CHRISTINA KUSHNIR, M.D.; and WOMEN'S CARE CENTER OF NEVADA, INC., Petitioners, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE TIERRA DANIELLE JONES, District Judge, Respondents, and the ESTATE OF CAROL A. GAETANO, Deceased; and VINCENT GARBITELLI, Administrator, Real Parties in Interest.

No. 81779-COA

August 5, 2021 495 P.3d 137

Original petition for a writ of mandamus challenging a district court order denying a motion for summary judgment in a medical malpractice action.

Petition granted.

McBride Hall and *Robert C. McBride* and *Heather S. Hall*, Las Vegas, for Petitioners.

Heaton & Associates and *Jared F. Herling*, Las Vegas, for Real Parties in Interest.

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

OPINION[1]

Per Curiam:

Pursuant to NRS 41A.097(2), a medical malpractice action against a health care provider must be filed within one year of the injury's discovery or three years of the date of injury, whichever occurs first. NRS 41A.097(3) permits tolling of both limitations periods "for any period during which the provider of health care has concealed any act, error or omission upon which the action is based and which is known or through the use of reasonable diligence should have been known to the provider of health care." And the Supreme Court of Nevada has interpreted the statute to warrant tolling where the health care provider's intentional concealment "would have hindered a reasonably diligent plaintiff from procuring an expert

[1]We originally resolved this petition in an unpublished order granting the petition and issuing a writ of mandamus. Petitioners subsequently filed a motion to publish the order as an opinion. We grant the motion and replace our earlier order with this opinion. *See* NRAP 36(f). Real parties in interest filed a petition for rehearing of our prior decision to grant the petition for a writ of mandamus. Having reviewed the petition, we deny rehearing. *See* NRAP 40(c).

affidavit" as required under NRS 41A.071. *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 255, 277 P.3d 458, 464 (2012).

In this original proceeding, we consider whether the one-year limitations period is tolled for concealment where (1) the undisputed facts show that the plaintiffs were in possession of the medical records necessary to procure the expert affidavit more than a year prior to filing the complaint, and (2) the alleged concealment did not hinder the procurement of the affidavit. Because the plaintiffs had all necessary medical records and were therefore on inquiry notice of the claim more than a year before filing the complaint, and because the alleged concealment did not hinder the plaintiffs' ability to procure an expert affidavit, we conclude that the one-year statute of limitations expired and extraordinary writ relief is appropriate. We therefore grant the petition for a writ of mandamus and direct the district court to grant the defendants' motion for summary judgment.

I.

In December 2015, petitioner Christina Kushnir, M.D., performed a diagnostic laparoscopy on Carol Gaetano during which Gaetano sustained a perforation to her colon requiring hospitalization. It is unclear whether the procedure alone caused the perforation or whether it resulted in conjunction with Gaetano's advanced cancer. Gaetano died on January 17, 2016. Real party in interest and co-administrator of Gaetano's estate, Vincent Garbitelli, M.D., requested an autopsy from the coroner's office.[2] The coroner issued its autopsy report on January 22, 2016.

Dr. Garbitelli and Gaetano's estate (collectively the Estate) received Gaetano's complete medical records in August 2016. Approximately 15 months later, in November 2017, the Estate filed a complaint against Dr. Kushnir and her employer, Women's Care Center of Nevada, Inc. (collectively hereinafter Dr. Kushnir), alleging medical malpractice pursuant to NRS 41A.015. Dr. Garbitelli prepared the expert affidavit filed with the complaint. Dr. Kushnir filed a motion to dismiss, arguing that the complaint was untimely. The Estate opposed the motion on the ground that the one-year limitations period was tolled because Dr. Kushnir had allegedly concealed the true cause of Gaetano's perforated colon by telling the family it was caused by the cancer. The district court denied the motion, reasoning that more discovery needed to be conducted.

Later, after discovery was significantly completed, Dr. Kushnir moved for summary judgment, arguing again that the complaint was untimely. Specifically, Dr. Kushnir argued that the Estate was on inquiry notice of the claim as of August 2016, when it received a complete copy of Gaetano's medical records, and therefore the

[2]Dr. Garbitelli is also Gaetano's second cousin.

November 2017 complaint was untimely filed. After a hearing on the motion, the district court denied the request, concluding that "questions of fact exist with respect to Dr. Kushnir's alleged concealment." Dr. Kushnir now petitions this court for a writ of mandamus.

The gravamen of Dr. Kushnir's writ petition is that the Estate's medical malpractice complaint was untimely filed and therefore the district court was obligated to grant her motion for summary judgment pursuant to NRS 41A.097(2). Specifically, Dr. Kushnir contends that the Estate was on inquiry notice of the claim no later than August 2016, once it received the complete medical records, and therefore the complaint that the Estate filed in November 2017 was barred by the one-year statute of limitations. The Estate argues that the district court correctly denied the summary judgment motion because of unresolved facts regarding Dr. Kushnir's alleged concealment.

II.

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Whether to consider a petition for a writ of mandamus is within this court's sound discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Ordinarily, extraordinary writ relief is not available to challenge a district court's order denying summary judgment, "but an exception applies when 'no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action.'" *Libby v. Eighth Judicial Dist. Court*, 130 Nev. 359, 363, 325 P.3d 1276, 1278 (2014) (quoting *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997)).

In this case, the district court denied Dr. Kushnir's summary judgment motion despite the fact that the Estate's complaint was plainly untimely and tolling was unavailable, as the alleged concealment had not hindered the Estate's ability to discover the alleged malpractice and procure an expert affidavit. Because the facts relevant to the timeline of events are not in dispute, and because the district court was obligated to dismiss the action pursuant to clear statutory authority, we elect to exercise our discretion and entertain this writ petition.

III.

"NRS 41A.097(2)'s one-year limitation period is a statutory discovery rule that begins to run when a plaintiff knows or, through the use of reasonable diligence, should have known of facts that would

put a reasonable person on inquiry notice of his cause of action." *Id.* at 364, 325 P.3d at 1279 (internal quotation marks omitted). "[A] person is put on 'inquiry notice' when he or she should have known of facts that 'would lead an ordinarily prudent person to investigate the matter further.'" *Winn*, 128 Nev. at 252, 277 P.3d at 462 (quoting *Black's Law Dictionary* 1165 (9th ed. 2009)). Accordingly, for purposes of NRS 41A.097(2), an injury is discovered once the injured party possesses facts that would lead "an ordinarily prudent person to investigate further into whether [his or her] injury may have been caused by someone's negligence." *Id.* at 253, 277 P.3d at 462.

Pursuant to NRS 41A.097(3), however, "[subsection 2's] time limitation is tolled for any period during which the provider of health care has concealed any act, error or omission upon which the action is based." Thus, a plaintiff seeking to toll subsection 2's one-year discovery period must show an intentional concealment and "establish that he or she satisfied subsection 2's standard of 'reasonable diligence.'" *Winn*, 128 Nev. at 255, 277 P.3d at 464. In short, the Estate must establish that (1) Dr. Kushnir "intentionally withheld information," and (2) "that this withholding would have hindered a reasonably diligent plaintiff from procuring an expert affidavit." *Id.*

A.

As a preliminary matter, we note that for purposes of this petition we assume (without deciding) that Dr. Kushnir intentionally withheld and/or concealed information following the surgery. Nevertheless, for the reasons articulated below, the Estate's medical malpractice claim fails as a matter of law.[3]

In its answering brief, the Estate concedes and agrees with Dr. Kushnir that the Estate received Gaetano's complete medical records in August 2016. Further, Dr. Garbitelli's expert affidavit, which was attached to the November 2017 complaint, states that his expert medical opinions contained therein are based on his "education, training, 40 years of medical practice, *review of the medical records* and facts o[f] this case." (Emphasis added.) Thus, the undisputed facts establish that the discovery rule was triggered in August 2016 when Garbitelli "had facts before him that would have led

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[3]Although we assume concealment for purposes of our analysis herein, we note that the Estate's concealment claim rests, at best, on dubious grounds. To the extent the Estate contends that Dr. Kushnir engaged in active and fraudulent concealment by proffering a non-negligent explanation for Gaetano's perforated colon (i.e., that Gaetano's advanced cancer was the primary cause of the perforation, not the laparoscopy) and failing to acknowledge that she was negligent, such an assertion finds little support in law, as one's mere denial of negligence is not tantamount to fraudulent concealment. *See Grimmett v. Brown*, 75 F.3d 506, 515 (9th Cir. 1996) ("A failure to 'own up' does not constitute active concealment." (emphasis omitted)); *cf. Joynt v. Cal. Hotel & Casino*, 108 Nev. 539, 542, 835 P.2d 799, 801 (1992) (recognizing that it is the plaintiff's burden to prove a defendant's negligence).

an ordinarily prudent person to investigate further," thereby putting him on inquiry notice of the cause of action. *Winn*, 128 Nev. at 253, 277 P.3d at 462. As a result, the one-year statute of limitations expired in August 2017, making the November 2017 complaint untimely. We therefore conclude that Dr. Kushnir correctly asserts that the one-year statute of limitations had run on the Estate's medical malpractice claim.

Despite these undisputed facts, the Estate appears to argue that the concealment clause tolls the one-year statute of limitations indefinitely and that a claim of concealment forgives the reasonable diligence requirement. Therefore, the Estate argues, the district court correctly denied Dr. Kushnir's summary judgment motion. We conclude, however, that these arguments are unpersuasive.

B.

First, the tolling provision is not limitless. Although NRS 41A.097(3) states that "[subsection 2's] time limitation is tolled for any period during which the provider of health care has concealed any act, error or omission," possibly suggesting never-ending tolling, *Winn* clarifies that the concealment must be of the type that "would have hindered a reasonably diligent plaintiff from procuring an expert affidavit." *Winn*, 128 Nev. at 255, 277 P.3d at 464. In other words, the concealment must have interfered with a reasonable plaintiff's ability to satisfy the statutory requirement that the complaint be accompanied by an expert affidavit. *See* NRS 41A.071.

Here, the alleged concealment was Dr. Kushnir's statement that Gaetano's advanced cancer, and not the laparoscopic procedure, caused the perforation to her colon. But this alleged concealment did not impact Dr. Garbitelli's ability to procure an expert affidavit. Indeed, Dr. Garbitelli's affidavit states that it was the medical records that revealed the alleged negligence—medical records that had been in his possession since August 2016 and admittedly served as the sole factual basis for his medical opinions. Accordingly, even assuming that Dr. Kushnir concealed the true cause of the perforated colon, the tolling period, if any, ended in August 2016 when Dr. Garbitelli received the complete medical records and the Estate was put on inquiry notice of the claim, making procurement of the expert affidavit attainable without hindrance. Therefore, the one-year statute of limitations expired in August 2017—approximately three months before the complaint was filed.

Nevertheless, relying on *Winn*, the Estate argues that the concealment tolls the statute of limitations despite the discovery rule. The Estate misconstrues *Winn*. In *Winn*, the supreme court concluded that although the plaintiff's complaint was filed more than one year after discovery of the injury, 128 Nev. at 253-54, 277 P.3d at 463, it could not affirm the district court's grant of summary

judgment based on the statute of limitations because "factual issues remain[ed] as to whether Sunrise concealed records from Winn so as to warrant tolling." *Id.* at 258, 277 P.3d at 466. Those unresolved factual issues related directly to whether the undisclosed information was material to the plaintiff's claim, thus hindering the procurement of an expert affidavit. *Id.* at 256, 277 P.3d at 465. In this case, as explained above, no such hindrance occurred, as the Estate possessed the complete medical records in August 2016 and those records provided Dr. Garbitelli with all the information necessary to discover the alleged medical malpractice and prepare his expert affidavit. Accordingly, *Winn* is unavailing on this point.[4]

C.

Second, the Estate's argument that concealment forgives the reasonable diligence requirement is without merit. *Winn*, in fact, manifestly states the opposite. The *Winn* court noted specifically that "a plaintiff seeking to toll subsection 2's one-year discovery period must . . . establish that he or she satisfied subsection 2's standard of 'reasonable diligence.'" *Id.* at 255, 277 P.3d at 464. Thus, reasonable diligence is clearly required, and the Estate was not reasonably diligent here, as it waited almost 3 months to review the medical records and approximately 15 months to file its complaint after being placed on inquiry notice in August 2016. Consequently, we conclude that this contention is meritless as it finds no support in controlling law. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's contention that is not cogently argued or lacks the support of relevant authority).[5]

[4]The Estate also contends that footnote 4 in the *Winn* opinion expressly authorizes "timely filing suit even more than a year *after receiving medical records* (i.e.[,] 'discovering' the injury based on 'inquiry notice') if the two-prong test for concealment is satisfied." (Emphasis added.) This, however, is not what footnote 4 holds. Rather, footnote 4 holds that the tolling provision of subsection 3 applies to both the three-year and one-year limitations periods of subsection 2 and that a plaintiff's independent discovery of his or her claim will not commence the one-year limitations period if the defendant's ongoing concealment (e.g., failure to produce medical records) continues to hinder the plaintiff's ability to procure an expert affidavit. *Winn*, 128 Nev. at 254 n.4, 277 P.3d at 463 n.4. Here, as explained in the body of the opinion, Dr. Kushnir's alleged concealment did not hinder the Estate's ability to procure its expert affidavit.

[5]Additionally, the Estate suggests the November 2017 complaint was timely because it was filed "within one year of Dr. Garbitelli having *actual knowledge* of [Dr.] Kushnir's negligence." (Emphasis added.) Actual knowledge, however, is not the standard; rather, subsection 2's one-year limitations period is triggered "when a plaintiff knows or, through the use of reasonable diligence, *should have known of facts* that would put a reasonable person on inquiry notice of his cause of action." *Libby*, 130 Nev. at 364, 325 P.3d at 1279 (emphasis added) (internal quotation marks omitted). Therefore, this contention, too, fails as a matter of law.

IV.

In sum, we conclude that extraordinary writ relief is warranted because no disputed issues of material fact exist as to when the Estate was on inquiry notice of the cause of action and, based on those same undisputed facts, subsection 3's tolling provision is inapplicable. *See Libby*, 130 Nev. at 363, 325 P.3d at 1278. The irrefutable facts, therefore, establish that the one-year statute of limitations expired in August 2017, making the November 2017 complaint untimely. As a result, "pursuant to clear authority under a statute or rule, the district court [wa]s obligated to dismiss [the] action." *Id.* (quoting *Smith*, 113 Nev. at 1345, 950 P.2d at 281).[6]

We therefore grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to grant petitioners' motion for summary judgment.

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[6]Insofar as the parties raise arguments that are not specifically addressed in this opinion, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

MOTOR COACH INDUSTRIES, INC., a Delaware Corporation, Appellant, *v.* KEON KHIABANI and ARIA KHIABANI, Minors, By and Through Their Guardian MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as Executor of the ESTATE OF KAYVAN KHIABANI, M.D. (DECEDENT); the ESTATE OF KAYVAN KHIABANI, M.D. (DECEDENT); SIAMAK BARIN, as Executor of the ESTATE OF KATAYOUN BARIN, DDS (DECEDENT); and the ESTATE OF KATAYOUN BARIN, DDS (DECEDENT), Respondents.

No. 78701

August 19, 2021 493 P.3d 1007

Appeal from a judgment after a jury verdict in a tort action. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Affirmed in part, reversed in part, and remanded.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, Joel D. Henriod*, and *Abraham G. Smith*, Las Vegas; *Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC*, and *D. Lee Roberts, Jr.*, and *Howard J. Russell*, Las Vegas; *Hartline Dacus Barger Dreyer LLP* and *Darrell L. Barger* and *Michael G. Terry*, Corpus Christi, Texas; *Hartline Dacus Barger Dreyer LLP* and *John C. Dacus* and *Brian Rawson*, Dallas, Texas, for Appellant.

Christiansen Law Offices and *Peter S. Christiansen* and *Kendelee L. Works*, Las Vegas; *Kemp Jones, LLP*, and *Will Kemp* and *Eric M. Pepperman*, Las Vegas, for Respondents.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

Dr. Kayvan Khiabani was riding a bicycle when he collided with a passing bus and was fatally injured. His estate and surviving family members, respondents in this appeal, sued several defendants, including appellant Motor Coach Industries, Inc. (MCI), the designer and manufacturer of the bus. Each defendant except MCI settled with respondents before trial. At trial, respondents argued that MCI was liable under theories of defective design and failure to warn. The jury returned a verdict for respondents on the failure-to-warn theory. MCI moved for judgment as a matter of law,

for a new trial, to alter or amend the judgment to offset the settlement proceeds paid by the other defendants, and to retax costs. The district court denied each of these motions. MCI appeals.

We affirm the district court's denial of MCI's motions for judgment as a matter of law, for a new trial, and to retax costs. We reverse and remand based on the district court's denial of MCI's motion to alter or amend the judgment, however, because MCI was entitled to an offset of the settlement proceeds as MCI and the settling defendants were liable for the same injury. We also take the opportunity presented in this matter to clarify Nevada law on calculating loss-of-support awards, the causation element of failure-to-warn claims, and special verdict forms.

BACKGROUND

Collision

In spring 2017, Edward Hubbard was driving a large bus designed and manufactured by MCI on Charleston Boulevard in Las Vegas. At the same time, Khiabani, a successful hand surgeon employed by the University of Nevada, Reno's (UNR) School of Medicine in Las Vegas, was cycling in the same direction in the bicycle lane. Khiabani turned right onto South Pavilion Center Drive, followed by Hubbard, who drove in the rightmost lane. Hubbard did not see Khiabani again until further down the road, when he attempted to overtake the bicycle. According to a witness, the side of the bus came within two to three feet of Khiabani. While the front of the bus passed without incident, Hubbard soon saw Khiabani drifting into the vehicle lane. Although Hubbard immediately turned the bus away in an attempt to avoid impact, Khiabani collided with the side of the bus, slid underneath, and was hit by its rear wheel. Khiabani did not survive the collision.

Khiabani's estate, widow, and children sued various defendants, including MCI, the manufacturers of the helmet Khiabani was wearing and the bicycle he was riding, the company operating the bus, and Hubbard. Good-faith settlements were reached before trial with all defendants except MCI.

Trial

Respondents proceeded against MCI on several product-defect theories, including failure to warn of an alleged defect. At trial, respondents argued that the boxy design of the bus caused air displacement that created a suction force on objects in close proximity to the sides of the bus, like bicyclists. This "air blast" effect, according to respondents, pulled Khiabani under the bus and led to his death. Respondents argued that this effect was both an unreasonably

dangerous design defect and an unreasonably dangerous condition against which MCI failed to warn purchasers and drivers of the bus.

To calculate loss-of-support damages, the jury was informed of Khiabani's gross, i.e., pretax, pay. MCI requested that the jury be informed of Dr. Khiabani's net pay instead, on the ground that no earner supports a family with his or her pretax income, but only with what is actually taken home. The district court denied this request.

After the close of respondents' presentation of evidence, MCI moved for judgment as a matter of law, partially on the ground that respondents had not sufficiently proven the causation element of their failure-to-warn theory. The district court denied this motion.

The jury ultimately found MCI liable on the failure-to-warn theory and awarded $18,746,003.62 in damages to respondents. $2,700,000 of that award was for loss of financial support.

Post-trial

Thereafter, MCI renewed its motion for judgment as a matter of law. The district court found that many of MCI's arguments were not preserved in its original motion at the close of respondents' presentation of evidence and also rejected the arguments that it found were preserved. The district court taxed MCI with respondents' trial costs. The district court also denied MCI's motion to alter or amend the judgment to offset the settlement proceeds paid by other defendants.

Alleged new evidence

At the time of the collision, UNR's medical school in Las Vegas (Khiabani's employer) was in the process of merging with a new medical school under the University of Nevada, Las Vegas and was conducting an audit to facilitate and guide that merger. In April 2018—after trial had been completed and the verdict returned—the local CBS affiliate published and televised investigative reporting details regarding the UNR medical school and the audit. The reporters had obtained several leaked internal documents and emails and alleged a practice of overbilling fraud. The reporters alleged that, at the time of his death, Khiabani had already lost or was about to lose his job as a result of the findings of that audit. UNR's medical school made a statement largely denying the allegations and emphatically said that the audit did not make findings or conclusions "related to Medicare fraud or abuse."

In light of these developments, MCI asked for limited post-trial discovery, but the district court denied the request. In addition, MCI filed a motion for new trial based on newly discovered evidence: namely, that Khiabani's job and medical license had potentially been in jeopardy. MCI argued that this situation, combined with

other factors,[1] suggested that Khiabani's death was not accidental. MCI also argued that the jury's loss-of-financial-support award presupposed that Khiabani's job and earning capacity were stable at the time of his death. In addition to the newly discovered evidence issue, MCI argued that a new trial on the failure-to-warn claim was necessary because the jury was not asked to find causation linking any failure to warn to Khiabani's death and because the award was based on Khiabani's gross income. The district court denied the motion, agreeing with respondents that MCI had every opportunity before trial to seek discovery regarding Khiabani's continued employment and that MCI's other claims lacked merit. MCI appeals.

DISCUSSION

MCI claims that the district court erred in denying its motions for judgment as a matter of law, for a new trial, to alter or amend the judgment to offset the settlement proceeds paid by other defendants, and to retax costs. We address each in turn.

Respondents presented sufficient evidence for the causation element of the failure-to-warn claim, and thus the district court properly denied MCI's motions for judgment as a matter of law

MCI asserts that the district court erred in denying its motion and renewed motion for judgment as a matter of law because respondents presented insufficient evidence of the causation element of their failure-to-warn claim.[2] We review the district court's denial of such motions de novo. *See Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 425 (2007).

In Nevada, those bringing a failure-to-warn claim must demonstrate "the same elements as in other strict product liability cases." *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 191, 209 P.3d 271, 275 (2009). One must show that "(1) the product had a defect which rendered it unreasonably dangerous, (2) the defect existed at the time the product left the manufacturer, and (3) the defect caused the plaintiff's injury." *Id.* In such cases, the lack of a warning functions as the relevant "defect." *See id.* "[S]trict liability may be imposed even though the product is faultlessly made if it was unreasonably

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[1]At the time of Dr. Khiabani's death, his wife was undergoing cancer treatment. She has since died.

[2]Respondents contend that many of the issues raised by MCI in this appeal were not preserved in MCI's original NRCP 50(a) motion. We disagree. This court has long recognized, in relation to preserving error under NRCP 51, that "[c]ounsel, in the heat of a trial, cannot be expected to respond with all the legal niceties and nuances of a brief writer." *Otterbeck v. Lamb*, 85 Nev. 456, 460, 456 P.2d 855, 858 (1969). The same principle applies to preservation under NRCP 50(a)-(b). In its oral NRCP 50(a) motion for judgment as a matter of law, MCI sufficiently, albeit briefly, put forth its arguments such that they are adequately preserved for appeal.

dangerous to place the product in the hands of the user without suitable and adequate warning concerning safe and proper use." *Lewis v. Sea Ray Boats, Inc.*, 119 Nev. 100, 107, 65 P.3d 245, 249 (2003) (quoting *Outboard Marine Corp. v. Schupbach*, 93 Nev. 158, 162, 561 P.2d 450, 453 (1977)). "[T]he burden of proving causation can be satisfied in failure-to-warn cases by demonstrating that a different warning would have altered the way the plaintiff used the product or would have prompted [the] plaintiff to take precautions to avoid the injury." *Rivera*, 125 Nev. at 191, 209 P.3d at 275 (internal quotation marks omitted).

MCI contends that respondents did not prove causation as a matter of law for three reasons: (1) respondents did not propose what specific warning was absent, (2) any warning was superfluous because the potential for collisions with cyclists is an open and obvious danger, and (3) there was no evidence that Hubbard could have avoided the accident even if he had been warned. We agree with the district court that these arguments lack merit when all inferences are drawn, as they must be, in respondents' favor. *See Nelson*, 123 Nev. at 222, 163 P.3d at 424 (explaining that "the district court must view the evidence and all inferences in favor of the nonmoving party" when deciding whether to grant a motion for judgment as a matter of law).

First, plaintiffs do not need to provide the jury with a specific proposed warning in failure-to-warn cases. In typical design-defect cases, while a plaintiff *may* "bolster their case with evidence of an alternative design," we have expressly rejected any *requirement* that the plaintiff do so, calling such a requirement "fundamentally unfair." *Ford Motor Co. v. Trejo*, 133 Nev. 520, 524, 402 P.3d 649, 652 (2017). Similarly, failure-to-warn plaintiffs may—but need not—provide the jury with an alternative or additional warning.

Next, the fact that a potential collision between vehicles and bicyclists is a well-known danger does not mean respondents did not prove causation. It is true that Nevada law does not require manufacturers to warn against generally known dangers. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 241, 955 P.2d 661, 666 (1998). But the danger alleged here was not as obvious as MCI suggests. The risk was not simply that the bus, like any bus, could strike a cyclist. Rather, the alleged risk was that air displacement caused by the particular shape of this bus could create a strong suction force while passing a cyclist. Although Hubbard's testimony regarding his knowledge of this risk was far from clear,[3] the district court

[3]When asked at trial, "Is it your understanding that, if a bus is moving at 30 or 35 miles an hour, that that will cause air blast or air displacement at the front of the bus? Have you ever heard that?" Hubbard answered, "No, sir." However, when confronted with his answer of "yes" to a very similar question at his deposition, Hubbard indicated that he was unfamiliar with the term "air blast" but knew that there was "air moving around a bus" when driving.

correctly found that "[e]ven if the evidence enabled this [c]ourt to find as a matter of law that Hubbard should have known generally of the 'risk of driving next to a bicyclist,' . . . no Nevada law holds that this would prevent a reasonable jury from finding that an adequate warning would have avoided the accident."

MCI's assertion that there was no evidence that Hubbard could have avoided the accident even if he had been warned fails when all reasonable inferences are drawn in respondents' favor. Hubbard testified that he had seen Khiabani turn onto South Pavilion Center Drive before he followed in the bus. On this ground, the district court correctly found that there was "sufficient evidence for a reasonable jury to find that, had the driver been adequately warned about the dangerous nature of the [bus], he would have driven differently as early as when he turned onto Pavilion Center—for example by driving in the left lane instead of the right lane, or by driving slower so as to not pass the bicycle."[4]

In sum, respondents presented sufficient evidence for a reasonable jury to find that the failure to warn about air displacement's effect on passing bicyclists caused Khiabani's injury.[5] Therefore, we affirm the district court's denial of MCI's motions for judgment as a matter of law.

The district court properly denied MCI's motion for a new trial

"The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and this court will not disturb that decision absent palpable abuse." *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996).

The district court properly used Khiabani's gross income to calculate the loss-of-support award

MCI argued in its motion for new trial that the district court should have allowed evidence regarding Khiabani's net, take-home

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[4]Nevada, unlike some jurisdictions, does not apply a "heeding presumption," *see Rivera*, 125 Nev. at 194, 209 P.3d at 277. Such a presumption requires no proof that a warned party would heed the warning. Nevertheless, in this matter, Hubbard testified that he certainly would have followed any safety training warnings he was given.

[5]MCI also argues that the district court erred in barring the presentation of evidence that NRS 484B.270 requires drivers who are overtaking or passing a bicycle to either move their vehicle to the lane to the left or keep at least three feet between the vehicle and the bicycle. We conclude the district court did not abuse its discretion in denying the inclusion of this evidence. This court has never held that warnings are unnecessary when a law already prohibits conduct. Further, the experts who testified regarding the air-disturbance effect said the effect is lessened the further a bicyclist is away from a bus, not that keeping a distance of three feet would completely eliminate the danger. For example, one expert testified, "The force doesn't suddenly go to zero at three feet . . . . [M]y estimates didn't associate the force with any particular distance."

income rather than gross, pretax income for loss-of-support damages. While the question of whether a particular measure of damages is appropriate is subject to our plenary review, *see Davis v. Beling*, 128 Nev. 301, 316, 278 P.3d 501, 512 (2012), the district court's decision to exclude evidence is reviewed for an abuse of discretion, *see M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). NRS 41.085(4) permits heirs to recover damages for "loss of probable support" that would have been provided by the decedent. Thus, as we have explained, "[h]eirs' damages, based on the decedent's lost earning capacity, may include present as well as future loss of support." *Freeman v. Davidson*, 105 Nev. 13, 16, 768 P.2d 885, 887 (1989).

We have not previously addressed whether juries should be informed of a decedent's pretax income or post-tax income to calculate an award for loss of probable support under NRS 41.085(4). Accordingly, we turn to other jurisdictions for guidance.

Under federal jurisprudence, loss-of-support damages must be based on the decedent's net, post-tax earnings. One of the leading federal cases on this point is *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490 (1980). There, the United States Supreme Court analyzed wrongful-death damages under the Federal Employers' Liability Act and held that "[i]t is [the decedent's] after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family." *Id.* at 493. *Liepelt* rejected the argument "that the introduction of evidence describing a decedent's estimated after-tax earnings is too speculative or complex for a jury." *Id.* at 494. *Liepelt* also held that juries should be informed about the nontaxable nature of an award for loss of support. *Id.* at 497-98. Although this court has declined to follow *Liepelt*'s second holding, *Otis Elevator Co. v. Reid*, 101 Nev. 515, 521-22, 706 P.2d 1378, 1382 (1985) ("[T]ax instructions are appropriate only in special circumstances when the likelihood that the jury will consider tax consequences is magnified by discussion of tax-related issues during the trial."), we have not yet spoken to the first.

A majority of state courts to consider this issue have diverged from *Liepelt*. *See generally* Lauren Guest & David Schap, *Rationales Concerning the Treatment of Federal Income Taxes in Personal Injury and Wrongful Death Litigation in the State Courts*, 21 J. Legal Econ. 85, 95-104 (2014) (surveying courts' treatment of this issue and determining that 30 states generally do not adjust damage awards to account for income tax exclusions). The Colorado Supreme Court, for example, has held that future income taxes should not be considered in calculating economic damages in wrongful death actions, reasoning that holding otherwise would invite "[a] battle of the experts about what Congress or the General

Assembly might effectuate in the future regarding tax policy and the amount individual tax payers will likely owe in the future," increase the expenses of litigation, and distract juries. *Hoyal v. Pioneer Sand Co., Inc.*, 188 P.3d 716, 719-20 (Colo. 2008). The Illinois Supreme Court follows a similar path, based on the rationale that calculating economic losses is "not simple under the best of circumstances" and that considering income tax would only make that process "more complex." *Klawonn v. Mitchell*, 475 N.E.2d 857, 861 (Ill. 1985). New York's highest court has likewise held that gross income is the proper measurement:

> No crystal ball is available to juries to overcome the inevitable speculation concerning future tax status of an individual or future tax law itself. Trial strategies and tactics in wrongful death actions should not be allowed to deteriorate into battles between a new wave of experts consisting of accountants and economists in the interest of mathematical purity and of rigid logic over less precise common sense.

Johnson v. Manhattan & Bronx Surface Transit Operating Auth., 519 N.E.2d 326, 329 (N.Y. 1988).

We are persuaded by the approach taken by the courts in Colorado, Illinois, and New York. A deceased person's gross income is the most workable and realistic measure of what salary would be used to support their surviving family. All such loss-of-support awards are based on an unavoidably imperfect attempt to predict an alternate future where the decedent had lived, received pay, and used it to support his or her family. It is not practical to add conjecture regarding tax policy to that already tenuous counterfactual exercise. Accordingly, we conclude that the district court did not abuse its discretion in excluding evidence of Khiabani's net income.

The failure-to-warn causation issue was submitted to the jury

MCI argues that the district court should have granted a new trial because the court provided a special verdict form that did not give the jury any opportunity to answer whether it found that respondents had proven the causation element of the failure-to-warn claim. Thus, MCI claims, even if evidence of causation existed from which the jury could link the lack of a warning to the injury, contrary evidence also existed and the jury erroneously was not asked to make that connection in determining liability.

Nevada allows juries to return special verdicts "in the form of a special written finding on each issue of fact." NRCP 49(a)(1). The district court "must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue." NRCP 49(a)(2). Special verdict forms should be read in concert with jury instructions. *See Yamaha Motor Co.*, 114 Nev. at 245,

955 P.2d at 669 ("We conclude that, when read together, the jury instructions and the special verdict form were not prejudicially misleading on this point.").

The district court's special verdict form contained five interrogatories under the heading "Liability." Interrogatories 1-4 related to the design-defect theories of liability, while Interrogatory 5 related to the failure-to-warn theory of liability. Interrogatories 1-4 were nearly identical to one another and inquired whether a design defect was the "legal cause" of Khiabani's death. For example, Interrogatory 4 read as follows: "Is MCI liable for defective design (Did the aerodynamic design of the [bus] make it unreasonably dangerous and a legal cause of Dr. Khiabani's death)?" However, Interrogatory 5 did not mention causation, asking only, "Did MCI fail to provide an adequate warning that would have been acted upon?" The liability section containing these interrogatories concluded with a paragraph which began "If you answered 'Yes' to any of the above liability questions . . . ."

The jury answered "no" to every interrogatory on the design-defect claims, and "yes" to the failure-to-warn question presented in Interrogatory 5. MCI contends that the district court erred in denying its motion for a new trial on the ground that the special verdict form did not allow the jury to make a decision regarding causation for the failure-to-warn theory.

MCI argues that the jury could only answer the question posed in Interrogatory 5—whether MCI failed to provide an adequate warning that would have been acted upon—and did not have any opportunity to indicate whether any such failure to warn was the cause of Khiabani's death. MCI emphasizes that in contrast to Interrogatory 5, the jury decided in its favor on every interrogatory that explicitly inquired as to legal causation.

However, while Interrogatory 5 did not mention causation, Jury Instruction 31 did, and "[t]his court presumes that a jury follows the district court's instructions." *Krause Inc. v. Little*, 117 Nev. 929, 937, 34 P.3d 566, 571 (2001). Jury Instruction 31 provided as follows: "If you find that warnings provided with the [bus] were inadequate, the defendant cannot be held liable unless Plaintiffs prove by a preponderance of the evidence that the individual who might have acted on any warning would have acted in accordance with the warning, and that doing so would have prevented the injury in this case." We conclude that the jury instruction and verdict form, read together, were sufficient to ensure that the jury considered the question of causation for the failure-to-warn claim.

For this claim, the jury was required to consider whether there was a failure to warn that made the bus unreasonably dangerous; whether the driver who would have received the warning would have acted upon it; and whether, if so, the injury would have been

prevented. *See Rivera*, 125 Nev. at 191, 209 P.3d at 275 (discussing the elements of failure-to-warn claims). All these questions were contained in Jury Instruction 31, and we presume the jury followed the instruction, even if the prevention question was not repeated in the special verdict form. Further, the jury was aware that Interrogatory 5 pertained to liability. Indeed, it was located in a section of the special verdict form titled "Liability." Thus, the jury was given the opportunity to consider whether the absence of a warning regarding air displacement would have been acted upon and would have prevented Khiabani's injuries. Therefore, we conclude that the district court did not abuse its discretion in denying the motion with respect to the verdict form.

The verdict was not inconsistent

MCI further argues that the district court should have granted a new trial because the jury's answers to the interrogatories were inconsistent and the court should not have entered a judgment without attempting to reconcile those inconsistencies. Specifically, MCI sees a contradiction in the jury's findings that (1) an air blast was not an unreasonably dangerous condition that caused the collision and (2) the failure to warn of an air blast was an unreasonably dangerous condition that caused the collision.

"[J]udgment must not be entered" if the answers to special verdict interrogatories are "inconsistent with each other and one or more is also inconsistent with [a] general verdict." NRCP 49(b)(4); *see Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1106, 197 P.3d 1032, 1035 (2008). Courts must make an effort to harmonize seemingly inconsistent special verdict answers and must interpret them in a consistent way if possible. *See Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052, 1058-59 (9th Cir. 2003) (citing *Gallick v. Balt. & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963)).

There is no contradiction here. As noted, failure-to-warn claims have the same elements as design-defect claims, *Rivera*, 125 Nev. at 191, 209 P.3d at 275, but the "defect" *is* the lack of a warning rather than an issue with the product itself. The jury could have found that the air blast effect itself was not an unreasonably dangerous condition but that the lack of a warning nevertheless made the product unreasonably dangerous. Therefore, we conclude that the jury's answers on the verdict form were not inconsistent.

No newly discovered evidence merited a new trial

MCI argues that news reporting after the trial brought to light new facts that merited a new trial. MCI argues that the revelations in these reports placed Khiabani's continued employment—had he lived—in such doubt that a new trial was warranted, given that the expert testimony on financial support at trial was based on the

assumption that Khiabani would have continued in the employment he held—or, at the very least, continued being employed as a surgeon.

NRCP 59(a)(1)(D) provides that "the court may, on motion, grant a new trial" on the ground that there has been "newly discovered evidence material for the party making the motion that the party could not, with reasonable diligence, have discovered and produced at the trial." We review the denial of such a motion for an abuse of discretion. *See Lucey v. First Nat'l Bank of Nev.*, 73 Nev. 64, 69, 307 P.2d 774, 776-77 (1957).

Here, as the district court found, the "new" evidence pointed out by MCI likely could have been discovered with reasonable diligence before or during trial. Respondents provided MCI with a release months before trial commenced, authorizing MCI to obtain Khiabani's employment information from the medical school. It appears that MCI did not ever subpoena that information. MCI surmises that the medical school would not have released the information contained in the news articles because the school was keeping the facts of the audit confidential. This is pure speculation, not proof that MCI could not have discovered the evidence with reasonable diligence.

MCI also argues that, if respondents' counsel knew that Khiabani's employment was in jeopardy and still proceeded to argue to the court and the jury as if it were not, respondents' counsel perpetrated a fraud upon the court. The record is simply devoid of any evidence to support such a bold contention, and the district court correctly found this argument to be too speculative. Accordingly, we conclude that the district court did not abuse its discretion in denying MCI's motion for a new trial on the ground of newly discovered evidence.

MCI was entitled to offset the judgment

MCI argues that because respondents had settled with all other defendants before trial for several million dollars, the jury's judgment of $18,746,003.62 should be offset by the settlement amount. Respondents argue that Nevada's offset statute, NRS 17.245, does not apply to strictly liable defendants like MCI because they are not entitled to contribution. The district court agreed with respondents and thus denied MCI's motion to alter or amend the judgment to offset the settlement proceeds paid by other defendants. We reverse.

This court generally reviews an order denying a motion to alter or amend a judgment for an abuse of discretion. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). However, "statutory interpretation is a question of law and is reviewed de novo." *Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 846, 102 P.3d 52, 68 (2004). Because the district court's

order hinged on its interpretation of NRS 17.245 with respect to strict liability claims, we review this question de novo.

"When interpreting a statute, we give words their plain meaning unless attributing the plain meaning would violate the spirit of the statute." *Banks*, 120 Nev. at 846, 102 P.3d at 68. NRS 17.245(1)(a) provides, in relevant part, as follows:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death . . . it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater.

Whether defendants held responsible under a strict liability theory are entitled to an offset under this provision is an issue of first impression for this court. As we recently explained in *J.E. Johns & Associates v. Lindberg*, however, when considering whether NRS 17.245 applies in a given matter, "district courts must determine whether both the settling and the nonsettling defendants were responsible for the same injury." 136 Nev. 477, 478, 470 P.3d 204, 206 (2020). Further, we held, contribution and offset are distinct concepts, and eligibility for an offset should not be determined by whether the settling and nonsettling defendants were joint tortfeasors under NRS 17.225, which governs the right of contribution. *Id.* at 480-81, 470 P.3d at 208.

Nothing in NRS 17.245 suggests that lines should be drawn between defendants found strictly liable and other tortfeasors when both are responsible for the same injury. NRS 17.245 is clear on its face and thus applies to MCI, as there is no dispute that MCI and the other defendants were liable for the same injury. Further, the jury calculated the total damages for that single injury and respondents had already received partial payment from the settling defendants. MCI was therefore entitled to offset the judgment under NRS 17.245. To hold otherwise would permit a double recovery by respondents for the same injury. *See Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 441, 444, 245 P.3d 547, 549 (2010) (adopting the double recovery doctrine and explaining that "a plaintiff can recover only once for a single injury even if the plaintiff asserts multiple legal theories"). Accordingly, the district court should have granted MCI's motion to alter or amend the judgment to offset the settlement proceeds paid by other defendants, and we remand for calculation of the offset due.

The district court properly denied MCI's motion to retax costs

We reject MCI's contention that the district court's award of costs included improper expenses that would more properly be

characterized as attorney fees and that the expert witness fees unjustifiably exceeded the statutory cap in NRS 18.005. “The determination of allowable costs is within the sound discretion of the trial court.” *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 493, 117 P.3d 219, 227 (2005). Thus, we defer to the district court’s finding that respondents were not seeking certain costs as an improper means to recover attorney fees.

Regarding expert witness fees, NRS 18.005(5) generally caps such costs to not more than five expert witnesses in an amount of no more than $1,500 per witness and requires the district court to carefully evaluate a request for excess fees. In evaluating such a request, the court should consider several factors, including “the importance of the expert’s testimony to the party’s case,” the extent of the expert’s work, and “whether the expert had to conduct independent investigations or testing.” *Frazier v. Drake*, 131 Nev. 632, 650-51, 357 P.3d 365, 377-78 (Ct. App. 2015). In its order on this issue, the district court cited these factors and respondents’ supporting documentation and taxed the entire amount requested for expert fees. We again defer to the district court’s decision, discerning no abuse of discretion, particularly given the obvious importance of experts to the entirety of respondents’ claims.

CONCLUSION

The district court properly denied the motions for judgment as a matter of law, for a new trial, and to retax costs, and we affirm the judgment and post-judgment orders as to those matters. However, the district court incorrectly denied the motion to alter or amend the judgment to offset the settlement proceeds paid by other defendants. We therefore reverse the judgment as to its amount and remand to the district court to determine the amount of the offset to which MCI is entitled and enter a corrected judgment thereon.

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

SUPERPUMPER, INC., AN ARIZONA CORPORATION; EDWARD BAYUK, INDIVIDUALLY AND AS TRUSTEE OF THE EDWARD WILLIAM BAYUK LIVING TRUST; SALVATORE MORABITO, AN INDIVIDUAL; AND SNOWSHOE PETROLEUM, INC., A NEW YORK CORPORATION, APPELLANTS, *v.* WILLIAM A. LEONARD, TRUSTEE FOR THE BANKRUPTCY ESTATE OF PAUL ANTHONY MORABITO, RESPONDENT.

No. 79355

September 16, 2021 495 P.3d 101

Appeal from a final judgment and order awarding attorney fees and costs in a tort action. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge, and Janet Berry, Senior Judge.

Affirmed.

[Rehearing denied October 11, 2021]

Claggett & Sykes Law Firm and *Micah S. Echols*, Las Vegas; *Hartman & Hartman* and *Jeffrey L. Hartman*, Reno; *Robison, Sharp, Sullivan & Brust* and *Frank C. Gilmore*, Reno, for Appellants.

Garman Turner Gordon and *Gerald M. Gordon, Gabrielle A. Hamm, Erika A. Pike Turner*, and *Teresa M. Pilatowicz*, Las Vegas; *Jones Lovelock* and *Stephen A. Davis*, Las Vegas, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

In this appeal, we examine whether a state district court had subject matter jurisdiction over a fraudulent conveyance action or whether such an action is within the exclusive jurisdiction of the federal bankruptcy court. We hold that the district court here had subject matter jurisdiction over the action because there is concurrent federal and state jurisdiction over fraudulent conveyance actions. We also conclude that, unlike subject matter jurisdiction, a defect as to in rem jurisdiction is a defect that is waived if not timely asserted. Accordingly, because the district court properly exercised jurisdiction over the action and did not abuse its discretion in its rulings on the discovery and evidentiary issues discussed below, we affirm the district court's judgment.

FACTS AND PROCEDURAL HISTORY

In 2007, Paul Morabito and Consolidated Nevada Corporation (CNC) filed a lawsuit against JH, Inc., Jerry Herbst, and Berry-

Hinckley Industries (collectively, the Herbsts). The Herbsts filed counterclaims against Morabito and CNC and ultimately prevailed. The Herbsts were awarded in excess of $149.4 million in damages. Thereafter, the parties entered into a settlement agreement for $85 million. By that time, Morabito had already moved most of his assets out of his name. Morabito and CNC defaulted on the settlement agreement, and, as a result, the Herbsts filed an involuntary Chapter 7 bankruptcy petition against Morabito and CNC. The bankruptcy court adjudicated Morabito as a Chapter 7 debtor.

In an attempt to collect on the settlement agreement, the Herbsts filed a fraudulent transfer action under NRS Chapter 112 against Morabito, as well as the transferees of his assets, in state district court. The transferees (appellants in this case) are Superpumper, Inc., an Arizona corporation; Salvatore (Sam) Morabito, who is Paul Morabito's brother; Edward Bayuk, individually and as trustee of the Bayuk Trust; and Snowshoe Petroleum, Inc., a New York corporation (collectively, when possible, Superpumper). All of the transferees received substantial assets from Morabito.

After the bankruptcy court appointed respondent William A. Leonard as Morabito's bankruptcy trustee (the Trustee), the Herbsts and Superpumper stipulated to substitute the Trustee for the Herbsts and to remove Morabito as a defendant in the state court action. Following an eight-day bench trial, the state district court avoided all of Morabito's transfers to Superpumper and awarded the Trustee the subject property or the value thereof.

Superpumper appeals, arguing that the district court (1) did not have subject matter jurisdiction over the underlying fraudulent conveyance action, (2) did not have in rem jurisdiction over the Bayuk Trust, and (3) erred in allowing attorney-client communications to be disclosed during discovery and admitted into evidence at trial.

DISCUSSION

The district court had subject matter jurisdiction over the fraudulent conveyance action

Superpumper's argument regarding subject matter jurisdiction is twofold. First, Superpumper asserts that the state district court did not have jurisdiction over the entire case because fraudulent transfer proceedings are within the exclusive jurisdiction of the bankruptcy court. Specifically, citing *In re Gruntz*, 202 F.3d 1074, 1080-81 (9th Cir. 2000), Superpumper argues that bankruptcy courts have exclusive jurisdiction over "core proceedings" and that a fraudulent conveyance action is a core proceeding. Second, Superpumper contends that the Trustee lacked standing to maintain the underlying action.

"Subject matter jurisdiction is a question of law subject to de novo review." *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009). Subject matter jurisdiction "can be raised by the parties

at any time, or sua sponte by a court of review, and cannot be conferred by the parties." *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) (internal quotation marks omitted). "[I]f the district court lacks subject matter jurisdiction, the judgment is rendered void." *Id.*

Federal district courts "have original and exclusive jurisdiction of all cases under title 11," which encompasses the federal bankruptcy provisions. 28 U.S.C. § 1334(a) (2005). However, "the district courts shall have *original but not exclusive jurisdiction* of all civil proceedings arising under title 11, or arising in or related to cases under title 11." *Id.* at § 1334(b) (emphasis added). Federal district courts may refer all cases arising under title 11 to bankruptcy judges. 28 U.S.C. § 157(a). And "[b]ankruptcy judges *may* hear and determine all cases under title 11 and all *core proceedings* arising under title 11." *Id.* at § 157(b)(1) (emphases added). "[A] 'core proceeding' in bankruptcy is one that invokes a substantive right provided by title 11 or . . . a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *Gruntz*, 202 F.3d at 1081 (internal quotation marks omitted). In contrast, "'[n]on-core proceedings' are those not integral to the restructuring of debtor-creditor relations and not involving a cause of action arising under title 11." *Id.*

Although Superpumper suggests otherwise, just because a proceeding is considered "core" does not mean that it lies within the exclusive jurisdiction of the bankruptcy court. Rather, whether a proceeding is considered "core" determines the relationship between Article I bankruptcy courts and Article III federal district courts, not state courts. In *Executive Benefits Insurance Agency v. Arkison*, the United States Supreme Court explained that bankruptcy courts are authorized to enter final judgments in core proceedings, which the federal district court may then review "under traditional appellate standards." 573 U.S. 25, 33-34 (2014). However, "for 'non-core' proceedings . . . [,] a bankruptcy court" is merely authorized to "'submit proposed findings of fact and conclusions of law to the district court' [which] must then review those proposed findings and conclusions *de novo* and enter any final orders or judgments." *Id.* at 34 (quoting 28 U.S.C. § 157(c)(1)).

Thus, whether a matter is "core" or "non-core" determines whether the bankruptcy court may enter a final judgment and the appropriate standard of review for that judgment, not whether a state court has jurisdiction over the matter. *See Gruntz*, 202 F.3d at 1081 ("[T]he separation of 'core' and 'non-core' proceedings . . . creates a distinction between those judicial acts deriving from the plenary Article I bankruptcy power and those subject to general Article III federal court jurisdiction."); *Hopkins v. Plant Insulation Co.*, 349 B.R. 805, 811 (Bankr. N.D. Cal. 2006) (stating that "[28 U.S.C. §] 157(b) governs the division of responsibility between Article III district courts

and Article I bankruptcy courts in each judicial district, and has nothing to say about the division of responsibility between state and federal courts").

Instead, as the Bankruptcy Appellate Panel of the Ninth Circuit noted in *In re McCarthy*, state and federal courts share concurrent jurisdiction over certain "core" proceedings. 230 B.R. 414, 418 (B.A.P. 9th Cir. 1999) ("The fact that a fraudulent transfer action might be a 'core proceeding' under 28 U.S.C. § 157(b)(2) does not equate to exclusive federal jurisdiction. Rather, there is concurrent federal and state jurisdiction over fraudulent transfer actions and many other core proceedings." (citing 28 U.S.C. § 1334(b))); *see also In re Brady, Tex., Mun. Gas Corp.*, 936 F.2d 212, 218 (5th Cir. 1991) ("[T]he only aspect of the bankruptcy proceeding over which the district courts and their bankruptcy units have exclusive jurisdiction is the bankruptcy petition itself. In other matters arising in or related to title 11 cases . . . , state courts have concurrent jurisdiction." (citation and internal quotation marks omitted)); *Hopkins*, 349 B.R. at 812 (concluding "that state courts retain concurrent jurisdiction over claims brought" by a trustee to recover fraudulent conveyances).

And although the *Gruntz* court stated broadly that a "bankruptcy court[has] plenary power over core proceedings," 202 F.3d at 1082, *Gruntz* did not overrule *McCarthy*, which stated that a core proceeding "does not equate to exclusive federal jurisdiction," 230 B.R. at 418. *Gruntz* is also distinguishable because there the state court acted in derogation of a bankruptcy court automatic stay. 202 F.3d at 1077. Here, however, the bankruptcy court lifted the stay specifically so that the Trustee could pursue the underlying action. Further, a bankruptcy court's exercise of jurisdiction is permissive, not mandatory. 28 U.S.C. § 157(b)(1) provides that a "[b]ankruptcy judge[ ] *may* hear and determine all cases under title 11 and all core proceedings arising under title 11." (Emphasis added.) There is no language in the statute or *Gruntz* that demands that core proceedings be exclusively within the jurisdiction of bankruptcy courts as against state courts. *See Hopkins*, 349 B.R. at 811 (stating that "[n]othing in *Gruntz* indicates that a bankruptcy court lacks the power to decline jurisdiction over core matters"). Therefore, assuming without deciding that a fraudulent conveyance action is a core proceeding, we hold that the state district court and the bankruptcy court shared concurrent jurisdiction over this fraudulent conveyance action.

We also reject Superpumper's argument that the district court lacked subject matter jurisdiction because the Trustee lacked standing. "When a bankruptcy petition is filed, all of the debtor's property, other than certain exceptions, becomes part of the bankruptcy estate." *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 632, 377 P.3d 118, 121 (2016) (citing 11 U.S.C. § 541(a) (2012)). "A

bankruptcy trustee is charged with administering the estate [including] recovering assets for the creditors' benefit." *Id*. at 633, 377 P.3d at 121. In Nevada "a creditor . . . may obtain . . . [a]voidance of [a fraudulent] transfer." NRS 112.210(1)(a). And 11 U.S.C. § 544(b)(1) provides that a "trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim . . . ." Further, courts have frequently held that a trustee stands in the shoes of creditors. *See Universal Church v. Geltzer*, 463 F.3d 218, 222 n.1 (2d Cir. 2006) ("[T]he Bankruptcy Code allows the trustee to step into the shoes of a creditor under state law and avoid any transfers such a creditor could have avoided."); *In re MortgageAmerica Corp.*, 714 F.2d 1266, 1275 (5th Cir. 1983) ("11 U.S.C. § 544[ ] allows the bankruptcy trustee to step into the shoes of a creditor for the purpose of asserting causes of action under state fraudulent conveyance acts for the benefit of all creditors."). Thus, it is a trustee's obligation to recover fraudulent conveyances for the estate, and the trustee has the authority to do so under NRS 112.210(1)(a) and 11 U.S.C. § 544.[1] Therefore, we conclude that the Trustee had standing to maintain this fraudulent conveyance action.[2]

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[1]Superpumper also argues that the Herbsts did not assign their claim to the Trustee, or that they could not do so under Nevada law. We reject this argument. Although a fraud claim is not assignable, *see Reynolds v. Tufenkjian*, 136 Nev. 145, 150, 461 P.3d 147, 152 (2020), Superpumper has not cited authority for the proposition that a fraudulent conveyance claim is not assignable, *see* 6A C.J.S. *Assignments* § 42 (2021 update) ("Unless it is forbidden by statute or clearly limited by agreement or waiver, any claim may be assigned except one to recover damages for personal injury or one involving a close, personal, and highly confidential relationship." (footnotes omitted)). Further, there are significant differences between the two types of claims. *See, e.g.*, *Sportsco Enters. v. Morris*, 112 Nev. 625, 631, 917 P.2d 934, 937 (1996) (distinguishing the elements of a claim for fraudulent conveyance from fraud). And Superpumper has not provided authority demonstrating that trustees cannot substitute for a creditor in a fraudulent conveyance action.

[2]Superpumper frames its argument about standing as a reason why the district court lacked subject matter jurisdiction. However, this court has never directly subscribed to the view that standing is an aspect of subject matter jurisdiction, and some jurisdictions have held that they are separate principles. *See, e.g.*, Meredith Hoberock, *Standing in Arkansas Courts:* Chubb *Holds That Standing Is Not a Component of Subject Matter Jurisdiction*, 64 Ark. L. Rev. 501, 508 (2011) ("The issue of standing in state courts is a matter of state law, and thus state courts are not bound by federal standing principles. Nonetheless, many state courts default to federal standing rules by treating standing as jurisdictional. A few states, however, do not treat standing as a component of subject-matter jurisdiction." (footnotes omitted)); *cf. In re Guardianship of Herrick*, 846 N.W.2d 301, 310 (Neb. Ct. App. 2014) (providing that "[t]he defect of standing is a defect of subject matter jurisdiction"). Nonetheless, because neither party has raised this issue and because we conclude that the Trustee has standing here, we do not address whether standing and subject matter jurisdiction are distinct principles other than to note that we do not necessarily agree with Superpumper's treatment of standing as a part of subject matter jurisdiction.

Superpumper waived its in rem jurisdiction argument

Superpumper also argues that the district court did not have subject matter jurisdiction over the Bayuk Trust because only Edward Bayuk was named in the trust's capacity, not the trust itself, seemingly arguing simultaneously that the district court did not have in rem jurisdiction. However, this argument conflates in rem jurisdiction with subject matter jurisdiction. In rem and quasi in rem jurisdiction, like personal jurisdiction, are forms of basis jurisdiction; they are distinct from subject matter jurisdiction. *See Leventhal v. Black & LoBello*, 129 Nev. 472, 477 n.5, 305 P.3d 907, 910 n.5 (2013) (clarifying that in rem jurisdiction is distinct from subject matter jurisdiction); *see also In re Aboud Inter Vivos Tr.*, 129 Nev. 915, 921, 314 P.3d 941, 945 (2013) (noting that a court needs either in rem jurisdiction over the property or in personam jurisdiction over the person in order to enter a judgment, but not both).

This distinction is crucial here because a defense of lack of personal jurisdiction must be raised in a responsive pleading or else it is waived, unlike subject matter jurisdiction, which may be raised at any time. *See* NRCP 12(h)(1)(B) (listing lack of personal jurisdiction as a defense that is waived if not raised in a responsive pleading or made in a Rule 12 motion, but not including lack of subject matter jurisdiction as a waivable defense); *Landreth*, 127 Nev. at 179, 251 P.3d at 166. Given that in rem jurisdiction is analogous to personal jurisdiction, other courts have held, and we agree, that a defendant's objection to in rem or quasi in rem jurisdiction is likewise waived if not timely asserted. *See Gager v. White*, 425 N.E.2d 851, 854, 856 (N.Y. 1981) (providing that in personam, in rem, and quasi in rem jurisdiction are waived if not "raised . . . by a preanswer motion or by pleading it as an affirmative defense"); *see also* 5B Charles Alan Wright, Arthur R. Miller & A. Benjamin Spencer, *Federal Practice and Procedure: Civil* § 1351 (3d ed. 2021 update) (interpreting Federal Rule of Civil Procedure 12(b)(2), upon which NRCP 12 is modeled, as "sufficiently elastic to embrace a defense or objection that the district court lacks in rem or quasi-in-rem jurisdiction"). Thus, because Superpumper participated in the litigation but did not raise lack of in rem or quasi in rem jurisdiction as a defense in its answer or in a Rule 12 motion, we conclude that it is waived.

The district court did not abuse its discretion when it allowed attorney-client communications to be disclosed in discovery and admitted into evidence at trial

Finally, Superpumper argues that the district court improperly permitted attorney-client communications to be disclosed in discovery and admitted at trial. During discovery, the Trustee sent notice of its intent to depose Dennis Vacco, Esq., Morabito's and

Superpumper's attorney. Superpumper filed a motion to partially quash the subpoena or for a protective order to safeguard attorney-client communications between Vacco, Superpumper, and Morabito, asserting the common interest privilege. In the discovery commissioner's recommendation, which the district court adopted in its entirety, he determined that the common interest privilege does not apply to the communications. Thereafter, the district court admitted the communications into evidence at trial.

"Discovery matters are within the district court's sound discretion, and we will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion." *Canarelli v. Eighth Judicial Dist. Court*, 136 Nev. 247, 251, 464 P.3d 114, 119 (2020) (internal quotation marks omitted). Similarly, the decision to admit evidence is committed to the district court's discretion, "and we will not interfere with the district court's exercise of discretion absent a showing of palpable abuse." *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008).

Although Superpumper argues the district court erred in determining that the common interest privilege does not apply to the communications at issue here, we need not reach its arguments regarding the contours of the privilege. This is apparent because Superpumper has not met its threshold burden of articulating its claim of privilege. *See* NRCP 26(b)(5)(A) (providing that a party claiming a privilege "must . . . expressly make the claim . . . and . . . describe the nature of the documents, communications, or tangible things" so as to "enable other parties to assess the claim"); *see also In re Foster*, 188 F.3d 1259, 1264 (10th Cir. 1999) (stating that "[a] party claiming the attorney-client privilege must prove its applicability . . . [and] must bear the burden as to specific questions or documents, not by making a blanket claim" (citation omitted)). As the discovery commissioner noted in his recommendation, Superpumper failed to "identif[y] specific information or documents that [it] believe[s] are protected." On appeal, as below, Superpumper has not identified what communications are privileged. Superpumper's blanket invocation of privilege is insufficient to demonstrate that the communications are privileged.

Further, Superpumper has not demonstrated how the admission of any of the communications at trial was prejudicial. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (stating that an error "not affect[ing] a party's substantial rights" does not require reversal unless "but for the alleged error, a different result might reasonably have been reached"); *see also* NRCP 61. Indeed, Superpumper does not specify or point to anything in the record that would demonstrate that a different result would have occurred if the communications were not admitted. Thus, we hold that the district

court did not abuse its discretion when it admitted the allegedly privileged communications into evidence.[3]

CONCLUSION

We conclude that the state district court had concurrent jurisdiction with the bankruptcy court over the fraudulent conveyance action, and thus the district court had proper subject matter jurisdiction over this action. We also conclude that the Trustee had standing to maintain this fraudulent conveyance action. Additionally, because in rem jurisdiction is akin to personal jurisdiction and lack thereof must be alleged in a preanswer motion or responsive pleading, we further conclude that Superpumper waived this argument, as it failed to do so. Lastly, we conclude that the district court did not abuse its discretion in allowing attorney-client communications to be disclosed in discovery or admitting the communications into evidence at trial, as Superpumper failed to meet its burden of demonstrating that the communications are privileged or that it was prejudiced by the admission of the communications.

Accordingly, we affirm the district court's judgment.[4]

Parraguirre, Stiglich, Cadish, Silver, Pickering, and Herndon, JJ., concur.

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[3]Superpumper also argues that exhibit 145, which contained one of these communications, was improperly admitted because it was hearsay and lacked foundation. We conclude that the admission of the exhibit does not warrant reversal, as Superpumper does not show how this alleged evidentiary error substantially affected its rights. *See Hallmark v. Eldridge*, 124 Nev. 492, 505, 189 P.3d 646, 654 (2008) (stating that "claims of prejudice concerning errors in the admission of evidence [are reviewed] based upon whether the error substantially affected the rights of the appellant" such that, "but for the error, a different result might reasonably have been expected" (internal quotation marks omitted)).

[4]Although Superpumper also appealed from the district court's order awarding attorney fees and costs, it fails to cogently argue how the award was improper other than to suggest that, if we were to vacate the district court's judgment, the award must also be vacated. Because we affirm the district court's judgment and Superpumper has failed to show how the district court's decision to award attorney fees and costs was an abuse of discretion, we decline to consider this argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that this court need not consider claims that are not cogently argued or supported by relevant authority); *see also Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014) (reviewing an award of attorney fees and costs for an abuse of discretion).

DAPHNE WILLIAMS, Appellant, *v.* CHARLES "RANDY" LAZER, Respondent.

No. 80350

September 16, 2021 495 P.3d 93

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

Reversed and remanded with instructions.

[Rehearing denied October 20, 2021]

Randazza Legal Group, PLLC, and *Marc J. Randazza* and *Alex J. Shepard*, Las Vegas, for Appellant.

TRILAW and *Adam R. Trippiedi*, Henderson, for Respondent.

American Civil Liberties Union Foundation and *Arianna Marie Demas*, New York, New York; *American Civil Liberties Union of Nevada* and *Nicole C. Levy*, Las Vegas, for Amici Curiae American Civil Liberties Union Foundation and American Civil Liberties Union of Nevada.

Law Offices of Clyde DeWitt and *Clyde F. DeWitt*, Las Vegas, for Amicus Curiae First Amendment Lawyers Association.

Before the Supreme Court, En Banc.

OPINION

By the Court, Cadish, J.:

This appeal presents issues concerning the scope of Nevada's anti-SLAPP statutory protections, including what the defendant must show to meet the statute's good faith standard for protected speech, how the statute works with common law-based privileges, and what is required of the plaintiff in terms of showing a probability of prevailing on the merits of his claim in order to proceed. After respondent threatened to sue appellant over a text message that he perceived as defamatory, appellant filed a complaint with the Nevada Real Estate Division (NRED), alleging that respondent acted unprofessionally and unethically in a real estate matter. Respondent filed the underlying tort complaint based on appellant's NRED complaint. Appellant, claiming that the anti-SLAPP statute and absolute litigation privilege protected her from liability, moved to dismiss. The district court denied the motion, concluding

that the statements did not meet the good faith standard for protected speech, the litigation privilege did not necessarily apply, and respondent showed a probability of prevailing on the merits of his claims.

On this record, we conclude that appellant met the good faith standard under the anti-SLAPP framework because her statements were either opinions, were truthful, or were made without knowledge of their falsehood, as supported by her sworn affidavit. We further conclude that the absolute litigation privilege applies at the second prong of the anti-SLAPP analysis and that an NRED proceeding is quasi-judicial for purposes of the privilege. As appellant's statements meet the requirements for anti-SLAPP protection and the absolute litigation privilege applies such that respondent cannot prevail on his claims, we reverse.

FACTS AND PROCEDURAL HISTORY

Appellant Daphne Williams, an African-American woman, agreed to purchase a condominium that she was renting from the property owner. Respondent, Charles "Randy" Lazer, a licensed real estate professional, represented the seller in the sale, and Williams acted without an agent. Williams and Lazer had communication problems during the transaction, and after delays in closing, Williams sent Lazer a text stating that she was contemplating filing a complaint with the NRED regarding what she perceived as Lazer's racist, sexist, and unprofessional behavior. Lazer responded to the text by contacting NRED, the seller, Williams's mortgage lender Bryan Jolly,[1] an attorney, and another real estate professional to explain his perception of what occurred. Further, after the sale closed, Lazer sent a demand letter to Williams seeking several thousand dollars and an apology in exchange for not filing a tort action against her based on the text message she sent only to him.

Williams refused the demand and subsequently filed an NRED complaint, alleging that Lazer (1) "displayed unethical, unprofessional, racist and sexist behavior" during the transaction; (2) inappropriately shared confidential information with her about his personal relationship with the seller; (3) contacted the appraiser before the appraisal, which she believed was unethical based on a conversation she had with an NRED employee; (4) falsely claimed that Williams would not allow the seller's movers to enter the condominium to remove the seller's property and that Williams caused delays in closing; (5) failed to send her a fully executed copy of the

[1]During his email exchange with Jolly, who is African-American, Lazer stated that he "play[s] and write[s] jazz, which is truly at the very heart of black/African culture, and [Lazer] ha[s] an incredible love and respect for that." Lazer also stated that no person had ever accused him of being racist in any prior real estate deal.

signed purchase agreement; and (6) had the seller call Williams to encourage her to apologize to Lazer for her text message.[2]

Lazer then filed the underlying complaint, alleging defamation, negligence, business disparagement, and intentional infliction of emotional distress. Williams filed an anti-SLAPP special motion to dismiss, arguing that the statements contained in her NRED complaint were protected "good faith communication[s] in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." She further argued that her statements were truthful, were made without knowledge of their falsehood, or were opinions, and they were otherwise privileged because they were made in the context of judicial proceedings, such that Lazer could not show a probability of prevailing on his claims. Specifically, as to common law privilege, she argued that NRED is a quasi-judicial body and thus the absolute litigation privilege protects statements made in her NRED complaint. Regardless, she argued, Lazer failed to show minimum merit to his claims.

In opposing the motion, Lazer argued that the anti-SLAPP statutes did not protect Williams's statements because she knew they were false when she made them and he made a prima facie showing of a probability of prevailing on his claims. As to the absolute litigation privilege, he argued that (1) Nevada law does not support that the privilege protects an NRED complaint and public policy justifying applying the privilege to complaints against police officers did not apply to realtors, (2) NRED is not a judicial body, and (3) it was unclear if NRED even contemplated engaging in a quasi-judicial proceeding against Lazer.

The district court denied Williams's anti-SLAPP special motion to dismiss, concluding that she failed to show that she made her statements in good faith, i.e., that they were truthful or made without knowledge of their falsity, but that even if she did, Lazer showed a probability of prevailing on his claims. The court of appeals affirmed. *Williams v. Lazer*, Docket No. 80350-COA (Order of Affirmance, Nov. 25, 2020). Williams filed a petition for review, which we granted.

DISCUSSION

We review de novo a decision to grant or deny an anti-SLAPP special motion to dismiss. *Rosen v. Tarkanian*, 135 Nev. 436, 438, 453 P.3d 1220, 1222 (2019). A court must grant an anti-SLAPP special motion to dismiss where (1) the defendant shows, by a preponderance of the evidence, that the claim is based on a "good faith communication in furtherance of . . . the right to free speech in direct connection with an issue of public concern" and (2) the

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[2]According to Williams, during that phone call, the seller stated that she did not "know why [Lazer] is trying to sabotage this deal."

plaintiff fails to show, with prima facie evidence, a probability of prevailing on the claim. NRS 41.660(3).

Williams satisfied her burden under the first prong of the anti-SLAPP analysis

Williams argues that her statement that Lazer was racist, sexist, unprofessional, and unethical is a non-actionable opinion and that either her remaining factual statements are true or Lazer failed to provide evidence that Williams knew the statements were false when she made them. We agree.

To satisfy the first prong of the anti-SLAPP special motion to dismiss analysis, the defendant must show that (1) "the comments at issue fall into one of the four categories of protected communications enumerated in NRS 41.637" and (2) the communication is made in good faith in that it is "truthful or is made without knowledge of its falsehood." *Stark v. Lackey*, 136 Nev. 38, 40, 458 P.3d 342, 345 (2020) (quoting NRS 41.637). The parties do not dispute that Williams's statements fall within a protected category, i.e., that they were made in furtherance of the right to petition or right to free speech in direct connection with an issue of public concern. Thus, we address only whether Williams made the statements in good faith in order to satisfy the first prong of the anti-SLAPP analysis.

Although the district court's order did not address Williams's argument that her general allegations of racism, sexism, and unprofessional and unethical conduct in her NRED complaint were non-actionable opinions, the record supports that they were. In support of her anti-SLAPP special motion to dismiss, Williams provided a sworn declaration in which she described various problems she encountered in purchasing the condominium and working with Lazer. She stated that Lazer was consistently rude and unprofessional and she had "no doubt in [her] mind" that had she not been an African-American woman, Lazer would have treated her with greater respect and professionalism. She further stated her belief that every statement in her NRED complaint was either true or her reasoned opinion based on her experience with Lazer. Lazer concedes that Williams's allegations of racism and sexism are opinions, and although he challenges her generalized statements that he acted unethically and unprofessionally, those statements were likewise opinion-based. *See Stark*, 136 Nev. at 43, 458 P.3d at 347 (holding that a defendant's affidavit affirming her statements were true or statements of opinion, in the absence of contradictory evidence in the record, is sufficient to show good faith).

As we have previously observed, opinion statements are incapable of being false, as " 'there is no such thing as a false idea.' " *Abrams v. Sanson*, 136 Nev. 83, 89, 458 P.3d 1062, 1068 (2020) (quoting *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 714, 57

P.3d 82, 87 (2002)) (observing that statements of opinion are statements made without knowledge of their falsehood for anti-SLAPP purposes). In *Abrams*, we affirmed a district court order granting the defendant's anti-SLAPP special motion to dismiss, concluding that the challenged statements calling the attorney plaintiff unethical and criticizing her courtroom behavior and methods were expressions of the defendant's personal views and thus opinions. *Id.* at 90, 458 P.3d at 1068. We perceive no difference in Williams's generalized statements here, especially in light of her sworn declaration affirming the statements as her own opinions based on her experience with Lazer. *Id.* at 90, 458 P.3d at 1069 (concluding that the defendant's declaration and other evidence supported that the defendant was stating his beliefs and opinions, which by definition cannot be knowingly false); *see also Stevens v. Tillman*, 855 F.2d 394, 402-03 (7th Cir. 1988) (holding that neither general statements charging a person with being racist, unfair, or unjust, nor references to general discriminatory treatment, without more, constitute provably false assertions of fact); *Overhill Farms, Inc. v. Lopez*, 119 Cal. Rptr. 3d 127, 140 (Ct. App. 2010) ("We agree that general statements charging a person with being racist, unfair, or unjust . . . constitute mere name calling and do not contain a provably false assertion of fact."). As Williams's opinion-based statements cannot be knowingly false, *Abrams*, 136 Nev. at 89, 458 P.3d at 1068, we conclude that she satisfied her burden as to these statements under the first prong of the anti-SLAPP framework.

Turning to the remaining statements, Williams's declaration explained that she believed every statement she made was true as well as the basis for that belief, which, under these circumstances, is sufficient to show that her statements were truthful or made without knowledge of their falsehood. *Stark*, 136 Nev. at 43-44, 458 P.3d at 347. While Lazer provided several declarations that allege some of Williams's statements are factually wrong, such declarations do not constitute contrary evidence to refute Williams's affidavit because they do not allege, much less show, that *Williams knew* any of the statements were false when she made them. *Id.* (explaining that a defendant met her preponderance burden by providing an affidavit affirming her communications as truthful or made without knowledge of their falsehood when the record contained no evidence to the contrary); *Shapiro v. Welt*, 133 Nev. 35, 38, 389 P.3d 262, 267 (2017) (observing that a statement is made without knowledge of its falsehood if "[t]he declarant [is] unaware that the communication is false at the time it was made").

For example, Williams stated that she believed Lazer's pre-appraisal contact with the appraiser was unethical based on a conversation she had with an NRED employee who told her that a seller's agent is not supposed to make such contact. Although Lazer

provided a declaration stating that such contact is permissible, that does not mean that Williams did not have a subjective belief that it was impermissible at the time she filed her NRED complaint. Moreover, the parties' declarations support that the gist of some of Williams's remaining statements, including that Lazer did not provide her with a copy of the fully executed purchase agreement and that he falsely claimed that she refused to allow the seller to remove property from the condo, were true, and thus made in good faith. *Rosen*, 135 Nev. at 441, 453 P.3d at 1224 (holding that in determining the truthfulness of a statement, courts do not parse individual words but instead consider "whether a preponderance of the evidence demonstrates that the gist of the story, or the portion of the story that carries the sting of the [statement], is true" (alteration in original) (internal quotation marks omitted)). Accordingly, we conclude that Williams met her burden of showing that she made the remaining statements in good faith and thus satisfied her burden under the first prong of the anti-SLAPP framework.

Lazer did not demonstrate a probability of prevailing on his claims

Under the second prong of the anti-SLAPP analysis, Lazer had the burden of showing that his claims had at least minimal merit in order to proceed with the litigation. *Abrams*, 136 Nev. at 91, 458 P.3d at 1069.

The absolute litigation privilege applies at the second prong of the anti-SLAPP analysis

As a threshold matter, Williams argues that Lazer cannot meet his burden under the second prong because the absolute litigation privilege precludes any tort liability for the statements in her NRED complaint, such that Lazer's claims necessarily lack merit.[3] Lazer contends that the privilege does not apply in the second prong of the anti-SLAPP analysis because the minimal merit standard limits the court's analysis to only the evidence and argument the plaintiff presents to make a prima facie showing of probable success on his claim.

We previously acknowledged that the absolute litigation privilege may be relevant to the anti-SLAPP analysis in *Shapiro v. Welt*. In *Shapiro*, although we reversed the district court's order granting an anti-SLAPP special motion to dismiss based on its conclusion that plaintiffs could not show their claim had minimal merit because the absolute litigation privilege protected defendants' statements, we did so because the district court did not conduct the case-specific, fact-intensive analysis required to determine whether the privilege applied to the statements at issue. 133 Nev. at 36-37, 389 P.3d at 265-66. In remanding for the district court to make that

[3]The record does not support Williams's waiver argument; therefore, we do not address it.

determination, we implicitly acknowledged that whether the statements are subject to the privilege was relevant to the second-prong minimal merit analysis. *See id.* To the extent that *Shapiro* did not expressly and thoroughly address the issue, we now explicitly hold that the absolute litigation privilege applies at the second prong of the anti-SLAPP analysis because a plaintiff cannot show a probability of prevailing on his claim if a privilege applies to preclude the defendant's liability.[4] Such a holding is consistent with California authority, which is instructive in deciding anti-SLAPP cases. *Id.* at 39, 389 P.3d at 268 (recognizing that this court "look[s] to California law for guidance" when analyzing Nevada's anti-SLAPP statute); *see Feldman v. 1100 Park Lane Assocs.*, 74 Cal. Rptr. 3d 1, 15 (Ct. App. 2008) (holding that "[t]he litigation privilege is relevant to the second step in the anti-SLAPP analysis" (internal quotation marks omitted)).

Statements made in a complaint filed with NRED are subject to the absolute litigation privilege

Williams argues that the absolute litigation privilege protects her from liability for her NRED complaint because the statements contained therein were made in the context of a quasi-judicial proceeding. Whether the absolute litigation privilege applies is a question of law reviewed de novo. *Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.*, 125 Nev. 374, 382, 213 P.3d 496, 502 (2009). We have expressly concluded that the absolute litigation privilege extends "to quasi-judicial proceedings before executive officers, boards, and commissions." *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 61, 657 P.2d 101, 104 (1983). A proceeding is quasi-judicial for purposes of the absolute litigation privilege if it "(1) provide[s] the opportunity to present and rebut evidence and witness testimony, (2) require[s] that such evidence and testimony be presented upon oath or affirmation, and (3) allow[s] opposing parties to cross-examine, impeach, or otherwise confront a witness." *Spencer v. Klementi*, 136 Nev. 325, 332, 466 P.3d 1241, 1247 (2020).

We conclude that an NRED proceeding initiated by a complaint from a party in a real estate transaction is quasi-judicial because it meets the criteria outlined in *Spencer*. Lazer does not dispute that on such a complaint, NRED is authorized to investigate and impose discipline. *See* NRS 645.630 (providing NRED with disciplinary authority); NRS 645.633-.635 (listing grounds for disciplinary action, including for unprofessional or improper conduct

[4]This holding is consistent with our prior caselaw. *Cf. Stark*, 136 Nev. at 44 n.4, 458 P.3d at 347 n.4 (instructing the district court to consider whether the Communications Decency Act, 47 U.S.C. § 230 (2012), applied during the second prong of the anti-SLAPP analysis because the CDA precludes liability where applicable and a plaintiff cannot show a probability of prevailing on his claims if a statute precludes the defendant's liability for his statements).

in a real estate transaction). Moreover, the real estate commission has authority to administer oaths, issue subpoenas, and serve process, and the real estate licensee against whom the complaint alleges wrongdoing may present and rebut evidence and witness testimony. *See* NRS 645.700-.730 (listing commission's powers and providing that any party to an NRED hearing has the right to call witnesses at the hearing or upon deposition); NAC 645.810 (listing procedural requirements at a hearing, which include allowing the real estate licensee to cross-examine NRED's witnesses and call his or her own witnesses and introduce evidence). Further, NRS 645.685(1) (providing a licensee the right to file an answer to the charges) and NRS 645.760(2) (providing that a licensee is entitled to judicial review of an adverse ruling or decision) support the conclusion that an NRED proceeding is quasi-judicial because those statutes "provide[ ] basic due-process protections similar to those provided in a court of law." *Spencer*, 136 Nev. at 332, 466 P.3d at 1247 (noting that the *Spencer* factors are the "minimum" required to show a quasi-judicial proceeding).

Lazer's arguments to the contrary are unpersuasive. In particular, our precedent squarely forecloses his argument that the absolute litigation privilege cannot apply because there was no formal hearing on Williams's complaint. *See Fink v. Oshins*, 118 Nev. 428, 433, 49 P.3d 640, 644 (2002) ("[T]he privilege applies not only to communications made during actual judicial proceedings, but also to 'communications preliminary to a proposed judicial proceeding.'" (quoting *Bull v. McCuskey*, 96 Nev. 706, 712, 615 P.2d 957, 961 (1980))); *see also Lewis v. Benson*, 101 Nev. 300, 301, 701 P.2d 751, 752 (1985) (applying the absolute litigation privilege to a complaint filed with the Las Vegas Metropolitan Police Department). Also unpersuasive is his argument that the privilege does not apply here because the Legislature has not codified its application in the NRED statutes but has in the statutes governing Gaming Control Board complaints. The absolute litigation privilege is rooted in a rich body of common law as a defense to defamation and other tort claims, and courts have historically applied this common law privilege to statements made in a variety of quasi-judicial proceedings regardless of additional statutory authority. *See, e.g.*, *Lewis*, 101 Nev. at 301, 701 P.2d at 752 (applying the privilege to complaints filed with law enforcement); *Knox v. Dick*, 99 Nev. 514, 518, 665 P.2d 267, 270 (1983) (applying the privilege to statements made to the Clark County Personnel Grievance Board); *Cohen v. King*, 206 A.3d 188, 191 (Conn. App. Ct. 2019) (recognizing that Connecticut has long recognized the common law litigation privilege to afford absolute immunity to those providing information in connection with judicial and quasi-judicial proceedings). Accordingly, we conclude that statements made in the context of an NRED proceeding, regardless

of whether it proceeds to a hearing, are subject to the absolute litigation privilege when they meet the criteria for the privilege to apply.

Williams filed her NRED complaint in good faith and in anticipation of future litigation

In order for the absolute litigation privilege to apply to statements made in the context of judicial or quasi-judicial proceedings, "(1) a judicial proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the litigation." *Jacobs v. Adelson*, 130 Nev. 408, 413, 325 P.3d 1282, 1285 (2014) (internal quotation marks omitted). Thus, "the privilege applies to communications made by either an attorney or a nonattorney that are related to ongoing litigation or future litigation contemplated in good faith." *Id.*

We conclude that Williams filed her NRED complaint in good faith and in relation to litigation. Because Williams's NRED complaint is a complaint in a quasi-judicial proceeding, the absolute litigation privilege applies and protects Williams's NRED complaint. *See Lewis*, 101 Nev. at 301, 701 P.2d at 752 (applying the privilege to complaints filed with law enforcement). Because all of Lazer's claims derive from the allegedly defamatory statements contained in Williams's NRED complaint, which is protected by the absolute litigation privilege, we hold that he cannot show by prima facie evidence a probability of prevailing on his claims. *See Spencer*, 136 Nev. at 326, 466 P.3d at 1243 (noting that the absolute litigation privilege protects statements made during judicial or quasi-judicial proceedings and "those statements cannot form the basis of a defamation claim"); *see also Asia Invs. Co., LTD v. Borowski*, 184 Cal. Rptr. 317, 324 (Ct. App. 1982) (collecting cases applying the absolute litigation privilege to non-defamation torts like abuse of process, intentional infliction of emotional distress, slander of title, and intentional interference with prospective business advantage).

CONCLUSION

The record demonstrates that Williams's statements either were opinions incapable of being knowingly false, were true, or were not knowingly false. Lazer's declarations asserting that Williams's statements were factually false are insufficient to show that she made the statements in bad faith because his declarations do not show that she knew the statements were false when she made them. The district court thus erred in determining that Williams did not meet her burden under the first prong of the anti-SLAPP analysis. Further, statements made in an NRED complaint are subject to the absolute litigation privilege, as proceedings before the real estate commission are quasi-judicial, and whether the privilege

applies to particular statements is relevant to the second prong of the anti-SLAPP analysis because a plaintiff cannot prevail on defamation-based claims and related torts if the privilege applies. Under the facts here, the absolute litigation privilege protects Williams's NRED complaint because the complaint itself initiated a quasi-judicial proceeding. Accordingly, the district court erred in concluding that Lazer demonstrated a probability of prevailing on his defamation claims. Therefore, we reverse the district court's order denying Williams's anti-SLAPP special motion to dismiss and remand with instructions that the district court grant the motion.

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

NEWS+MEDIA CAPITAL GROUP LLC, a Delaware Limited Liability Company; and LAS VEGAS REVIEW-JOURNAL, INC., a Delaware Limited Liability Company, Appellants/Cross-Respondents, *v.* LAS VEGAS SUN, INC., a Nevada Corporation, Respondent/Cross-Appellant.

No. 80511

September 16, 2021 495 P.3d 108

Appeal and cross-appeal from a district court judgment confirming an arbitration award in a commercial contract matter. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Affirmed.

Kemp Jones, LLP, and *J. Randall Jones, Michael J. Gayan*, and *Mona Kaveh*, Las Vegas; *Jenner & Block LLP* and *Richard L. Stone, David R. Singer*, and *Amy M. Gallegos*, Los Angeles, California, for Appellants/Cross-Respondents.

Lewis Roca Rothgerber Christie LLP and *E. Leif Reid, Kristen L. Martini*, and *Nicole S. Scott*, Reno; *Pisanelli Bice PLLC* and *James J. Pisanelli, Todd L. Bice*, and *Jordan T. Smith*, Las Vegas, for Respondent/Cross-Appellant.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Stiglich, J.:

This appeal and cross-appeal concern the standard of review a court should apply when asked to overturn the result of a private arbitration. The parties are two newspapers with an extensive contractual relationship. In their contract, they elected to submit disputes arising out of the contract to binding private arbitration, instead of the court system. When a dispute arose over amounts owed under the contract, the parties submitted the dispute to arbitration, and the arbitrator rendered an award. Neither party was fully satisfied with the award, so they both turned to the district court to seek vacatur of the portions they perceived as unfavorable to their respective sides. They had high bars to clear. Under well-settled law, an arbitration award can only be overturned for very limited reasons, and a mere error is not one of those reasons. Here, both parties argued in essence that the arbitrator's award was not simply wrong, but so egregiously wrong that it was clear the

[1]The Honorable Kristina Pickering, Justice, did not participate in the decision of this matter.

arbitrator had failed to apply the contract at all. The district court was not persuaded. Nor are we. We affirm.

FACTS

In 1989, the Las Vegas Sun newspaper was struggling to stay afloat financially. Pursuant to the federal Newspaper Preservation Act, the Sun entered into a joint operating agreement (JOA) with its larger competitor, the Las Vegas Review-Journal (RJ).[2] Under the agreement, the two newspapers continued their separate news and editorial operations, but the RJ took over production, distribution, and advertising. Because the RJ handled distribution and advertising, it also collected all revenue. Thus, the original agreement required the RJ to pay the Sun a sum each month to cover the Sun's news and editorial expenses.

Further, the agreement required the RJ to pay the Sun a fixed percentage of total operating profits. Operating profits were defined as "Agency Revenues" minus "Agency Expenses," where "Agency" referred to the joint venture. The original agreement was relatively clear as to what costs could properly be considered deductible Agency Expenses. The agreement allocated each newspaper a budget for news and editorial expenses and a separate budget for promotional activities. The allocated budgets were considered Agency Expenses. If a newspaper desired to exceed its budget for promotional activities, the agreement was clear that it could choose to do so, but additional costs would not be included in Agency Expenses and would instead be borne by the respective newspaper.

In 2005, the parties entered into an amended agreement, which tracked the structure of the 1989 agreement but included several important changes. In particular, the new agreement did not refer to "Agency Expenses." It eliminated the existing allocations for news, editorial, and promotional expenses. Instead, it simply stated that the parties would bear their own editorial costs; that promotions of the RJ must "include mention of equal prominence for the Sun" but either newspaper "may undertake additional promotional activities for their respective newspaper at their own expense"; and that "[a]ll costs, including capital expenditures, of operations under this Restated Agreement, except the operation of the Sun's news and editorial department, shall be borne by the Review-Journal."

The 2005 agreement also changed the formula for calculating the profits payment. Whereas the 1989 agreement required a simple

[2]The Newspaper Preservation Act permits joint operating agreements between competing newspapers—agreements that might otherwise violate antitrust laws—when the United States Attorney General approves the arrangement. 15 U.S.C. § 1803(b). This furthers the public interest in an "editorially and reportorially independent" press, *id.* § 1801, by allowing newspapers to create cost-saving synergies rather than fail. Appellant News+Media Capital Group LLC is the parent company of the RJ.

monthly payment of a fixed percentage of operating profits, the 2005 agreement was somewhat more complicated. The payment for the year 2005 was set at $12 million. Going forward, this was to be adjusted on an annual basis by the percentage change in earnings before interest, taxes, depreciation, and amortization (EBITDA), which is an accounting term roughly similar to operating profit. The 2005 agreement stated that, in calculating EBITDA for any period that included earnings *prior* to April 1, 2005, such earnings must not be reduced by any amounts that would have been deducted from earnings under the 1989 agreement's Appendix A.1—which apparently meant that news and editorial allocations were not deductible for that period. The 2005 agreement also listed certain items that could not be deducted from EBITDA at any time. Importantly, the agreement stated that "[t]he Parties intend that EBITDA be calculated in a manner consistent with the computation of 'Retention' as that line item appears on the profit and loss statement for Stephens Media Group[3] for the period ended December 31, 2004." The referenced profit-and-loss statement is in the record and shows that editorial expenses were among the costs deducted to compute "Retention."

Finally, the 2005 agreement contained a mandatory arbitration clause covering any dispute as to amounts owed by the RJ to the Sun. The clause stated that the arbitrator "shall also make an award of the fees and costs of arbitration, which may include a division of such fees and costs among the parties in a manner determined by the arbitrator to be reasonable."

PROCEDURAL HISTORY

The instant dispute boiled over in 2018, and the Sun sued the RJ for breach of contract. The Sun alleged that the RJ had been improperly deducting its own editorial and promotional expenses from its calculation of EBITDA, thus reducing the profits payment to the Sun. Consistent with the arbitration clause, the court compelled arbitration.

During arbitration, the Sun argued that the 2005 agreement did not permit the RJ to deduct its own editorial and individual promotional expenses before distributing profits to the Sun. The Sun supported this argument by pointing to the elimination of the editorial allocation, the exclusion of editorial costs for the first year, and the distinction between deductible "equal prominence" promotional expenses versus non-deductible separate promotional expenses. The RJ, of course, argued that it was allowed to deduct its editorial expenses. The RJ relied heavily on the Stephens Media Group profit-and-loss statement. In its view, editorial expenses were deductible because that statement showed a deduction for editorial

[3]Stephens Media Group was a former owner of the RJ.

expenses. With respect to the promotional expenses, the RJ argued that the Sun had failed to prove that any particular promotional activities did not benefit the Sun. The RJ further argued that, under generally accepted accounting principles, even promotional activities that *only* benefited the RJ would be deductible if the activities' associated revenues were included in EBITDA.

After hearing evidence and argument, the arbitrator issued a decision in which he found that editorial expenses were not deductible and that the Sun had proven damages. He wrote:

> At issue here are multiple readings of the JOA. On one hand the JOA includes language in Appendix D indicating that the EBITDA calculation should be performed in a manner akin to the computation of "Retention" (a newspaper term of art used by a prior owner of the RJ in preparing financial statements). The term "Retention" was very similar to earnings before interest, taxes, depreciation and amortization (EBITDA). The prior (pre-2005) computation of "Retention" included Editorial Expenses of the RJ as allowable deductible expenses. On the other hand, a specific provision of the JOA (4.2), a provision which was new to the calculation in the 2005 JOA, specifically indicates that the RJ and Sun would each bear their own editorial costs meaning that the RJ would not, in keeping the books of the JOA, be permitted to deduct editorial expenses of the RJ in computing EBITDA of the JOA and the subsequent annual profits payments (if any) to the Sun. The weight of the evidence leads to the conclusion that the RJ has improperly deducted the RJ editorial expenses reducing the EBITDA of the JOA resulting in improperly low annual profits payments to the Sun.

He also found that, while promotional expenses were not deductible if they did not feature the Sun in equal prominence, the Sun had failed to prove its damages. Finally, although both parties expressly requested attorney fees in their post-hearing briefs, the arbitrator declined to award either party attorney fees. He stated that, in his opinion, the JOA's provision for "fees and costs of arbitration" included the arbitrator's fee and the American Arbitration Association's (AAA) fee but did not include attorney fees.

The Sun moved the district court to confirm the substance of the award relating to editorial and promotional costs but to vacate the arbitrator's denial of attorney fees. In the alternative, it asked the district court to modify or correct the award to include $39,800 in expenses related to the hearing and transcription, in addition to the sum paid to the AAA. The RJ cross-moved the district court to vacate the award in its entirety. It argued that the award was "so irrational and so inconsistent with the parties' contract and fundamental legal principles that vacating it is the only option. . . . [T]he Arbitrator

recognized that the parties' contract required editorial expenses to be deducted, but he did the opposite . . . ." The RJ again insisted that editorial and promotional expenses should be deductible.

The district court denied both motions and confirmed the award. It found that there was no clear and convincing evidence that the arbitrator had exceeded his powers, acted arbitrarily and capriciously, or manifestly disregarded the law. Both as to the underlying dispute and as to attorney fees, the district court found that the arbitrator based his rulings on his interpretations of the parties' contract. The parties cross-appealed.

DISCUSSION

Nevada has adopted the Uniform Arbitration Act of 2000, which is consistent with this state's long-standing public policy in favor of "efficient and expeditious enforcement of agreements to arbitrate." *Tallman v. Eighth Judicial Dist. Court*, 131 Nev. 713, 718, 359 P.3d 113, 117 (2015); *see Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990). Arbitration has numerous benefits that lead parties to choose it over litigation. It is faster and permits the parties to rely on an arbitrator with "specialized knowledge and competence." *Clark Cty. Pub. Emps. Ass'n v. Pearson*, 106 Nev. 587, 597, 798 P.2d 136, 142 (1990) (quoting *Exber, Inc. v. Sletten Constr. Co.*, 92 Nev. 721, 729, 558 P.2d 517, 522 (1976)). It is also usually less expensive than litigation. *See Burch v. Second Judicial Dist. Court*, 118 Nev. 438, 442, 49 P.3d 647, 650 (2002). And arbitration typically enjoys a "presumption of privacy and confidentiality."[4] *See Stolt-Nielsen*

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[4]Indeed, in this very case, the parties agreed the arbitration would be confidential. When the matter was brought to district court, the RJ then sought and obtained an order sealing *all* materials filed or generated in the arbitration, including the final award that was the subject of judicial review. In a prior unpublished order, this court maintained those documents under seal over the Sun's objections. *News+Media Capital Grp. LLC v. Las Vegas Sun, Inc.*, Docket No. 80511 (Order, June 18, 2020). We do not now have occasion to revisit that order. *But see Howard v. State*, 128 Nev. 736, 740, 291 P.3d 137, 139-40 (2012) (noting that documents "filed with the court as part of the permanent record of a case and relied on in the course of judicial decision-making" are presumptively public (internal quotation marks omitted)); *see also Jankula v. Carnival Corp.*, No. 18-cv-24670-UU, 2019 WL 8051719, at *2 (S.D. Fla. Sept. 5, 2019) (unsealing arbitration award after finding that confidentiality agreement did not overcome "strong" presumption of public access to documents "integral to resolving the merits of the parties' dispute").

Although the documents themselves remain sealed pursuant to this court's prior order, we necessarily discuss the arbitrator's final award in writing this opinion. The district court, too, quoted portions of the arbitration award that were necessary to its decision. Such quotation is proper because, otherwise, readers would be unable to discern "what the Court has done." *See Glob. Reins. Corp. v. Argonaut Ins. Co.*, Nos. 07 Civ. 8196 (PKC), 07 Civ. 8350 (PKC), 2008 WL 1805459, at *2 (S.D.N.Y. Apr. 21, 2008), *as amended* (Apr. 24, 2008). While the parties may have chosen arbitration in part to preserve their privacy and confidentiality, they both then chose to seek judicial review and so necessarily

S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686 (2010) (internal quotation marks omitted). In the context of a dispute about arbitrability, we have repeatedly held that courts must err on the side of arbitration and cannot lightly deprive parties of those benefits. *See, e.g.*, *Clark Cty. Pub. Emps. Ass'n*, 106 Nev. at 597, 798 P.2d at 142. Courts must respect (and enforce) the contractual choice, especially by legally sophisticated businesses, to agree to submit a dispute to binding private arbitration instead of the judiciary.

For similar reasons, courts are properly reluctant to overturn an arbitration award once rendered. Although "[t]his court reviews a district court's decision to vacate or confirm an arbitration award de novo," *Washoe Cty. Sch. Dist. v. White*, 133 Nev. 301, 303, 396 P.3d 834, 838 (2017), "the scope of judicial review of [the underlying] arbitration award is limited and is nothing like the scope of an appellate court's review of a trial court's decision," *Health Plan of Nev., Inc. v. Rainbow Med., LLC*, 120 Nev. 689, 695, 100 P.3d 172, 176 (2004). "The party seeking to attack the validity of an arbitration award has the burden of proving, by clear and convincing evidence, the statutory or common-law ground relied upon for challenging the award." *Id*. Those grounds do *not* include "that the [arbitrator] committed an error—or even a serious error." *See Stolt-Nielsen*, 559 U.S. at 671. Rather, the grounds are quite narrow and present a "high hurdle" for petitioners to clear. *See id*. The limited availability of appellate review helps, in part, to preserve the efficiency and other benefits of arbitration. We keep this purpose in mind as we analyze the grounds for review in this matter.

There are three grounds upon which we are urged to overturn or modify various parts of the award: one statutory and two common-law. Statutorily, the parties argue that the "arbitrator exceeded his or her powers." NRS 38.241(1)(d). Turning to the common-law grounds, the parties argue that the arbitrator's award was "arbitrary, capricious, or unsupported by the agreement" and that the arbitrator "manifestly disregarded the law." *See White*, 133 Nev. at 306, 396 P.3d at 839 (quoting *Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist.*, 122 Nev. 337, 341, 131 P.3d 5, 8 (2006)). We consider each ground in turn and use this opportunity to clarify the differences between them.

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gave up some measure of confidentiality. The fact that litigation arises from an arbitration does not entitle the parties to "transfer the privileges of their private arbitration to a public judicial forum." *Standard Chartered Bank Int'l (Americas) Ltd. v. Calvo*, 757 F. Supp. 2d 258, 260 (S.D.N.Y. 2010). We agree with the Seventh Circuit that "[p]eople who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials." *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000). We add that that principle remains true even if the parties first arbitrate in secrecy and subsequently "call on the courts" to review the arbitration.

The arbitrator did not exceed his powers

The statutory grounds for vacatur are delineated in NRS 38.241. The only one arguably relevant here is that the "arbitrator exceeded his or her powers." NRS 38.241(1)(d).[5] "Arbitrators exceed their powers when they address issues or make awards outside the scope of the governing contract. . . . [But a]rbitrators do not exceed their powers if their interpretation of an agreement, even if erroneous, is rationally grounded in the agreement." *Health Plan*, 120 Nev. at 697-98, 100 P.3d at 178. "The question is whether the arbitrator had the authority under the agreement to decide an issue, not whether the issue was correctly decided." *Id.* at 698, 100 P.3d at 178. The award should be confirmed "so long as the arbitrator is arguably construing or applying the contract" and the outcome has a "colorable justification." *Id.* After all, "[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

However, "[t]he deference afforded an arbitrator . . . is not limitless; he is not free to contradict the express language of the contract." *White*, 133 Nev. at 304, 396 P.3d at 838 (alterations in original) (quoting *Int'l Ass'n of Firefighters, Local 1285 v. City of Las Vegas*, 107 Nev. 906, 910, 823 P.2d 877, 879 (1991)); *cf. Stolt-Nielsen*, 559 U.S. at 671-72 (explaining that an arbitrator exceeds his powers if he "strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' " (alteration in original) (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001))). When an arbitrator directly contradicts express contract language or adopts an interpretation that is not at least "colorable," he is not "arguably construing or applying the contract." *See White*, 133 Nev. at 304, 396 P.3d at 838 (internal quotation marks omitted). In order to determine whether the arbitrator's award is "colorable," a reviewing court necessarily has to engage in at least some of its own analysis of the contract's language. *See id.* at 305, 396 P.3d at 839 (analyzing contract). We reiterate, however, that the court's analysis is *not* plenary. The court's own conclusions about the contract's meaning are irrelevant—the parties bargained for the *arbitrator's* interpretation. *United Steelworkers*, 363 U.S. at 599. Thus, the court should conduct an abbreviated review limited to determining whether the award, on its face, (1) directly contradicts the express language of

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[5]Other statutory grounds in NRS 38.241—which involve the arbitrator's alleged partiality or misconduct, prejudicial procedural errors, or the lack of an agreement to arbitrate in the first place—are not at issue in this case.

the contract, or (2) appears fanciful or otherwise not "colorable." A court will not find that the arbitrator exceeded his or her powers by misinterpreting the contract unless there is not even a minimally plausible argument to support the arbitrator's decision.

Here, the arbitrator determined that the agreement did not permit the RJ to deduct its editorial expenses from EBITDA. He stated that there were "multiple readings" of the JOA and that different provisions weighed in favor of different readings. Both parties presented at least minimally plausible arguments in favor of their preferred reading. The weight of the evidence led the arbitrator to adopt the Sun's reading. We cannot immediately perceive an express contradiction or an extracontractual invention. The arbitrator simply decided an arguable question—which is to say he performed the job he was hired to do.

The RJ's argument to the contrary is without merit, but we address it here to further illustrate what is *not* an excess of authority. The RJ contends that the provision in the contract referencing the Stephens Media profit-and-loss statement is dispositive of this case. In its view, because that statement shows editorial expenses were deducted from Retention, editorial expenses must be deducted from EBITDA, full stop. We agree that the RJ's contention appears to be one facially plausible interpretation of the contract. But, as the arbitrator recognized, other provisions appear to weigh in the opposite direction, including the provision that each side will bear its own editorial costs. Both parties have offered this court extensive briefing in support of their preferred interpretations. We need not, and do not, decide which interpretation we would find more persuasive if we were reviewing this matter afresh. We are satisfied that the Sun's interpretation, adopted by the arbitrator, was at least minimally plausible.

Likewise, the arbitrator's decision that the contract did not permit him to award attorney fees was not in excess of his authority. The contract stated that the arbitrator "shall also make an award of the fees and costs of arbitration, which may include a division of such fees and costs among the parties in a manner determined by the arbitrator to be reasonable."[6] The phrase "fees and costs of arbitration" does not obviously either include or exclude attorney fees.[7]

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[6]It is clear from this language that the arbitrator was not required to award attorney fees. He could have determined that it was reasonable for each party to pay its own attorneys. The Sun contends the arbitrator erred, not by failing to award fees, but by failing to recognize that he *could* award fees under the contract. Because we find that the arbitrator's construction of the contract was plausible, we do not consider whether an award can be vacated for stating implausible reasons when the *result* is clearly permissible.

[7]The Sun contends that "[i]f there was any ambiguity regarding the meaning of fees and costs, the parties' course of dealing"—i.e., the fact that both parties requested attorney fees—"settles the question." That is plainly wrong. If there

There is at least some support for the proposition that it excludes such fees, as contracts sometimes expressly contrast "fees and costs of arbitration" with attorney fees. *E.g.*, *Rosenthal v. Rosenblatt*, A-3753-12T2, 2014 WL 5393243, at *6, *8 (N.J. Super. Ct. App. Div., Oct. 24, 2014). But, again, it does not matter whether or not this court or a district court would have awarded attorney fees in a similar case; nor does it matter whether there might be persuasive authority to support an award of fees. What matters is that the arbitrator's interpretation was an arguable construction of the contract that was at least minimally plausible. We readily conclude that his interpretation met this standard.[8]

The arbitrator's decision was not arbitrary or capricious

We now turn to the common-law grounds for vacatur. The first of these grounds provides that an award may be vacated if it is "arbitrary, capricious, or unsupported by the agreement." *White*, 133 Nev. at 306, 396 P.3d at 839 (internal quotation marks omitted). This standard "ensures that the arbitrator does not disregard the facts or the terms of the arbitration agreement." *Id.* (internal quotation marks omitted). An award is arbitrary and capricious if the arbitrator's factual findings are not supported by substantial evidence in the record. *Id.* at 308, 396 P.3d at 841.

We take this opportunity to note that there is significant overlap between the third part of this common-law ground, which asks whether the award is "unsupported by the agreement," and the statutory ground provided by NRS 38.241(1)(d). As explained above, an arbitrator exceeds his or her powers under that statute by contradicting the express language of the agreement or otherwise adopting a fanciful or non-colorable interpretation of the agreement. We see no meaningful distinction between this standard and the common-law "unsupported by the agreement" standard. If a court has already

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was any ambiguity regarding the meaning of fees and costs, then the arbitrator did not exceed his powers by choosing one reasonable interpretation over another. We decline the Sun's invitation to reweigh evidence of the parties' course of dealing.

[8]The Sun also contends that the JOA incorporated the AAA's Commercial Rules, which provide that an award "may include . . . an award of attorneys' fees if all parties have requested such an award . . . ." Am. Arb. Ass'n, *Commercial Arbitration Rules & Mediation Procedures*, R-47(d)(ii), at 28 (Oct. 1, 2013), https://adr.org/sites/default/files/CommercialRules_ Web-Final.pdf. But it goes without saying that in rules, as in statutes, the word " 'may' is permissive." *Arnold v. Kip*, 123 Nev. 410, 414 n.7, 168 P.3d 1050, 1052 n.7 (2007). We are accordingly unpersuaded that the AAA's rules required the arbitrator to award attorney fees. Similarly, the Sun's argument that the parties agreed to an award of attorney fees when they both requested fees is misguided. While the Sun cites authority that arbitrators *may* award fees when both parties request them, *see, e.g.*, *Hollern v. Wachovia Secs., Inc.*, 458 F.3d 1169, 1174 (10th Cir. 2006), the Sun cites no authority showing that an arbitrator *must* do so.

analyzed the contract under the statutory ground and found the arbitrator was arguably construing or applying the contract, then it is not necessary to redundantly analyze whether the award is "supported by the agreement." Accordingly, in this section, we simply consider whether the award is arbitrary and capricious, in the sense that it is based on factual findings that are not supported by substantial evidence.

Importantly, the disputed decisions in this case were matters of pure contract interpretation. The parties' briefing and the record do not show any significant factual disputes. "When the facts are not in dispute, contract interpretation is a question of law." *Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co.*, 124 Nev. 319, 322, 184 P.3d 390, 392 (2008). The "arbitrary and capricious" standard, being concerned with the sufficiency of evidence to support factual findings, simply does not apply to invalidate the arbitrator's legal conclusions as to the meaning of the contract language. As discussed above, we conclude that the arbitrator's substantive findings on the contract's interpretation are not reversible under this justification.

The Sun does also contend that the arbitrator acted arbitrarily and capriciously by excluding from the award certain expenses other than attorney fees, such as transcription costs, which the Sun asserts totaled "almost $40,000." If supported by evidence, that could constitute a factual dispute as to the amount of costs actually incurred. But the Sun's only record citation for the amount of those costs refers to a brief it filed in the district court, which simply asserted the amount of those costs without any citation to evidence. We have nevertheless reviewed the record and have not found evidence to support the Sun's assertion. The "[a]rguments of counsel . . . are not evidence" and, standing alone, are categorically insufficient to prove the existence or amount of those costs. *Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255-56 (2014) (quoting *Jain v. McFarland*, 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993)). Thus, the Sun has not met its burden to prove this ground for vacatur with "clear and convincing evidence." *Health Plan*, 120 Nev. at 695, 100 P.3d at 176.[9]

The arbitrator did not manifestly disregard the law

Finally, we may vacate an arbitration award if the arbitrator "manifestly disregard[s] the law." *White*, 133 Nev. at 306, 396 P.3d at 839. "Manifest disregard of the law goes beyond whether the law was correctly interpreted, it encompasses a conscious disregard of

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[9]We reach the same conclusion under NRS 38.242(1)(a), which permits a court to modify or correct, rather than vacate, an award. Even if the arbitrator made a "mathematical miscalculation" by failing to include the Sun's transcription and related costs, such mistake is not "evident" in the absence of evidence showing the amount of those costs.

applicable law." *Health Plan*, 120 Nev. at 699, 100 P.3d at 179; *see White*, 133 Nev. at 307-08, 396 P.3d at 840-41 (finding no manifest disregard where arbitrator did not "willfully ignore[ ]" applicable collective bargaining agreement's terms). In this sense, "manifest disregard" requires something approaching intentional misconduct: the arbitrator must not only reach a legally incorrect result, but must also do so deliberately. *Cf. Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1459-62 (11th Cir. 1997) (finding manifest disregard of the law where counsel expressly urged arbitrators "not to follow" the relevant statute, and it appeared arbitrators likely followed counsel's suggestion).[10] This standard strikes a careful balance. Vacatur in these narrow circumstances preserves the rule of law by preventing private arbitrations from becoming a parallel legal system subject to different rules of decision at the whim of individual decision-makers. At the same time, this standard preserves the abbreviated character of judicial review of arbitrations—recognizing that the parties agreed to abide by the arbitrator's honest, even if mistaken, decision.

The RJ points out that we have occasionally treated "manifest disregard" as requiring something less than conscious, deliberate error. In *Coblentz v. Hotel Employees & Restaurant Employees Union Welfare Fund*, 112 Nev. 1161, 925 P.2d 496 (1996), we held that an arbitration panel manifestly disregarded the law when its conclusion "rendered one of the [contract] provisions meaningless" in violation of the general rule of contract law that "[i]f at all possible, we should give effect to every word in the contract." *Id.* at 1169, 925 P.2d at 501 (quoting *Caldwell v. Consol. Realty & Mgmt. Co.*, 99 Nev. 635, 639, 668 P.2d 284, 287 (1983)). The RJ argues that under *Coblentz*, an arbitrator manifestly disregards the law whenever the award renders language without effect and, here, the arbitrator rendered the sentence about the Stephens Media profit-and-loss statement meaningless, because the editorial costs are *not* being deducted consistent with that sentence. As explained above, we disagree substantively that that sentence is necessarily dispositive. But we take this opportunity to clarify that the *Coblentz* court failed to recognize that a manifest disregard necessarily involves a *knowing* disregard of the law. *Coblentz* wrongly suggests that errors in applying the law, without more, can suffice to overturn an award.

[10]We note that some federal courts have recently come to reject manifest disregard as a basis for vacatur under the Federal Arbitration Act. *Gherardi v. Citigroup Glob. Mkts. Inc.*, 975 F.3d 1232, 1236 n.3 (11th Cir. 2020) (recognizing abrogation of *Montes*); *accord Jones v. Michaels Stores, Inc.*, 991 F.3d 614, 615 (5th Cir. 2021); *see also Stolt-Nielsen*, 559 U.S. at 672 n.3 (assuming without deciding that manifest disregard remains viable basis for vacatur). Whatever the status of manifest disregard under the FAA, it is firmly established in Nevada law as a ground for vacatur—albeit an "*extremely limited*" one. *See White*, 133 Nev. at 306, 396 P.3d at 840.

Since that is inconsistent with our other precedents, we overrule *Coblentz* to this extent only.[11]

Returning to the instant case, while the parties put forth several arguments that the arbitrator manifestly disregarded the law, most of these are reducible to assertions that the arbitrator incorrectly applied the law. They do not allege the requisite subjective intent and accordingly do not comprise "manifest disregard." One allegation does merit further discussion: the RJ argues that the arbitrator manifestly disregarded the law because he "clearly acknowledg[ed] that the [RJ's] editorial costs were *allowable* deductions under the EBITDA formula in the 2005 JOA" but issued an award inconsistent with that formula. If this assertion were true, it might constitute a manifest disregard of the law since the arbitrator would have disallowed something he subjectively knew was allowable. But the RJ's assertion is simply belied by the record. As explained above, the arbitrator expressly found that the JOA was subject to "multiple readings" and that different provisions weighed in favor of different readings. The arbitrator concluded that although the editorial costs were allowable deductions under the 2004 Stephens Media profit-and-loss statement, they were nevertheless *not* deductible under the 2005 agreement's EBITDA formula. We see nothing in the award that suggests the arbitrator knowingly reached a result contrary to his own understanding of what the law required. We agree with the district court that the arbitrator "based his rulings on his interpretations of the JOA."

CONCLUSION

Nevada law permits contracting parties to agree to binding private arbitration in order to take advantage of the benefits thereof: speed, privacy, lower cost, and adjudicators expert in a particular subject matter. Abbreviated judicial review is a feature, not a bug, of those parties' choice. If the parties or their counsel anticipate desiring substantive judicial review, that is something they must consider before agreeing to arbitration in the first place. Plenary judicial review of the merits would transform binding arbitration into little more than mediation and would make lengthy and expensive appeals common—as this case illustrates well.

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[11]We note that the *result* in *Coblentz* nevertheless appears supportable under the statutory "exceeded his or her powers" ground. *See* NRS 38.241(1)(d). The contract in *Coblentz* required a tenant to obtain insurance covering damages "in or upon the [leased] Premises or the remainder of the Property," but the arbitration panel ruled that the contract's insurance requirement was limited only to the Premises and not the remainder of the Property. 112 Nev. at 1167, 925 P.2d at 500 (emphasis omitted). That is at least arguably the kind of express contradiction that is not even minimally plausible and that a court can properly vacate as exceeding the arbitrator's authority. As explained above, that is not the situation here.

We reaffirm that the grounds for overturning an arbitration award are extremely limited and that errors of fact or law—even arguably serious ones—do not justify vacating an award. An arbitrator's misinterpretation of an agreement constitutes an excess of authority only if the adopted interpretation is not even minimally plausible. A factual finding is arbitrary and capricious only if it is not supported by substantial evidence in the record. And an arbitrator manifestly disregards the law only when he or she *knowingly* disregards clearly controlling law. Here, the parties alleged numerous errors, but none of those errors support vacatur or modification under the narrow statutory or common-law grounds stated above. Thus, the district court's order confirming the arbitration award is affirmed.

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