jury. U.S. Const. amend. VI; Nev. Const. art. 1, § 3. To effectuate the right to a jury trial, defendants must "have 'a panel of impartial, "indifferent" jurors.'" *Bishop v. State*, 92 Nev. 510, 515, 554 P.2d 266, 269 (1976) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)). Central to determining whether an impartial juror has been seated is "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Blake v. State*, 121 Nev. 779, 795, 121 P.3d 567, 577 (2005) (quoting *Irvin*, 366 U.S. at 723). The right to an impartial jury is violated when empaneled jurors are unfair or biased. *Id.* at 796, 121 P.3d at 578. When a jury is exposed to potentially prejudicial information, we have required the appellant to prove that the exposure "was so prejudicial as to be unsusceptible to neutralizing by an admonition to the jury." *Geiger v. State*, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996) (quoting *Allen v. State*, 99 Nev. 485, 490, 665 P.2d 238, 241

(1983)), *overruled on other grounds by Barber v. State*, 131 Nev. 1065, 363 P.3d 459 (2015).

In *Geiger*, the defendant was charged as a habitual offender, and the pertinent statute required that the defendant's prior convictions be listed in the charging document but prohibited their use at trial. *Id.* at 941 n.3, 920 P.2d at 995 n.3. After the jury was empaneled,[2] but before opening statements, the court clerk read the charging document, including improper references to the prior offenses. *Id.* at 941-42, 920 P.2d at 995. Geiger moved for a mistrial, claiming the impermissible reference prejudiced the jury against him. *Id.* at 940, 920 P.2d at 994-95. The district court denied the motion but admonished the jury that it was not to consider the document as read by the clerk. *Id.* at 940, 920 P.2d at 995. On review, this court concluded that the district court was within its discretion to provide a curative instruction rather than grant a mistrial motion. *Id.* at 942, 920 P.2d at 996.

Geiger determined that some potentially prejudicial references are susceptible to curative admonitions, while others are not. *Geiger* adopted a four-factor test to determine whether an improper reference to a prior bad act was curable: "(1) whether the remark was solicited by the prosecution; (2) whether the district court immediately admonished the jury; (3) whether the statement was clearly and enduringly prejudicial; and (4) whether the evidence of guilt was convincing." *Id.* at 942, 920 P.2d at 995-96. The court concluded that the curative admonition sufficed where the prosecution did not solicit the statement, the judge immediately and thoroughly admonished the jury, the statement was merely a single reference at the start of a two-day trial, and the other evidence of guilt was convincing. *Id.* at 942, 920 P.2d at 996.

We apply *Geiger* to assess whether an admonition may cure prejudicial information improperly presented to a venire. Although *Geiger* involved prejudicial information that was disclosed to an empaneled jury rather than a venire, the nature of the information and the underlying concerns are similar. In both cases, the information involved other uncharged acts that could prejudice the jury. The information in both cases also came from a nonparty who was not a witness—the court clerk in *Geiger* and a prospective juror in this case. Therefore, we consider *Geiger*'s framework to be appropriate here.

Our analysis of the four *Geiger* factors as to the denial of Mariscal-Ochoa's motion yields a similar result to *Geiger*. First, the prosecution did not solicit J.M.'s statements. Rather, J.M. was responding to the court, and the State interrupted the court's

[2]Although the motions in these cases are different, we review a district court's actions on a mistrial motion for abuse of discretion. *Randolph v. State*, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001). Thus, our standard of review in both cases is the same.

questions to avoid further prejudice. This factor supports allowing for a curative admonition.

Second, although the admonition came later than in *Geiger*, the district court admonished the venire when requested by Mariscal-Ochoa. *Cf. LaChance v. State*, 130 Nev. 263, 276, 321 P.3d 919, 928 (2014) (stating that "a defendant will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit" (internal quotation marks omitted)). After the recess following the denial of Mariscal-Ochoa's motion for a mistrial, the district court indicated that it was ready to provide the curative admonition when the venire returned, but the court delayed doing so at Mariscal-Ochoa's request. After the district court asked further questions of prospective jurors, Mariscal-Ochoa requested the instruction, and the court promptly provided it. District courts may have a sua sponte duty to act with more alacrity when a prospective juror makes a clearly prejudicial statement requiring immediate attention. Given the unclear nature of J.M.'s statement, however, it was permissible for the district court to honor Mariscal-Ochoa's request to delay the curative admonition. Thus, the second factor as to whether a curative admonition was timely is neutral.

Third, J.M.'s statement was not clearly and enduringly prejudicial. Similar to *Geiger*, J.M.'s statement occurred on the first day of voir dire in a multiday trial. Each empaneled juror committed to being neutral and fair to Mariscal-Ochoa, even after J.M. made her statements. J.M.'s comments also appeared to the district court to be "hazy" and equivocal, and J.M. did not state that she knew Mariscal-Ochoa, only that she thought she *might* have known him. The court noted that J.M. spoke quietly and indicated a language barrier in her jury questionnaire. Further, it is not clear what J.M. alleged Mariscal-Ochoa did. The district court also noted that no other prospective juror visibly reacted to J.M.'s statements.

Moreover, Mariscal-Ochoa has not shown enduring prejudice through examining the other prospective jurors. Mariscal-Ochoa did not question the other prospective jurors about J.M.'s comments, and he did not attempt to determine whether J.M.'s statements had a prejudicial effect on the other venirepersons. Only the district court made a record of its observations, noting that the other venirepersons did not seem affected by J.M.'s statements. Further, Mariscal-Ochoa did not question J.M. outside the presence of the venire to determine the veracity of her story and whether she actually knew Mariscal-Ochoa. He instead moved to strike her for cause without any further fact-gathering for the record. Under these circumstances, we cannot assume that the jury was prejudiced by J.M.'s single vague statement. Thus, factor three of the *Geiger* analysis—whether the statement was clearly and enduringly prejudicial—strongly supports the sufficiency of a curative admonition.

Fourth, notwithstanding J.M.'s comment, the evidence of Mariscal-Ochoa's guilt based on L.N.C.'s testimony is sufficient to secure Mariscal-Ochoa's conviction. As discussed below, the State presented sufficient evidence at trial for a reasonable jury to convict Mariscal-Ochoa of the charged offenses. Thus, factor four of the *Geiger* analysis also supports the sufficiency of a curative admonition.

Under our analysis of the *Geiger* factors, we conclude that J.M.'s statements were not so prejudicial that they could not be cured by an admonition. Thus, we conclude the district court did not abuse its discretion by choosing to provide a curative admonition rather than dismissing the venire.

Finally, Mariscal-Ochoa challenges the efficacy of the provided admonition. We agree that to the extent the admonition was intended to ameliorate prejudice from J.M.'s statements, it should have explicitly referred to J.M.'s statements. Nonetheless, Mariscal-Ochoa failed to object at the time the admonition was given, and the admonition otherwise correctly states the law. Mariscal-Ochoa also fails to establish how the admonition prejudiced him. Therefore, we decline to consider the admonition's actual effectiveness in this case.

Mariscal-Ochoa was not entitled to a lesser-included-offense jury instruction and his convictions for sexual assault and lewdness are not redundant

Mariscal-Ochoa asserts two arguments regarding the interplay between his sexual assault and lewdness convictions. He argues first that the jury should have been instructed that lewdness with a minor was a lesser-included offense of sexual assault of a minor. He next claims that, because sexual assault of a minor and lewdness with a minor are mutually exclusive, his two convictions are redundant because they are based on a single act. Mariscal-Ochoa did not raise these arguments below, so we review for plain error. *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018).

First, we have previously held that "it is clear that lewdness with a child under the age of fourteen cannot be deemed an included offense of the crime of sexual assault. The express language of the lewdness statute precludes this." *Townsend v. State*, 103 Nev. 113, 120, 734 P.2d 705, 710 (1987). Mariscal-Ochoa fails to address *Townsend* and thus fails to show any error.

Second, we are similarly unconvinced by Mariscal-Ochoa's redundancy argument. Mariscal-Ochoa's convictions are not redundant. "The crimes of sexual assault and lewdness are mutually exclusive and convictions for both based upon a single act cannot stand." *Braunstein v. State*, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002). To support separate convictions for lewdness and sexual assault, the defendant must have committed separate acts with at least some interruption in activity. *Crowley v. State*, 120 Nev. 30, 34, 83 P.3d 282, 285-86 (2004). In this case, the State charged Mariscal-Ochoa with sexual assault and lewdness related to incidents that took place on different dates. L.N.C. testified that the two incidents for which Mariscal-Ochoa was convicted occurred on different dates. Therefore, we conclude Mariscal-Ochoa's convictions for sexual assault and lewdness are not redundant.

Sufficient evidence supports Mariscal-Ochoa's convictions

Mariscal-Ochoa argues that the State presented insufficient evidence to sustain his convictions, asserting that it "makes no sense" for the jury to convict him of some counts but not others based on L.N.C.'s testimony. In essence, Mariscal-Ochoa argues the jury cannot have partially believed L.N.C.'s testimony. We disagree.

In reviewing the sufficiency of the evidence, this court must decide "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Because sex crimes often rely solely on victim testimony, this court has concluded that so long as the victim testifies "with *some* particularity regarding the incident," the victim's testimony alone can support a sexual assault charge. *LaPierre v. State*, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992).

L.N.C. provided a detailed account of the incidents that resulted in Mariscal-Ochoa's two convictions. She recounted in detail what Mariscal-Ochoa did to her and other relevant details that a 9-year-old would likely remember. She testified that Mariscal-Ochoa did not actually penetrate her on three of the four events. Therefore, a rational jury could convict Mariscal-Ochoa of one incident constituting sexual assault involving penetration and lewdness for another incident where penetration did not occur, while acquitting on the other sexual assault charges based on L.N.C.'s testimony. It is not our role to invade the province of the jury to evaluate witness credibility. Accordingly, we conclude that sufficient evidence supports Mariscal-Ochoa's convictions.

The prosecution did not commit misconduct during its closing argument

Mariscal-Ochoa alleges that the prosecution committed misconduct during its closing argument by vouching for L.N.C.'s testimony and by calling Mariscal-Ochoa a liar.

When a defendant alleges prosecutorial misconduct, we determine first "whether the prosecutor's conduct was improper" and second, if so, whether the conduct warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Because we conclude that the prosecutor's conduct here was proper, we do not reach the second step of the analysis.

The prosecutor did not vouch for L.N.C. "[V]ouching occurs when the prosecution places the prestige of the government behind the witness by providing personal assurances of [the] witness's veracity." *Browning v. State*, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (second alteration in original) (internal quotation marks omitted). Here, the prosecutor argued that "[L.N.C.]'s statements have always been consistent" regarding an element of the sexual assault count. This explanation does not amount to vouching, as the prosecutor did not make an assurance of L.N.C.'s truthfulness. *See id.* (allowing a prosecutor to comment that a witness's testimony supported a conviction). We conclude that the prosecutor did not commit misconduct in this regard.

Nor did the prosecutor's comments about Mariscal-Ochoa's testimony amount to misconduct. It is generally improper for a prosecutor to characterize a witness as a liar. *Witherow v. State*, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988). In closing arguments, the prosecutor stated the following:

> The statements of the defendant are not to be believed. The defendant doesn't want to be found guilty and he has some bias, certainly. If the jury believes that any witness has willfully sworn falsely, they may disregard the whole of the evidence of any such witness. The defendant stood up here and said, I didn't do it. I didn't sexually assault [L.N.C.]. You have to view that in the context of his other statement that he didn't go back to the house on December 11th, 2019.
>
> Ladies and gentlemen, when he says he didn't go back to the house, the evidence proves otherwise. He willfully swore falsely on this witness stand. His statements that he didn't do it should be disregarded.

Though calling a witness a liar is generally inappropriate, "when a case involves numerous material witnesses and the outcome depends on which witnesses are telling the truth, reasonable latitude should be given to the prosecutor to argue the credibility of the witness—even if this means occasionally stating in argument that a witness is lying." *Rowland v. State*, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). This case turned on the competing testimony of L.N.C. and Mariscal-Ochoa. The prosecutor could permissibly argue that Mariscal-Ochoa's testimony was not credible based on the other evidence in the case. *See Ross v. State*, 106 Nev. 924, 927, 803 P.2d

1104, 1106 (1990). Thus, we conclude that the prosecution did not commit misconduct by so arguing.

Nevada's sentencing statute for sexual assault is constitutional

Mariscal-Ochoa argues that NRS 200.366(3)(c), which mandates a sentence of 35 years to life, violates the Eighth Amendment of the United States Constitution and the separation of powers provision of the Nevada Constitution by depriving the judiciary of discretion at sentencing. We disagree.

Because the sentence under NRS 200.366(3)(c) is mandatory, the district court lacks the discretion ordinarily exercised in sentencing.[3] We review the constitutionality of a statute de novo. *Collins v. State*, 125 Nev. 60, 62, 203 P.3d 90, 91 (2009). "Statutes are presumed to be valid," and a "challenger must make a clear showing of invalidity." *Id.* (internal quotation marks omitted). Both the United States and Nevada Constitutions prohibit cruel or unusual punishment. *See* U.S. Const. amend. VIII; Nev. Const. art. 1, § 6. "A sentence does not constitute cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience." *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).

Mariscal-Ochoa argues that NRS 200.366(3)(c) is unconstitutional because it imposes higher penalties than any comparable statute in the nation and is excessive and extreme because it does not facilitate rehabilitation. Even if Mariscal-Ochoa were correct in asserting that Nevada's sentence for sexual assault of a child under 14 years of age was disproportionately severe relative to other states, a higher sentence for a crime in one state relative to other states does not render a sentencing statute unconstitutional. Rather, divergence in sentences among states "is the inevitable, and often beneficial, result of the federal structure." *People v. Cooper*, 51 Cal. Rptr. 2d 106, 110 (Ct. App. 1996); *see also Rummel v. Estelle*, 445 U.S. 263, 282 (1980) ("Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."). We conclude that the existence of distinctions in sentences between states does not overcome the presumption of validity.

Further, Mariscal-Ochoa does not show that his punishment is so disproportionate as to shock the conscience. "[A] punishment is excessive and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and

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[3]Here, the only discretion available in sentencing was whether to impose the sentences consecutively or concurrently. The district court chose to impose the sentences consecutively, and we conclude that decision was not an abuse of discretion.

suffering; or (2) is grossly out of proportion to the severity of the crime." *Pickard v. State*, 94 Nev. 681, 684, 585 P.2d 1342, 1344 (1978) (internal quotation marks omitted). We have recognized that the term of imprisonment imposed by NRS 200.366(3)(c) serves a valid retributive purpose. *Griego v. State*, 111 Nev. 444, 447, 893 P.2d 995, 997 (1995), *abrogated on other grounds by Koerschner v. State*, 116 Nev. 1111, 13 P.3d 451 (2000). NRS 200.366(3)(c) serves other valid goals of punishment as well, and we conclude the punishment is not grossly out of proportion to the severity of the crime. *Cf. Alfaro v. State*, 139 Nev. 216, 230, 534 P.3d 138, 152 (2023) (concluding that an aggregate sentence of 275 years for multiple convictions of sexual assault against and lewdness with a child under 14 years of age was not unreasonably disproportionate to the crimes where each count was sentenced within its statutory range). Sexual assault of a child is undoubtedly a serious crime, and the Legislature has the power to require a harsh punishment. Therefore, we conclude that Mariscal-Ochoa's sentence was not unconstitutionally cruel or unusual.

Mariscal-Ochoa also urges us to invalidate the Legislature's mandatory sentencing scheme, citing *United States v. Booker*, 543 U.S. 220 (2005), and advancing several policy and interest-of-justice rationales. In *Mendoza-Lobos v. State*, we expressly upheld such a mandatory scheme, holding that "it is within the Legislature's power to completely remove any judicial discretion to determine a criminal penalty by creating mandatory sentencing schemes." 125 Nev. 634, 640, 218 P.3d 501, 505 (2009). Mariscal-Ochoa acknowledges this legal precedent but argues that "[t]his sentencing scheme needs an overhaul." We decline to overturn *Mendoza-Lobos*. First, Mariscal-Ochoa's reliance on *Booker* is misplaced, as *Booker* concerned a sentencing judge's application of federal sentencing guidelines. *See Booker*, 543 U.S. at 244 ("Any fact . . . necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."). Mariscal-Ochoa next urges us to disregard this court's legal precedent on separation-of-powers grounds. We construed the division of constitutional powers between the branches of state government in *Mendoza-Lobos*, however, and upheld mandatory sentences as consonant with that distribution. 125 Nev. at 640, 218 P.3d at 505. The separation of powers does not provide a justification for deviating from *Mendoza-Lobos*. Moreover, to the extent that Mariscal-Ochoa relies on sociological studies to suggest that long sentences fail to deter crime or rehabilitate convicted persons, those are policy arguments to be made before the Legislature and not valid grounds to invalidate precedent. Mariscal-Ochoa therefore fails to present a compelling argument for overturning *Mendoza-Lobos*. *See*

Armenta-Carpio v. State, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) ("[U]nder the doctrine of *stare decisis*, we will not overturn [precedent] absent compelling reasons for so doing." (internal quotation marks omitted)). Accordingly, Mariscal-Ochoa has not shown that relief is warranted in this regard.[4]

CONCLUSION

Decisions regarding voir dire generally, and regarding motions to strike the entire venire specifically, are within the district court's discretion. The district court acted within its discretion here when it denied Mariscal-Ochoa's motion for a mistrial, construed as a motion to strike the entire venire, based on a prospective juror's statements because those statements were not so prejudicial as to be unsusceptible to a curative admonition under the factors in *State v. Geiger*. Mariscal-Ochoa's counsel failed to develop the record during voir dire to show any clear and enduring prejudicial effect J.M.'s statements had on the rest of the venire, and we cannot infer or assume prejudicial effect from a single "hazy" statement and an otherwise silent record. Accordingly, we affirm the judgment of conviction.

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

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[4]Mariscal-Ochoa argues that he received ineffective assistance of counsel. We decline to consider this claim. *Archanian v. State*, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-21 (2006) ("This court has repeatedly declined to consider ineffective-assistance-of-counsel claims on direct appeal unless the district court has held an evidentiary hearing on the matter or an evidentiary hearing would be needless."). Additionally, Mariscal-Ochoa argues cumulative error warrants reversal. Because we find no errors to cumulate, we reject this argument. *See Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006) (rejecting appellant's argument of cumulative error where the "errors were insignificant or nonexistent").

DEUTSCHE BANK TRUST COMPANY AMERICAS AS TRUSTEE RALI 2006QA5, Appellant, *v.* SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company, Respondent.

No. 85073

June 27, 2024 551 P.3d 837

Appeal from a district court summary judgment in an action to quiet title. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Reversed and remanded.

[Rehearing denied August 12, 2024]

Wright, Finlay & Zak, LLP, and *Darren T. Brenner*, *Christina V. Miller*, and *Stephanie A. Garabedian*, Las Vegas, for Appellant.

Hanks Law Group and *Karen L. Hanks* and *Chantel M. Schimming*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Bell, J.:

This appeal involves a dispute between the first deed of trust holder and the purchaser of a property at a homeowners' association (HOA) lien foreclosure sale. The issue presented requires us to examine the parameters of *9352 Cranesbill Trust v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 76, 459 P.3d 227, 228 (2020). *Cranesbill* provided for allocation of a defaulting homeowner's partial payments to an HOA superpriority lien. Under *Cranesbill*, a court must look at any allocation by the homeowner at the time of payment, application of the payment by the HOA prior to any dispute about allocation, and the equities involved. We now make clear that absent express direction of the homeowner to the contrary, the HOA may not apply a payment in a way that jeopardizes the first deed of trust holder's interest and deprives the homeowner of the security on the homeowner's mortgage. Additionally, principles of justice and equity presume a superpriority lien is satisfied first, unless the court has a compelling reason to conclude otherwise.

Here, the district court concluded under *Cranesbill* that the homeowner's partial payments failed to satisfy the superpriority lien, meaning that the subsequent HOA foreclosure extinguished the first deed of trust. We disagree. Therefore, we reverse the district court.

FACTS AND PROCEDURAL HISTORY

In 2006, Anthony Swaggerty missed several monthly HOA dues payments for his home in Las Vegas. The dues were $90 per month in 2006 and increased to $91 per month in 2007. Swaggerty's arrears quickly ballooned due to collection costs, late fees, interest, and other charges. By March 2007, when the HOA's foreclosure agent and trustee Nevada Association Services (NAS) filed a notice of lien, the superpriority portion of the HOA's lien totaled $523.

In June 2008, Swaggerty declared Chapter 13 bankruptcy and set up a plan to pay off debts, including the HOA debt. The next month, Swaggerty paid $91 directly to the HOA. The bankruptcy reorganization plan ultimately failed.

In May 2009, Swaggerty sent a request for a payment plan through NAS to settle the HOA debt. Along with the request for a payment plan, Swaggerty sent a $500 payment. NAS charged $150 to set up the payment plan, which Swaggerty agreed to at the time. In an August 2009 correspondence, Swaggerty characterized the payment, minus the setup fee, as a "down payment" on his arrears. Of the $500, NAS kept $125, sent $125 to a title company, sent $125 to a posting company, and forwarded $125 to the HOA.

NAS responded to the request for a payment plan in June. The proposed plan provided that payments would first cover current monthly HOA dues and stated, "[y]our association may apply your payments to assessments, penalties, if any, fines, if any, late fees, interest, collection costs and other charges." Apparently, Swaggerty never signed the plan; however, the next month, he sent another $500 to NAS. NAS allocated the payment in the same manner, forwarding $125 to the HOA.

In May 2011, Swaggerty, NAS, and the HOA entered into a new payment agreement. Under the new plan, Swaggerty agreed to make monthly payments to the HOA, with current dues paid first and the rest going to NAS to pay collection costs. The HOA agreed that it would attempt to foreclose only if Swaggerty breached the agreement, and the HOA agreed to waive some of the collection costs, fines, penalties, and interest if Swaggerty remained in compliance. Over the next two years, Swaggerty remained in compliance with the plan. During that time, $220 was applied towards the delinquent HOA dues. The parties agree that the $220 from these payments would apply to the superpriority portion of the HOA's lien.

Although Swaggerty never breached the May 2011 agreement, the HOA decided to pursue foreclosure on the home in July 2013. When NAS declined to move forward with foreclosure, citing Swaggerty's compliance with the payment plan, the HOA substituted Alessi & Koenig, LLC (A&K), as trustee. A&K then foreclosed on the property. In July 2014, Respondent SFR Investments Pool 1, LLC, purchased the property at the foreclosure sale for $56,000. At the time, the home was worth approximately $441,000.

Appellant Deutsche Bank Trust Company Americas as Trustee Rali 2006QA5, the holder of the first deed of trust on the property, brought a quiet title action against SFR and the HOA. Deutsche Bank principally asserted that the homeowner's partial payments had satisfied the superpriority portion of the HOA lien so that the HOA foreclosure did not extinguish the first deed of trust. Deutsche Bank alternatively asserted the foreclosure should be set aside because the HOA had engaged in fraud, unfairness, and oppression. Both Deutsche Bank and SFR sought summary judgment.

Initially, the district court granted summary judgment in favor of Deutsche Bank, finding Swaggerty's pre-foreclosure payments satisfied the superpriority lien and concluding SFR took the property subject to Deutsche Bank's deed of trust. SFR appealed to this court. On appeal, we vacated and remanded with instructions for the district court to consider the analysis in the then recently decided case *9352 Cranesbill Trust v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 459 P.3d 227 (2020). *SFR Invs. Pool 1, LLC v. Deutsche Bank Tr. Co. Americas as Trustee Rali 2006QA5*, No. 78335, 2021 WL 931238 (Nev. Mar. 10, 2021) (Order Vacating Judgment and Remanding).

On remand, both Deutsche Bank and SFR filed supplemental briefs concerning the application of *Cranesbill* and contesting the allocations of the payments. For purposes of the district court's analysis, the parties stipulated that the superpriority amount at issue was $523 and stipulated to the documentary record. But the parties disagreed as to how Swaggerty and the HOA intended the payments to be allocated. After argument, the district court applied *Cranesbill* and concluded that $0 of the $91 in July 2008, $34 of the $500 from May 2009, $34 of the $500 from July 2009, and $220 from payments under the May 2011 payment agreement applied to the superpriority portion of the lien. The district court ruled in favor of SFR, concluding that $235 of the superpriority lien remained unsatisfied, so the HOA foreclosure extinguished Deutsche Bank's deed of trust.

The parties disagree on the underlying nature of the judgment. The district court order is entitled "Findings of Fact, Conclusions of Law and Judgment." The order does not specify whether the court was ruling on summary judgment or entering a judgment following a bench trial. Despite ruling in SFR's favor, the district court declined to consider Deutsche Bank's alternative grounds for relief on the fraud, unfairness, and oppression of the foreclosure. Deutsche Bank now appeals.

DISCUSSION

Deutsche Bank challenges the district court's conclusion that the homeowner's partial payments failed to satisfy the HOA superpriority lien under *Cranesbill*. *Cranesbill* requires a court to look for direction from the homeowner allocating a payment at the time payment was made. 136 Nev. at 80, 459 P.3d at 231. Without any direction from the homeowner, a court must determine if the HOA clearly allocated the payment prior to any dispute regarding allocation. Absent allocations by the homeowner or HOA, the court must turn to principles of justice and equity to determine how to allocate the payment. *Id.* We now hold that, unless expressly authorized by the homeowner, the HOA may not allocate a payment in a way that results in a forfeiture of the first deed of trust holder's interest and deprives the homeowner of the security in the home. Such allocations are invalid, and a court may not consider them in conducting its analysis.

We review the case de novo

As a preliminary matter, it is difficult to ascertain whether the district court resolved this matter on summary judgment or as a bench trial, and the parties do not agree on this point. Our standard of review typically changes depending upon whether we review a granted motion for summary judgment or the judgment following a bench trial. We review grants of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). After a bench trial, the district court's legal conclusions are still reviewed de novo, but factual findings will not be disturbed unless they are unsupported by substantial evidence or are clearly erroneous. *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018).

In our view, the case is still in the posture of summary judgment and should be reviewed de novo. This court originally vacated and remanded the case after a grant of summary judgment to Deutsche Bank. The district court never found in its rulings or on the record that a genuine dispute of material fact existed such that a trial was necessary. *See Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 291 n.2, 662 P.2d 610, 614 n.2 (1983) (suggesting that the district court should determine whether a genuine issue of material facts exists before proceeding to trial where there are cross-motions for summary judgment). The parties agreed during oral argument before this court that no material facts were in dispute when considering the *Cranesbill* analysis, suggesting the case was resolved at the summary judgment stage below.

While we understand the procedural posture of this case as the district court granting SFR's prior motion for summary judgment following remand from the first appeal, the difference in the standard of review does not alter the outcome of the case. Even under the more deferential standard of review following a bench trial, we would still conclude that the district court erred in ruling for SFR and would reverse.

Cranesbill *provides a test for courts to allocate partial payments to HOA liens*

Nevada law provides that up to nine months of unpaid HOA dues constitutes a superpriority lien on a property, taking priority over other interests, including the first deed of trust, while any other HOA debt remains junior. NRS 116.3116(3)(b). When an HOA forecloses on this superpriority lien, the foreclosure extinguishes all junior liens, including the first deed of trust. *Deutsche Bank Nat'l Tr. Co. v. Fid. Nat'l Title Ins. Co.*, 139 Nev. 431, 439, 536 P.3d 915, 924 (2023). *Cranesbill* examined what happens to the superpriority lien when the HOA receives partial payments from the homeowner.

"The homeowner has the ability to cure a default as to the superpriority portion of an HOA lien." *Cranesbill*, 136 Nev. at 82, 459 P.3d at 232. *Cranesbill* considered the situation of a homeowner who tendered payment sufficient to cover the superpriority portion of the HOA lien but did not satisfy the whole amount of her HOA arrears. *Id.* at 76, 459 P.3d at 228. We held that "[p]roper allocation of partial payments" requires analysis of the intent of the parties "and an assessment of the competing equities involved." *Id.* at 77, 459 P.3d at 229.

Cranesbill stressed that a debtor must have the right to decide what part of the debt a payment satisfies. *Id.* at 80, 459 P.3d at 231. If the debtor fails to allocate payment at the time payment is made, the reviewing court should also consider any allocation by the creditor prior to a disagreement about the allocation. *Id.* Absent a clear allocation, *Cranesbill* requires a court to look to "the basic principles of justice and equity so that a fair result can be achieved." *Id.* (internal quotation marks omitted). Many factors weigh in the equities analysis, including the preference for paying off the earliest matured debts first, the homeowner's presumed preference to pay the superpriority amount to avoid the loss of security in the home, and the homeowner's covenants with the first deed of trust holder. *Id.* at 81 & n.3, 459 P.3d at 231 & n.3. *Cranesbill* focused on achieving a just and equitable outcome for homeowners and HOAs in situations where payments did not fully satisfy arrears.

The HOA may not allocate payments to cause forfeitures for nonpayment on debt

When a homeowner makes partial payments to an HOA, *Cranesbill* instructs courts to follow the direction of the homeowner at the time of payment as to how those payments are allocated. *Id.* at 80, 459 P.3d at 231 ("The debtor must direct that appropriation at the time the payment is made." (internal quotation marks omitted)). Direction from the homeowner controls over any other indications of how a payment should be allocated. *Id.*

If the homeowner provides no direction, courts must consider any allocation by HOAs so long as the allocation is not changed and the allocation occurs prior to any dispute arising. *Id.* ("If the debtor does not direct how to apply the payment to her account, the creditor may determine how to allocate the payment."). We now recognize that within the *Cranesbill* framework an HOA's right to allocate payments is not unlimited. Creditors may not selectively apply payments in a way that causes forfeiture for nonpayment on part of the debt. *See* 28 Richard A. Lord, *Williston on Contracts* § 72:10 (4th ed. 2020) ("[W]here the creditor knows or has reason to know that the nonpayment of one debt . . . will cause a forfeiture, the creditor cannot appropriate a payment to other claims and must, instead, apply the payment to prevent the forfeiture."). A creditor also cannot selectively privilege less secured debts to the disadvantage of more secured debts held by third parties. *Id.* Thus, HOAs may not unilaterally direct partial payments in a manner that causes forfeiture of the bank's interest in the first deed of trust, nor can an HOA unilaterally privilege its own less secured debts (its junior lien) over the more secured debt held by the bank (the first deed of trust).

Similarly, the HOA may not selectively direct payment in a way that leaves the homeowner personally liable for mortgage debt without the collateral of the property. Even when a first deed of trust is extinguished from a property, the former homeowner may remain personally obligated to repay the amount borrowed. *See McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 816, 123 P.3d 748, 750 (2005) (recognizing both foreclosure and personal suit as methods of enforcing rights secured by liens on real estate). The loss of security to satisfy the obligation when the first deed of trust is extinguished represents a forfeiture through nonpayment of a particular part of the debt owed to the HOA. In the absence of express allocation by the debtor, the HOA may not direct payments in a way that preserves the HOA's superpriority lien to the detriment of the homeowner and the bank.

The equities analysis under *Cranesbill* also supports this conclusion. 136 Nev. at 80, 459 P.3d at 231. The equities favor curing the superpriority lien first because homeowners presumptively wish to retain the security to satisfy the first deed of trust on the property. *Id.* at 81 n.3, 459 P.3d at 231 n.3. The homeowner's independent obligations to the first deed of trust holder also warrant consideration under the equities. *Id.* at 81 n.4, 459 P.3d at 231 n.4. Thus, we conclude that the HOA creditor's opportunity to allocate payment may not be used to disadvantage the bank and the homeowner with the risk of forfeiture through nonpayment of a part of the HOA debt.

Applying Cranesbill *to Swaggerty's payments shows that Swaggerty satisfied the superpriority lien*

Deutsche Bank asserts that the superpriority amount here was $523 because the notice of lien was filed in March of 2007 when Swaggerty was not yet nine months in arrears. The district court used the figure of $523 in its analysis, which SFR agreed to "for the sake of argument." The $523 amount appears to be a correct analysis under *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 133 Nev. 21, 25-26, 388 P.3d 226, 231-32 (2017) (concluding that only those monthly dues in arrears at the time the HOA files its notice of lien constitute the superpriority portion of the lien).

The parties agree that Swaggerty paid at least $220 towards the superpriority portion of the lien with his periodic payments starting in May 2011. The pertinent question before us, then, is whether Swaggerty's other three payments—$91 in July 2008, $500 in May 2009, and $500 in July 2009—satisfied the outstanding $303 of the superpriority lien under the *Cranesbill* analysis. We conclude that they did.

An analysis of Swaggerty's first payment shows that the entire payment applies to current monthly dues

Swaggerty made his first contested payment of $91 in July 2008. We agree with the district court's conclusion that none of that payment should be applied to the superpriority lien. Swaggerty paid the HOA without any direction, so the court cannot look to Swaggerty's direction of the payment. *Cranesbill*, 136 Nev. at 80, 459 P.3d at 231. The HOA also made no allocation apparent from the record when it received Swaggerty's payment, so the court cannot consider the HOA's allocation of this payment either. *Id.*

Without direction from the homeowner allocating payment or allocation by the HOA at the time payment was made, we turn to the equities to allocate this payment. The equities presume application of the payment to the superpriority lien first, absent a compelling reason to conclude otherwise. Here, though, there is a compelling reason to conclude that this $91 applied to Swaggerty's current monthly HOA dues, not his superpriority balance. Swaggerty had an approved Chapter 13 bankruptcy plan in place that accounted for all his arrears at the time he made this payment. The bankruptcy plan required Swaggerty to make payments to the bankruptcy trustee in order to receive relief from his debts. Nevertheless, Swaggerty sent an amount exactly equaling one month's current dues directly to the HOA, rather than to the bankruptcy trustee. Under the circumstances of the bankruptcy for this payment, we conclude that the whole of the $91 covered Swaggerty's current dues, and none applied to his superpriority lien.

An analysis of Swaggerty's second payment shows that $150 must be allocated to setting up a payment plan, and the remaining $350 applied to the superpriority lien

Swaggerty made the second contested payment of $500 in May 2009. When Swaggerty made this May 2009 payment, he signed a form to establish a payment plan through NAS to settle his outstanding HOA obligations. That form required a $150 setup charge, payable to NAS, to establish the plan. The debtor's allocations at the time of the payment control. *Cranesbill*, 136 Nev. at 80, 459 P.3d at 231. Consequently, $150 of Swaggerty's payment satisfies the setup charge for the payment plan. Swaggerty made no other allocations at the time of payment.

The record shows NAS retained $375 of Swaggerty's payment for various fees and sent $125 of Swaggerty's payment to the HOA. No record shows how the HOA allocated that $125. The allocation made by the HOA and its agent prioritized the HOA's less secured debt and risked forfeiture of the bank's and Swaggerty's interests through nonpayment. The creditor may neither prioritize the less secured portion of their debt over the more secured bank debt nor allocate payment in a way that interferes with the homeowner's obligation to the first deed of trust holder to protect the security interest in the home. *See* 28 *Williston on Contracts*, *supra*, at § 72:10 (stating that, as a general rule, creditors "may be precluded from applying payments made as they choose, even though the debtor has not directed the application of the payment"). By diverting three-quarters of Swaggerty's payment to this less-secured portion of the debt first, the HOA risked forfeiture of the bank's and Swaggerty's interests in the home through nonpayment of the superpriority lien, which they may not do. Thus, these allocations by the HOA are invalid, and we do not consider them.

Without direction from the homeowner or valid allocations from the HOA as to the remaining $350, the court turns to the equities to allocate the payment. The equities support a presumption that payments should be allocated to the superpriority portion first. The court assumes, absent direction to the contrary, that a homeowner would prefer to avoid the loss of security to satisfy the homeowner's obligations to the first deed of trust holder. *Cranesbill*, 136 Nev. at 81 n.3, 459 P.3d at 231 n.3. The homeowner is also usually obligated by agreement with the first deed of trust holder to protect the first deed of trust, a factor favoring allocation of payments to the superpriority portion of the amount due. *Id.* at 81 n.4, 459 P.3d at 231 n.4. Finally, the long-standing principle of paying the oldest debt first generally supports applying payments to the superpriority portion of an HOA lien, as typically the superpriority piece will constitute the oldest debt. *See Foster v. Marshman*, 96 Nev. 475, 479, 611 P.2d 197, 200 (1980).

Here, all these considerations weigh toward applying the remaining $350 to Swaggerty's superpriority lien. Swaggerty would, assumably, wish to avoid the loss of security in the home. The mortgage covenants obligated Swaggerty to preserve the first deed of trust, and the superpriority lien amount was debt accrued during the very beginning of Swaggerty's financial troubles. Further, in an email to the HOA a few months after the first $500 payment, Swaggerty called the $350 a "down payment" on the arrears. This communication does not represent an allocation at the time of payment but provides further support of application of the remainder of Swaggerty's payment to the superpriority lien amount.

The district court determined that only $34 of the $500 payment applied to the superpriority lien. That court's determination was based on a clearly erroneous conclusion that "this payment was made as part of a requested payment plan." Although Swaggerty agreed to a start-up charge and requested that a plan be set up in May 2009, no payment plan with agreed-to payment allocation terms existed when Swaggerty made the payment in question. With no allocation by the debtor at the time of payment, $350 of the payment should have been allocated to the superpriority lien based on the equities.

The May 2009 payment and the stipulated payments satisfy the superpriority lien

When the $350 from the May 2009 payment is added to the agreed upon $220 from later payments, the amount exceeds the outstanding $523 superpriority lien. Therefore, we need not consider Swaggerty's last contested payment from July 2009. Because Swaggerty's partial payments satisfied the superpriority lien, the HOA's foreclosure on the remaining junior lien did not extinguish Deutsche Bank's deed of trust. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 748, 334 P.3d 408, 412-13 (2014) (concluding that only a foreclosure on the superpriority portion can extinguish the first deed of trust), *superseded by statute on other grounds as stated in Saticoy Bay LLC 9050 W Warm Springs 2079 v. Nev. Ass'n Servs.*, 135 Nev. 180, 444 P.3d 428 (2019). SFR therefore took the property subject to Deutsche Bank's deed of trust. *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 610, 427 P.3d 113, 120 (2018).

SFR summarily argues that, notwithstanding *Cranesbill*, it should be protected as a bona fide purchaser for value under NRS 111.180(1). This court has previously rejected this argument because tender of payment renders a sale void as to the superpriority portion of the lien. *Id.* at 612, 427 P.3d at 121 ("A party's status as a [bona fide purchaser] is irrelevant when a defect in the foreclosure proceeding renders the sale void."). SFR makes no attempt to distinguish our caselaw here, and we decline to reconsider this conclusion now.

Because we conclude that SFR took the property subject to Deutsche Bank's first deed of trust, we need not reach Deutsche Bank's alternative argument that the district court erred by failing to consider Deutsche Bank's assertion of fraud, unfairness, or oppression.

CONCLUSION

Courts applying *Cranesbill* must look first for direction of the homeowner allocating payment at the time payment was made. Then, if the homeowner fails to provide direction, a court must determine if the HOA allocated the payment prior to the dispute over the allocation. The HOA may not, without express direction from the homeowner, allocate the payment so as to forfeit the first deed of trust holder's interest and deprive the homeowner of the security in the home. If allocation by neither the homeowner nor the HOA resolves the question, the court considers principles of justice and equity, which presume that the superpriority lien is paid first, unless the court has a compelling reason to conclude otherwise.

Here, under *Cranesbill*, the homeowner's partial payments to the HOA satisfied the HOA's superpriority lien, so the foreclosure did not extinguish Deutsche Bank's first deed of trust. SFR took possession of the property subject to the deed of trust. Accordingly, we reverse the judgment of the district court and remand for entry of judgment for Deutsche Bank consistent with this opinion.

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

THE REDEVELOPMENT AGENCY OF THE CITY OF SPARKS, Appellant, *v.* NEVADA LABOR COMMISSIONER, a Nevada Administrative Agency; and LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 169, an Unincorporated Association, Respondents.

No. 85630

June 27, 2024 551 P.3d 303

Appeal from a district court order denying a petition for judicial review of a Labor Commissioner decision. First Judicial District Court, Carson City; William A. Maddox, Sr. Judge.

Reversed and remanded with instructions.

Wesley K. Duncan, City Attorney, and *Brandon C. Sendall*, Senior Assistant City Attorney, Sparks, for Appellant.

Aaron D. Ford, Attorney General, and *Andrea Nichols*, Senior Deputy Attorney General, Carson City, for Respondent Nevada Labor Commissioner.

Michael E. Langton, Reno, for Respondent Laborers' International Union of North America, Local 169.

Before the Supreme Court, Cadish, C.J., and Pickering and Bell, JJ.

OPINION

By the Court, Pickering, J.:

Under Nevada's Community Redevelopment Law, if a redevelopment agency transfers property to a developer for less than its fair market value, NRS 279.500(2)(a), or provides financial incentives to a developer worth more than $100,000, NRS 279.500(2)(c), then the agency's agreement with the developer must include a clause requiring payment of prevailing wages. In this case, the Labor Commissioner considered a transaction where a redevelopment agency transferred property to the developer of an apartment project in exchange for the developer agreeing to a deed restriction obligating it to maintain free public parking on the property for the next 50 years. The parties structured the transaction this way because, while the developer preferred a cash-for-property exchange, the agency could not afford to lose public parking in the downtown redevelopment area. Appraisers valued the property and the 50-year public parking obligation as an equivalent exchange, and the Labor Commissioner made no finding that the agency transferred the property for less than its fair market value. Although NRS 279.500(2)(a) did not apply, the Labor Commissioner nonetheless determined that, because the redevelopment agency received "future compensation" as opposed to cash for the property, it provided the developer a "financial incentive" worth more than $100,000, so NRS 279.500(2)(c) applied. On this basis, the Labor Commissioner assessed a penalty against the redevelopment agency for not requiring the developer to pay prevailing wages on the project.

The question before us is whether the Labor Commissioner's decision squares with the plain language of NRS 279.500(2). We hold that it does not. The statute does not reference "future compensation," much less equate its receipt with a redevelopment agency giving a developer "financial incentives [worth] more than $100,000." NRS 279.500(2)(c). Without a finding that the present value of the parking obligation was less than the fair market value of the property, *see* NRS 279.500(2)(a), or evidence of a financial incentive worth more than $100,000, *see* NRS 279.500(2)(c), the penalty against the redevelopment agency cannot stand. We therefore reverse and remand to the district court with instructions to grant the petition for judicial review.

I.

A.

The City of Sparks and the Sparks Redevelopment Agency (RDA) agreed to convey city-owned property with an aging four-story public parking garage on it to a developer. The developer wanted to renovate the garage and construct high-density apartments on the property. Originally, the developer proposed paying cash for the property equal to its fair market value. But the City and the RDA did not want to lose public parking in the downtown redevelopment area, so they rejected the proposal. Eventually, the parties arrived at an alternative proposal—the developer would at its sole cost provide and maintain free public parking on the first floor of the garage for at least 50 years in exchange for the property.

This transaction implicated NRS Chapter 279, which contains statutes pertaining to community redevelopment agencies like the Sparks RDA. NRS 279.500 provides that the prevailing-wage provisions in NRS 338.013 to 338.090 apply to certain redevelopment projects. Pertinent here, NRS 279.500(2) states that if a redevelopment agency "(a) [p]rovides property for development at less than the fair market value of the property; . . . or (c) [p]rovides financial incentives to a developer with a value of more than $100,000," the agency must, "regardless of whether the project is publicly or privately owned, . . . provide in . . . the agreement with the developer . . . that the development project is subject to the [prevailing-wage] provisions of NRS 338.013 to 338.090."

Before agreeing on terms, the RDA and the City commissioned a professional appraisal of the property. The RDA sought to establish the property's fair market value, so it would know whether it needed to require the developer to pay prevailing wages on the project under NRS 279.500(2). A certified Member of the Appraisal Institute (MAI) appraiser priced the property at a fair market value of $950,000. That appraiser also undertook to determine the value of the obligation to provide free public parking on the first floor of the garage. He estimated that the ground floor would accommodate 100 parking spaces, with a rental value of approximately $60,000 per year. A second MAI appraiser reviewed the first appraiser's work and agreed with it. After review, the RDA determined that the first floor of the parking garage would support 90 parking spaces, with some additional motorcycle parking, yielding a value of $54,000 per year. Using a three-percent discount rate, the present value of the $54,000 annual benefit of the parking spaces over 50 years was $1.4 million—or $980,000 using a five-percent discount rate—more than the property's fair market value of $950,000.

The RDA and the developer entered into a Disposition and Development Agreement (DDA). Based on the appraisals, the RDA concluded that the value of the public parking covenant equaled or exceeded the property's fair market value. Because this took the transaction outside NRS 279.500(2), the DDA included a clause stating that the developer did not have to pay prevailing wages on the project. In the DDA, the developer agreed to a deed restriction obligating it or its successor to provide 90-100 free public parking spaces on the ground floor of the parking garage at their sole expense for a period of 50 years. After two publicly noticed meetings, the Sparks City Council and the RDA approved the DDA.

B.

When work began on the project, the developer did not pay prevailing wages. This prompted respondent Laborers' International Union of North America, Local 169 to file a complaint against the RDA with the Office of the Labor Commissioner. The complaint alleged that the RDA violated NRS 279.500(2)(a) when it sold the property for less than its fair market value without requiring the developer to pay prevailing wages for work on the project. In its prehearing statement but without amending its complaint, Local 169 expanded its claims to allege that, by conveying the property to the developer for less than its fair market value, the RDA not only triggered NRS 279.500(2)(a) but also provided a financial incentive worth more than $100,000, triggering NRS 279.500(2)(c) as well.

The Labor Commissioner conducted an evidentiary hearing on Local 169's complaint. At the hearing, the appraisers' reports were admitted without objection and a representative from the City of Sparks and Local 169 each testified. Local 169 presented no expert appraisal evidence of its own. The Sparks representative testified to the negotiations that led to the DDA, including that the developer proposed to pay cash and it was the RDA that initiated the public parking trade.

The Labor Commissioner resolved the case by written decision. As amended on reconsideration, the decision acknowledges that the appraisals established that the property's fair market value was $950,000 and that, spread out over 50 years, the present value of the agreement to provide 90+ free public parking spaces could equal or exceed that sum. The Labor Commissioner thus did not find that the RDA transferred the property for less than its fair market value, such that NRS 279.500(2)(a) applied. Instead, because the developer acquired the property for "future compensation," not cash or money up front, the Labor Commissioner concluded that the RDA provided the developer a financial incentive worth more than $100,000, so NRS 279.500(2)(c) applied.

In her decision, the Labor Commissioner found that the developer preferred to pay cash for the property, that the idea of a 50-year public parking exchange originated with the RDA, and that the RDA did not intend to create a financial incentive by structuring the transaction as it did. The decision nonetheless concluded that the RDA "provided a financial incentive to [the developer] worth more than $100,000 (NRS 279.500 subdivision 2(c)) because [the RDA] did not require [the developer] to pay any money/cash" for the property. "Future compensation," the decision stated, "does not meet the intent or language of NRS 279.500(2)." Because the RDA did not include a clause in the DDA requiring the developer to pay prevailing wages for work done on the first floor of the parking garage, the decision assessed a $5,000 penalty against the RDA for investigative costs. It also stated that the Office of Labor Commissioner "will evaluate any potential wage claims/complaints that may be filed involving work on the first-floor parking garage."

The RDA filed a petition for judicial review. The district court upheld the Labor Commissioner's decision, except that it remanded for findings to support the administrative penalty calculation. The RDA timely appealed. The district court's remand as to the penalty calculation does not affect the finality of its decision, so this court has jurisdiction over this appeal. *See Bally's Grand Hotel & Casino v. Reeves*, 112 Nev. 1487, 1488-89, 929 P.2d 936, 937 (1996) (holding that where a remand to an agency for calculation of benefits due does not require further substantive action or change the decision that benefits are owed, the district court's decision on the petition for judicial review is final and appealable).

II.

A.

This court applies the same standards as the district court in resolving a petition for judicial review of an administrative agency's decision in a contested case. *Bombardier Transp. (Holdings) USA, Inc. v. Nev. Labor Comm'r*, 135 Nev. 15, 18, 433 P.3d 248, 252 (2019); *see* NRS 233B.135(3). The agency's factual findings are reviewed deferentially "for clear error or an abuse of discretion" and will not be overturned if "supported by substantial evidence." *Dep't of Bus. & Indus. v. TitleMax of Nev., Inc.*, 135 Nev. 336, 340, 449 P.3d 835, 839 (2019) (citing NRS 233B.135(3)(e), (f)). However, "[a] de novo standard of review is applied when [a reviewing] court addresses a question of law, including the administrative construction of statutes." *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013) (internal quotation omitted); *accord Bombardier*, 135 Nev. at 18, 433 P.3d at 252 (stating that "[w]e . . . review de novo statutory interpretation questions in the administrative context"); *City of North Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011) ("Like the district court, we review an administrative appeals officer's determination of questions of law, including statutory interpretation, de novo."); *see* NRS 233B.135(3)(a), (b), (d). Some cases recognize an exception to this general rule, saying deference is appropriate when the agency's interpretation is "within the language of the statute," *Taylor v. State, Dep't of Health & Hum. Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013) (internal quotation omitted), or "reasonably consistent with the language" of a statute that the agency is "charged with administering," *TitleMax of Nev.*, 135 Nev. at 340, 449 P.3d at 839. But this exception is limited and does not apply when the agency's interpretation falls outside the statute's plain text. *See United States v. State Eng'r*, 117 Nev. 585, 589-90, 27 P.3d 51, 53 (2001) (stating that courts do not defer to an agency's interpretation of a statute when "an alternative reading is compelled by the plain language of the provision").

B.

The RDA raises a threshold challenge to the Labor Commissioner's jurisdiction. It argues that the Commissioner has neither the expertise nor the statutory authority to address a dispute arising under NRS Chapter 279 over the valuation of interests in real property. But NRS 607.160(1)(a) requires the Labor Commissioner to "enforce all labor laws of the State of Nevada," unless enforcement is "specifically and exclusively vested" in some other officer, board, or commission. Although codified as part of NRS Chapter 279, Nevada's Community Redevelopment Law, NRS 279.500(2) provides that the prevailing-wage provisions in NRS 338.013 to 338.090 apply "to the same extent as if the agency had awarded the contract for the project" if a redevelopment agency transfers property to a developer for less than its fair market value or provides financial incentives to a developer worth more than $100,000. NRS 338.015(1) vests authority to enforce NRS 338.013 to 338.090 in the Labor Commissioner.

When a statute incorporates the prevailing-wage provisions, the Labor Commissioner has jurisdiction to enforce those provisions. *See City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 121, 251 P.3d 718, 722-23 (2011). By its plain terms, NRS 279.500(2) incorporates the prevailing-wage provisions in NRS 338.013 to 338.090, and the RDA does not establish that enforcement is "specifically and exclusively" vested in some other officer, board, or commission, *see* NRS 607.160(1)(a). Therefore, the Labor Commissioner had authority and jurisdiction to enforce NRS 279.500(2), including the obligation it imposes on a redevelopment agency to require a developer to pay prevailing wages in specified circumstances. *Cf. City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006) (explaining that while the agency's powers are limited to those set by statute, "certain powers may be implied even though they were not expressly granted by statute, when those powers are necessary to the agency's performance of its enumerated duties").

C.

This brings us to the Labor Commissioner's interpretation of NRS 279.500(2)(c). In her decision, the Labor Commissioner found that the DDA involved "future compensation" because it did not require the developer to pay cash up front for the property. As stated in the decision, "the question then becomes, did the 'future compensation' satisfy the intent of NRS 279.500, or does it create a potential loan and/or financial incentive because the terms of the DDA spread the future compensation/contractual rights/deed over 50-years[?]" Without analyzing the text of the statute or finding it ambiguous, the decision concludes that it would violate the "intent" of NRS 279.500(2)(c) to allow a developer to acquire property for "future compensation" as opposed to cash without requiring the developer to pay prevailing wages for work on the project.

The Labor Commissioner's interpretation of NRS 279.500(2)(c) impermissibly broadens its reach. The plain text of NRS 279.500(2)(c) states that if a redevelopment agency provides "financial incentives" to a developer worth more than $100,000, then its prevailing-wage provisions apply. The statute says nothing about "future compensation." Nor does it state that a redevelopment agency must include prevailing-wage language in a DDA if it sells a parcel of property for anything besides cash on the barrelhead. *Cf. Williams v. Bd. of Educ. of E. Otero Sch. Dist. R-1*, 749 P.2d 472, 474 (Colo. App.

1987) (reasoning that because a state statute did not require sale of school district property for cash only, "non-cash consideration" did not automatically invalidate the sale).

The Office of the Labor Commissioner and Local 169 do not argue that their interpretation of NRS 279.500(2)(c) fits within the statute's plain text. Instead, they defend their interpretation as consistent with the statute's "intent," citing legislative history and with Local 169 arguing that it would be "virtually impossible" for NRS 279.500(2) to list every situation to which it applies. But, absent ambiguity, a statute's plain text controls its interpretation. *Home Warranty Adm'r of Nev., Inc. v. State, Dep't of Bus. & Indus.*, 137 Nev. 43, 45, 481 P.3d 1242, 1246 (2021). Under our caselaw, "where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction" or gap filling by the agency. *State, Loc. Gov't Emp.-Mgmt. Rels. Bd. v. Educ. Support Emps. Ass'n*, 134 Nev. 716, 721, 429 P.3d 658, 662-63 (2018) (internal quotation omitted).

The Labor Commissioner's interpretation of NRS 279.500(2)(c) equates "financial incentive" with "future compensation." This equation effectively expands NRS 279.500(2)(c) to say that its prevailing-wage provisions apply any time a redevelopment agency transfers property to a developer for non-cash consideration. But under well-established principles of contract law, legally enforceable promises to perform services in the future, or "future consideration," is valid and does not automatically equate to a "financial incentive." *See Cain v. Price*, 134 Nev. 193, 195, 415 P.3d 25, 28 (2018) ("Consideration is the exchange of a promise or performance, bargained for by the parties.") (quoting *Jones v. SunTrust Mortg., Inc.*, 128 Nev. 188, 191, 274 P.3d 762, 764 (2012)). Looking beyond the statute's language and interpreting "financial incentive" to mean "future compensation" in the form of non-cash consideration was error. Because this interpretation of NRS 279.500(2)(c) does not fall within the language of the statute, we do not defer to it. *Home Warranty*, 137 Nev. at 45, 481 P.3d at 1246.

The Labor Commissioner's conclusion that the acceptance of non-cash consideration automatically creates a "financial incentive" also conflicts with the ordinary meaning of that phrase, as the facts of this case illustrate. NRS 279.500(2)(c) does not define the phrase "financial incentive." The RDA proffers a definition for financial incentive—it is "[a] benefit given to customers or companies to get them to do something they normally wouldn't. It is money offered to get them to try something new offered. The event might not have happened without the incentive." *Financial Incentive*, *The Law Dictionary*, http://thelawdictionary.org/financial-incentive (formerly *Black's Law Dictionary* (online version) 2d ed). Although the record shows the Labor Commissioner initially used this definition, the amended final decision neither cites this definition, nor offers any other. Rather, it deemed that the legislature intended "financial incentive" to include the acceptance by a redevelopment agency of non-cash consideration for a property transfer and concluded that because the agreement between the RDA and the developer allowed for future compensation rather than requiring cash or money, NRS 279.500(2)(c) applied. But the evidence established that the developer preferred a cash transaction, indicating that the RDA's acceptance of non-cash consideration did not operate as a financial incentive to the developer—if anything, it was a disincentive. Transferring property in exchange for future services does not, without more, automatically provide a "financial incentive."

This is not to say that the legislature could not enact a statute providing that an agreement allowing for consideration other than money or cash must always include a provision for the payment of prevailing wages. But our task is not to determine what the legislature could have done. It is to determine what the legislature did. *Cf. Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 ("The question, however, is not what Congress 'would have wanted' but what Congress enacted . . . ."). And under NRS 279.500(2)(c), the legislature provided that a financial incentive from an agency to a developer valued over $100,000 requires the payment of prevailing wages—not that any form of consideration other than cash or money up front requires the payment of prevailing wages.

D.

Accepting arguendo that the RDA's transfer of the property in exchange for future public parking rights could create a "financial incentive," substantial evidence does not support that such an incentive existed in this case, where the developer preferred to pay cash, or that if it did, its value exceeded $100,000. *See City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 899, 59 P.3d 1212, 1219 (2002) (recognizing that "[i]f the agency's decision lacks substantial evidentiary support, the decision is unsustainable"); *see also Elizondo*, 129 Nev. at 784, 312 P.3d at 482 (defining substantial evidence as "evidence adequate to support the agency's conclusion"). We recognize that the Labor Commissioner concluded that using a 50-year analysis to "support an amount equal to or above the appraised amount" of the property was not "reasonable." But the Labor Commissioner also concluded that the agreement to provide public parking for 50 years was "legally recorded and enforceable," recognized that the appraisers valued the public parking over 50 years as equal to or greater than the appraised value of the property, and found that the developer did not seek out the public parking obligation but preferred to acquire the property for cash. And, of note, the final decision made no finding that the RDA conveyed the property to the developer at less than fair market value or that the appraisals and reports of the property's fair market value or the value of the public parking were unreliable or inaccurate. On this record and given these findings, we conclude that the Labor Commissioner's decision that the RDA provided a financial incentive exceeding $100,000 to the developer lacks substantial evidence and must be reversed.

III.

The Labor Commissioner correctly concluded that she had jurisdiction to decide whether the prevailing-wage provisions apply under NRS 279.500. But the plain language of NRS 279.500 did not require the application of the prevailing-wage provisions to this agreement between the RDA and the developer. It was error to conclude that the RDA created a financial incentive to the developer worth more than $100,000 and to assess the administrative penalty. Accordingly, we reverse and remand to the district court with instructions to grant the RDA's petition for judicial review.

Cadish, C.J., and Bell, J., concur.

SOMSAK LIMPRASERT, an Individual, Appellant, *v.* PAM SPECIALTY HOSPITAL OF LAS VEGAS LLC, a Foreign Limited Liability Company, dba PAM SPECIALTY HOSPITAL OF LAS VEGAS, Respondent.

No. 84607

June 27, 2024 550 P.3d 825

Appeal from a district court order granting a motion to dismiss. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Reversed and remanded.

[Rehearing denied October 9, 2024]

Injury Lawyers of Nevada and *Jared B. Anderson* and *David J. Churchill*, Las Vegas, for Appellant.

Lewis Brisbois Bisgaard & Smith, LLP, and *Keith A. Weaver* and *Alissa N. Bestick*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

In this opinion, we address two issues concerning claims for professional negligence. First, we clarify the standard for distinguishing professional negligence claims, which require a supporting affidavit from a medical expert under NRS 41A.071, from ordinary negligence claims. In doing so, we overrule the common knowledge exception enunciated in *Estate of Curtis v. South Las Vegas Medical Investors, LLC*, 136 Nev. 350, 466 P.3d 1263 (2020). Second, we reiterate that even when a medical expert affidavit is filed after the complaint, NRS 41A.071 is satisfied under *Baxter v. Dignity Health*, 131 Nev. 759, 357 P.3d 927 (2015), if the affidavit was incorporated by reference in the complaint and was executed before the complaint was filed. Because appellant Somsak Limprasert alleged an injury caused by a provider of health care rendering services in the course of a professional relationship, we determine that his claims sound in professional negligence and thus required an affidavit under NRS 41A.071. We further conclude, however, that Limprasert's expert declaration complied with NRS 41A.071 under *Baxter*, and the district court therefore erred by dismissing his complaint for noncompliance. Accordingly, we reverse the dismissal of Limprasert's professional negligence claims and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Limprasert was diagnosed with COVID-19 and acute hypoxic respiratory failure, among other illnesses, for which he received acute care from a hospital.[1] He was subsequently transferred or admitted to respondent PAM Specialty Hospital of Las Vegas LLC, for rehabilitation and treatment for the effects of COVID-19, respiratory failure, cough, fever, and general malaise. He remained at PAM for approximately one month.

While at PAM, Limprasert was bedridden and unable to stand without support. PAM and individuals including nurse practitioners, caregivers, medical professionals, staff members, and/or employees, agents, or independent contractors working for PAM, and who were pleaded as fictitious Doe defendants, were aware that Limprasert was unable to stand without being supported. On August 3, 2020, PAM's workers assisted Limprasert to rise from his bed. Then, they unexpectedly let go of him while he was in a standing position, which caused him to fall to the ground and suffer injuries.

Limprasert filed a complaint against PAM on August 3, 2021, asserting claims for negligence and abuse of the vulnerable.[2] In the alternative, he asserted claims against PAM under Nevada's medical malpractice statutes. However, Limprasert failed to attach the supporting declaration of Stewart Curtis, D.O., to his complaint. On September 9, 2021, PAM filed a motion to dismiss. The following day, Limprasert filed an erratum to his complaint with Dr. Curtis's declaration attached. The erratum was therefore filed after the 1-year statute of limitations had run on his professional negligence claims. *See* NRS 41A.097(2) (stating in relevant part that "an action for injury . . . against a provider of health care may not be commenced more than . . . 1 year after the plaintiff discovers . . . the injury"). Following a hearing, the district court found that Limprasert's claims sound in professional negligence, that Limprasert filed his complaint without the supporting declaration of an expert witness, and that the erratum was not filed at the same time as the complaint. Thus, the district court granted PAM's motion to dismiss.

Limprasert appealed, and the court of appeals determined that the district court erred by dismissing Limprasert's complaint because it alleged facts that could entitle him to relief under ordinary negligence principles. Additionally, the court of appeals found the district court erred by dismissing Limprasert's professional negligence claims because he complied with NRS 41A.071. The court of

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[1]These factual allegations are drawn from the complaint and expert declaration and deemed true for purposes of this appeal. *See Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

[2]PAM is used to indicate collectively the hospital, its employees, and its agents. Limprasert does not challenge the dismissal of his abuse of the vulnerable claim on appeal.

appeals reversed and remanded the case to the district court. PAM petitioned this court for judicial review, and we granted the petition.

DISCUSSION

"We review a district court order granting a motion to dismiss de novo." *Zohar v. Zbiegien*, 130 Nev. 733, 736, 334 P.3d 402, 404 (2014). In doing so, we deem "all factual allegations in [the plaintiff's] complaint as true and draw all inferences in [the plaintiff's] favor." *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672. A "complaint should be dismissed only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* We also review a "district court's decision to dismiss [a] complaint for failing to comply with NRS 41A.071 de novo." *Yafchak v. S. Las Vegas Med. Invs., LLC*, 138 Nev. 729, 731, 519 P.3d 37, 40 (2022).

Limprasert argues that his claims sound in ordinary negligence and alternatively, if his claims sound in professional negligence, that he satisfied the affidavit requirement for such claims. Addressing these arguments in turn, we determine that Limprasert has asserted claims for professional negligence rather than ordinary negligence. We agree, however, that he satisfied the affidavit requirement.

Whether Limprasert's claims are for ordinary or professional negligence

Limprasert argues that his claims sound in ordinary negligence because the negligence alleged does not involve medical judgment, treatment, or diagnosis and would not require expert testimony at trial. We disagree.

The Legislature has defined professional negligence by statute as "the failure of a provider of health care, *in rendering services*, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." NRS 41A.015 (emphasis added). This definition suggests that a claim arising from services rendered within the course of the relationship between a patient and a health care provider sounds in professional negligence.

We have developed a body of caselaw consistent with this understanding. Indeed, this court has previously distinguished ordinary negligence from professional negligence within the health care context by examining whether the claim arose outside of the professional relationship. For example, in *DeBoer v. Senior Bridges of Sparks Family Hospital Inc.*, a patient with dementia suffered financial damages due to the actions of a social worker employed by an acute care facility. 128 Nev. 406, 408, 412, 282 P.3d 727, 729, 732 (2012). The social worker provided the patient with a preprinted general power-of-attorney form, which, upon execution, gave a third party power over the patient's financial and personal affairs. *Id.* at 408, 282 P.3d at 729-30. The third party subsequently misappropriated the patient's money, real property, and other assets. *Id.* at 408, 282 P.3d at 730. We concluded that the care facility may have breached its duty of reasonable care under ordinary negligence principles by failing to act reasonably in performing the nonmedical function of facilitating the power-of-attorney forms to effectuate the patient's discharge. *Id.* at 413, 282 P.3d at 733. Thus, we concluded a medical facility should be held to general negligence standards of reasonableness when it "acts outside of the scope of medicine." *Id.* at 411, 282 P.3d at 731.

Similarly, in *Szymborski v. Spring Mountain Treatment Center*, a father sued his adult son's health care provider. 133 Nev. 638, 639, 644, 403 P.3d 1280, 1282, 1286 (2017). Conflict existed between the father and son, and the employees of the treatment center assured the father that his son would not be released to his house. *Id.* at 639, 403 P.3d at 1282-83. Nonetheless, without notifying the father, the son was released to the father's house. *Id.* at 640, 403 P.3d at 1283. The son promptly vandalized the father's home, causing a total of $20,000 in damage. *Id.* We determined the gravamen of the father's claim was that the treatment center breached its ordinary duty of care to the nonpatient father because the allegations pertained to the center performing nonmedical functions. *Id.* at 644, 403 P.3d at 1286.

Most recently, in *Estate of Curtis v. South Las Vegas Medical Investors, LLC*, we retreated from this line of cases. 136 Nev. 350, 351, 357, 466 P.3d 1263, 1265, 1269 (2020). In *Curtis*, a licensed nurse who was taking care of multiple patients mistakenly administered to the plaintiff morphine that had been prescribed for a different patient. *Id.* at 351, 466 P.3d at 1265. In determining whether this constituted professional negligence, we set out in full and adopted as appropriate for Nevada the two-part test the Michigan Supreme Court created in *Bryant v. Oakpointe Villa Nursing Centre, Inc.*, 684 N.W.2d 864 (2004):

> "[A] court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or [professional negligence]: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern [professional negligence] actions."

Id. at 356, 466 P.3d at 1268 (alterations in original) (quoting *Bryant*, 684 N.W.2d at 871). Applying this test, we concluded that "although administering medication constitutes medical treatment, an allegation that a health care professional administered a patient's medicine to a different patient is an allegation of ordinary negligence that requires no expert testimony to assess." *Id.* at 357, 466 P.3d at 1269 (citation omitted). We further explained that the nurse's act of administering the morphine prescribed for someone else involved no "questions of medical judgment" and the nurse "used no professional judgment in administering the morphine—she simply gave [the plaintiff] the wrong drug because she had mixed up the prescriptions." *Id.* Thus, we concluded "where lay persons' common knowledge is sufficient to determine negligence without expert testimony," the so-called common knowledge exception could "be applied to determine whether a claim that appears to sound in professional negligence[ ] and does not fall under [the res ipsa loquitur statutory exceptions], actually sounds in ordinary negligence and is therefore not subject to" the affidavit requirement. *Id.* at 350, 466 P.3d at 1265. To reach this conclusion, we relied on dicta from *Szymborski*.

We conclude that only the first half of the test that we adopted in *Curtis* properly applies in Nevada. That is, to determine whether a claim sounds in professional negligence, the question is whether the claim pertains to an action that occurred within the course of a professional relationship. If it does not, the claim is for ordinary negligence. If it does, the claim sounds in professional negligence and requires an affidavit unless a statutory exception applies. But the second part of the Michigan test adopted in *Curtis* is at odds with Nevada's statutory scheme. Unlike Michigan, Nevada has by statute, NRS 41A.100, and caselaw, *Peck v. Zipf*, 133 Nev. 890, 891, 407 P.3d 775, 777 (2017), provided that the common law res ipsa loquitur doctrine does not apply in professional negligence cases except in the limited instances specified in NRS 41A.100. That a claim raises a question that is within "the realm of common knowledge and experience" thus does not, except in the limited instances specified in NRS 41A.100, take it outside the affidavit-of-merit requirement in NRS 41A.071, making it confusing and unhelpful in deciding whether a claim sounds in professional or ordinary negligence.

"[U]nder the doctrine of stare decisis, we will not overturn absent compelling reasons for so doing." *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (footnote omitted). Nonetheless, "when governing decisions prove to be 'unworkable or are badly reasoned,' they should be overruled." *State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). And here, *Curtis* has proven unworkable, creating conflicts with Nevada statutes and caselaw that have destabilized existing precedent in this area. For these reasons, we overrule the second part of the *Curtis* test to the extent that it provides that the concept of common knowledge can be used to determine whether a claim is for professional or ordinary negligence. We emphasize that whether a claim sounds in ordinary negligence or professional negligence focuses on the nature of the conduct rather than on the complexity of proving a claim. The sole inquiry is whether the claim involves a provider of health care rendering services in a way that causes injury, not whether an expert affidavit or expert testimony is needed for a jury to understand the allegations.

Looking to the nature of the conduct alleged by Limprasert makes clear that his claims sound in professional negligence. The complaint alleges PAM knew that Limprasert was bedridden and unable to stand without support. It further alleges that PAM workers did not follow reasonable policies and procedures and that Limprasert relied on them to follow the doctor's orders with respect to his weakness and inability to care for himself. Additionally, Limprasert averred in his complaint that PAM negligently assisted him by helping him rise from his bed to change his sheets and then unexpectedly letting go of him while he was in a standing position, which caused him to fall to the ground and suffer injuries. Here, there is no dispute that PAM is a provider of health care and that Limprasert was a patient. Further, changing Limprasert's sheets and assisting him to stand during the process were services that PAM provided to Limprasert while he was recovering and bedridden. Thus, based upon the gravamen of Limprasert's allegations, we conclude his claims sound in professional negligence.

Whether Limprasert's claims required an affidavit

Having determined that Limprasert's claims are for professional negligence, we next turn to whether an affidavit was required. Limprasert argues that he did not need an affidavit because the common knowledge exception creates an exception to the requirement. We disagree.

The Legislature has created a tightly scripted scheme for professional negligence actions in Nevada that limits recovery for noneconomic damages, mandates settlement conferences, and more. *See, e.g.*, NRS 41A.035; NRS 41A.081. As noted, under NRS 41A.071, a professional negligence action requires a supporting affidavit from a medical expert. *Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006). NRS 41A.071 was adopted in 2002 to replace the former Medical-Legal Screening Panel, which also required a supporting medical expert affidavit. *Id.* "According to NRS 41A.071's legislative history, the requirement that a complaint be filed with a medical expert affidavit was designed to streamline and expedite medical malpractice cases and lower overall costs, and the Legislature was concerned with strengthening the requirements for expert witnesses." *Id.* Accordingly, the general rule under Nevada's statutory scheme is that any professional negligence action filed without a supporting affidavit must be dismissed. *See id.* at 1304-05, 148 P.3d at 794-95.

Before NRS 41A.071 was enacted, we had recognized "the general rule that expert testimony must be used to establish medical malpractice, unless the propriety of the treatment, or the lack of it, is a matter of common knowledge of laymen." *Fernandez v. Admirand*, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992) (collecting cases). Since NRS 41A.071's enactment, however, we have held a professional negligence action can only be filed without a supporting affidavit in narrow circumstances. Because the Legislature has enacted strict criteria for professional negligence actions, the narrow and few exceptions to the affidavit requirement that it created reflect its policy choice.

Specifically, the Legislature has carved out statutory exceptions to the affidavit requirement for res ipsa loquitur, which we have applied and interpreted. *See* NRS 41A.100(1) (providing expert "evidence is not required and a rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented" of any of five specific circumstances);[3] *see also Szydel v. Markman*, 121 Nev. 453, 454, 117 P.3d 200, 201 (2005) ("We conclude that the expert affidavit requirement does not apply when the malpractice action is based solely on the res ipsa loquitur doctrine."). For res ipsa loquitur cases, expert evidence that the standard of care was breached is unnecessary because the doctrine applies to fact patterns that can only arise where the care provided was negligent. Thus, proving the facts by "present[ing] some evidence that one . . . of the factual situations enumerated" in the statute exists necessarily establishes negligence. *Szydel*, 121 Nev. at 459, 117 P.3d at 204. No affidavit is needed in such circumstances because "[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.

For example, in *Szydel*, we determined that no affidavit was needed when a needle was left inside a patient's breast during a

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[3]The following five exceptions are enumerated in NRS 41A.100(1):

> (a) A foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery;
>
> (b) An explosion or fire originating in a substance used in treatment occurred in the course of treatment;
>
> (c) An unintended burn caused by heat, radiation or chemicals was suffered in the course of medical care;
>
> (d) An injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto; or
>
> (e) A surgical procedure was performed on the wrong patient or the wrong organ, limb or part of a patient's body.

bilateral mastopexy or breast lift surgery. *Id.* at 454-55, 461, 117 P.3d at 201, 205; *see* NRS 41A.100(1)(a) (including the circumstance of "[a] foreign substance other than medication or a prosthetic device [being] unintentionally left within the body of a patient following surgery"). We have tended to strictly construe the res ipsa loquitur exceptions, however, concluding that they are available only when the circumstances expressly listed by the Legislature in NRS 41A.100 are present. *See Peck*, 133 Nev. at 891, 407 P.3d at 777 ("We reiterate that the enumerated res ipsa loquitur exceptions in NRS 41A.100 supersede the common knowledge res ipsa loquitur doctrine."). For example, in *Peck*, we concluded that NRS 41A.100(1)(a)'s circumstance of "[a] foreign substance other than medication or a prosthetic device [being] unintentionally left within the body of a patient following surgery" was not met when an intravenous needle was left in an individual's hand, because it was not the result of *surgery*. *Id.* at 891, 894, 407 P.3d at 777, 779; *see also Montanez v. Sparks Fam. Hosp., Inc.*, 137 Nev. 742, 744, 499 P.3d 1189, 1192 (2021) (concluding bacteria did not constitute a foreign substance unintentionally left within the body of a patient after surgery for purposes of NRS 41A.100(1)(a) because "foreign substance" "was intended to mean something that a doctor purposefully implanted or used during surgery that was then left in the body unintentionally"). *But see Cummings v. Barber*, 136 Nev. 139, 140, 460 P.3d 963, 965 (2020) ("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."). Overall, under statute and our caselaw, actions for professional negligence that implicate the circumstances of res ipsa loquitur enumerated in NRS 41A.100 are narrowly excepted from the affidavit requirement.

In *Curtis*, we essentially created a new and very broad exception to the affidavit requirement in the form of a common knowledge exception. The exceptions to the affidavit requirement, however, are statutory, narrow, and few. The exceptions are a recognition that these types of injuries during treatment do not need an affidavit because res ipsa loquitur applies to fact patterns that can only arise where the care provided was negligent. We now overrule *Curtis* to the extent it created a common knowledge exception to the expert affidavit requirement. Whether and to what degree common knowledge may seem to obviate the need for an affidavit in the professional negligence sphere, such that a new exception is warranted, are issues in the purview of the Legislature. Accordingly, we hold an expert affidavit is required to support allegations that a provider of health care was negligent in rendering services unless a recognized exception is present.

Here, Limprasert does not argue that any of the res ipsa loquitur statutory exceptions enumerated in NRS 41A.100 apply to his claims, and we limit our review to the issues the parties present. *See Senjab v. Alhulaibi*, 137 Nev. 632, 633-34, 497 P.3d 618, 619 (2021) ("We will not supply an argument on a party's behalf but review only the issues the parties present."). Thus, we determine that Limprasert did not establish an exception to the affidavit requirement.

Whether Limprasert satisfied the affidavit requirements for a professional negligence claim

Limprasert next argues that even if his claims required an affidavit, the district court improperly granted the motion to dismiss because his expert declaration complied with the standard set forth in *Baxter v. Dignity Health*, 131 Nev. 759, 357 P.3d 927 (2015). Specifically, he contends that in accordance with *Baxter* and the public policy goals of NRS 41A.071, he established that a competent medical professional reviewed the allegations, that he obtained Dr. Curtis's declaration before filing the complaint, and that the complaint incorporates the declaration by reference. Further, he argues *Baxter* did not provide a specific time period by which a declaration that was inadvertently omitted must be filed and that PAM was not negatively affected by the late filing.

"If an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit that . . . [s]upports the allegations contained in the action." NRS 41A.071(1). "The 'affidavit' can take the form of either a sworn affidavit or an unsworn declaration made under penalty of perjury." *Baxter*, 131 Nev. at 762, 357 P.3d at 929 (internal quotation marks omitted). The purposes behind the requirement include "to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion." *Washoe Med. Ctr.*, 122 Nev. at 1304, 148 P.3d at 794 (internal quotation marks omitted). A complaint filed without the requisite supporting medical expert affidavit does not legally exist and cannot be amended. *Id.* at 1300-01, 148 P.3d at 792.

When reviewing the complaint on a motion to dismiss, "[a] court may also consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *Baxter*, 131 Nev. at 764, 357 P.3d at 930 (internal quotation marks omitted). "NRS 41A.071 does not state that the affidavit of merit must be physically attached to the malpractice complaint . . . ." *Id.* at 764-65, 357 P.3d at 931.

> [W]here the complaint incorporates by reference a preexisting affidavit of merit, which is thereafter filed and served with the

> complaint, and no party contests the authenticity of the affidavit or its date, the affidavit of merit may properly be treated as part of the pleadings in evaluating a motion to dismiss.

Id. at 765, 357 P.3d at 931.

In *Baxter*, the plaintiff filed the declaration "five judicial hours after the complaint." *Id.* The declaration verified the truth of the allegations in the complaint, was sworn under penalty of perjury, and was dated three days before the complaint was filed. *Id.* We reasoned that the plaintiff "literally complied with NRS 41A.071" and the defendants were not negatively affected by the declaration being filed after the complaint because the complaint incorporated the declaration, the complaint and declaration were served on the defendants together, and the defendants could challenge the declaration's sufficiency in their motions to dismiss. *Id.* Further, we reasoned that reading the complaint as incorporating the declaration promoted substantial justice and aligned with the policy goals of NRS 41A.071 because the plaintiff filed a medical malpractice claim only after procuring a declaration from a medical expert. *Id.* at 766, 357 P.3d at 931.

Limprasert asserted in his complaint "[t]hat the facts and circumstances of this case have been reviewed by a medical doctor named Stewart Curtis, D.O., who has provided a declaration of merit supporting the claims and allegations made in this complaint. *See* Declaration of Merit, attached hereto as Exhibit 1." However, Limprasert did not attach the declaration to the complaint that was filed on August 3, 2021. PAM moved to dismiss on September 9, 2021. The next day, Limprasert filed an erratum to his complaint with Dr. Curtis's declaration attached. Dr. Curtis's declaration was dated August 3, 2021. Dr. Curtis did not state explicitly in his declaration that he reviewed the complaint, but he did comment on the allegations pertaining to Limprasert's fall and stated that the "information in this declaration is based upon the information made available to me at the time of the declaration." The declaration was made under penalty of perjury. In his opposition to PAM's motion to dismiss, Limprasert included an email from Dr. Curtis that indicated the declaration was attached and that it was sent to Limprasert's attorney on August 3, 2021, at 12:41 p.m. The opposition also included an affidavit from Limprasert's attorney attesting "[t]hat only after the final, executed supporting declaration of Dr. Curtis was received by the law office of Tanner Churchill Anderson was the subject complaint filed, on August 3, 2021 at 4:35 p.m." At the hearing on the motion to dismiss, PAM's attorney raised to the district court that the email from Dr. Curtis indicated the doctor had two declarations and nothing in his email referenced the Limprasert case specifically. PAM's attorney, however, said she was "comfortable accepting [Limprasert's attorney's] . . . representation because I'm familiar with him and I find him to be very trustworthy . . . [although] it is not . . . proof positive of the matter asserted."

We conclude the declaration was central to Limprasert's alternative theory of liability of professional negligence and was made under penalty of perjury. PAM did not question the authenticity of the declaration or its date because PAM's attorney stated at the hearing that she was comfortable trusting the representation of Limprasert's attorney as to the document's authenticity. Thus, the district court should have deemed the declaration incorporated by reference in the complaint and considered it when reviewing the motion to dismiss.

We note that unlike *Baxter*, Limprasert did not serve the complaint and the declaration contemporaneously, PAM's motion to dismiss was filed before the declaration, and the declaration was filed after the statute of limitations on the claim had expired. PAM, however, was aware of the declaration through the complaint and had the opportunity to challenge its sufficiency at the hearing. We agree with Limprasert that PAM has not shown it was negatively affected by the late filing of the declaration. Moreover, reading the declaration with the complaint is consistent with the policy goals of NRS 41A.071 because the declaration of Dr. Curtis and the affidavit of Limprasert's attorney support that Dr. Curtis gave his medical opinion before the filing of the complaint. Although Dr. Curtis's declaration does not mention the complaint expressly and is more specific regarding certain details than the complaint, we conclude the declaration supports Limprasert's allegations and demonstrates he engaged in good faith to support his claim with expert medical opinion before filing. Accordingly, we determine the district court erred by dismissing the complaint for noncompliance with NRS 41A.071.[4]

CONCLUSION

The Legislature has constructed a strict scheme for professional negligence actions in Nevada, and that scheme includes a definition of professional negligence and exceptions to the affidavit requirement that are intentionally narrow. We hold that to distinguish professional from ordinary negligence, the relevant question is whether the claim pertains to an action that occurred within the course of a professional relationship. If it does not, it is for ordinary negligence. If it does, it sounds in professional negligence and requires an affidavit under NRS 41A.071, unless it falls under the statutory exceptions enumerated in NRS 41A.100. The sole question

[4]We have considered Limprasert's remaining arguments, including his assertions that the district court misunderstood the facts and that the district court erroneously assumed the declaration may not have been served, and we discern no errors.

for distinguishing professional and ordinary negligence relates to the nature of the conduct in the claim, specifically whether it arises from services rendered in the course of a professional relationship. We clarify that the complexity of a claim that involves a provider of health care rendering services cannot be used to transform a professional negligence claim into an ordinary negligence claim. We also hold that only the circumstances of res ipsa loquitur enumerated in NRS 41A.100 are exceptions to the affidavit requirement. Therefore, we overrule the common knowledge exception created in *Curtis*. In addition, we reiterate that an affidavit satisfies NRS 41A.071 under *Baxter* even when it is filed after the complaint, if it was incorporated by reference in the complaint and executed before the complaint was filed.

Here, although Limprasert's claims sound in professional negligence, the district court erred by dismissing the complaint for noncompliance with NRS 41A.071. Therefore, we reverse the district court's order dismissing Limprasert's professional negligence claims and remand for further proceedings consistent with this opinion.

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